

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 22, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1386-CR

Cir. Ct. No. 2002CF1436

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TYRONE L. TILLERY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. CONEN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Tyrone L. Tillery appeals from an order denying his motion for resentencing. The issue is whether the trial court erroneously exercised its discretion because it failed to consider the sentencing guidelines for armed robbery, the predicate offense for his felony murder conviction. We

conclude that the trial court's failure to consider the sentencing guidelines for the predicate offense for Tillery's felony murder conviction was not an erroneous exercise of sentencing discretion notwithstanding that the challenge is also procedurally barred. Therefore, we affirm.

¶2 A jury found Tillery guilty of felony murder (attempted armed robbery), and first-degree recklessly endangering safety, each as a party to the crime. Tillery committed these crimes on March 11, 2002. The trial court imposed a forty-year aggregate sentence, comprised of twenty-five- and fifteen-year aggregate respective periods of initial confinement and extended supervision. Tillery's sentencing challenge is limited to the thirty-year felony murder sentence, bifurcated into twenty- and ten-year respective periods of initial confinement and extended supervision.

¶3 This court affirmed the judgment of conviction on direct appeal, expressly addressing why it would lack arguable merit to challenge the trial court's exercise of sentencing discretion. *See State v. Tillery*, No. 2003AP3406-CRNM, unpublished slip op. at 4-5 (WI App Dec. 14, 2005). Tillery filed two postconviction motions, one in 2006, and another in 2007, for sentence modification. Both were denied. Tillery appealed from the denial of the latter motion; we affirmed. *See State v. Tillery*, No. 2007AP1028-CR, unpublished slip op. ¶6 (WI App July 29, 2008).

¶4 Tillery's current postconviction motion challenges the trial court's failure to consider the sentencing guidelines. The trial court denied the motion as untimely and as procedurally barred because Tillery could have preserved or raised this issue in a sentence modification motion within ninety days of his

sentencing, or on direct appeal. *See* WIS. STAT. §§ 973.19 (2003-04); 809.30(2) (2003-04). Tillery appeals.

¶5 Tillery’s substantive claim is that the trial court failed to consider the sentencing guidelines, as required by *State v. Grady*, 2007 WI 81, ¶¶2, 46, 302 Wis. 2d 80, 734 N.W.2d 364, *clarified on reconsideration in* 2007 WI 125, ¶2, 305 Wis. 2d 65, 739 N.W.2d 488 (per curiam). He phrases this challenge as an erroneous exercise of sentencing discretion, and alternatively claims that his *Grady* challenge is a new sentencing factor. We affirm the trial court’s denial.

¶6 Insofar as Tillery’s challenge is to the trial court’s exercise of sentencing discretion, it is untimely. Tillery filed a response to his appellate counsel’s no-merit report; he could have identified this challenge in his response. Regardless, we considered the trial court’s exercise of sentencing discretion, and rejected the arguable merit of such a challenge, although not specifically on the basis of the guidelines. *See Tillery*, No. 2003AP3406-CRNM, unpublished slip op. at 4-5.

¶7 Tillery contends that the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), does not apply because his challenge is not jurisdictional or constitutional as required by WIS. STAT. § 974.06(1) (2007-08), but that if *Escalona* applies, his “sufficient reason” for failing to previously raise this issue was the recent case law requiring consideration of the guidelines.¹ *See Grady*, 302 Wis. 2d 80, ¶2. *Escalona*’s

¹ Tillery also cited a February 2009 case on the sentencing guidelines issue; however, the case he cited was not published, and therefore, may not be cited as authority. *See* WIS. STAT. RULE 809.23(3) (amended July 1, 2009).

(continued)

procedural bar applies because Tillery challenges the trial court's exercise of sentencing discretion for its failure to consider the sentencing guidelines.

¶8 Tillery claims that the obligation to consider the sentencing guidelines is a new sentencing factor. If Tillery were correct, *Escalona* would not apply because if the factor were legitimately new, that is why the challenge was not raised previously. Tillery's claim, however, is not a new sentencing factor.

¶9 A new factor is

“a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.”

State v. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial court must determine whether that “‘new factor’ ... frustrates the purpose of the original sentence.” *State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶10 Tillery's initial claim was that *Grady* is a 2007 case, requiring the trial court to consider the guidelines when imposing sentence. *Grady* imposes that obligation on trial courts for crimes committed on or after February 1, 2003. *See Grady*, 302 Wis. 2d 80, ¶2 n.2 (interpreting WIS. STAT. § 973.017(2) (amended Feb. 1, 2003)). Tillery committed the crimes about which he complains on March 11, 2002. Consequently, *Grady*'s directive does not apply to Tillery's crimes.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶11 Tillery then contends that the guidelines were available before *Grady*. First, the availability of the guidelines deprives Tillery’s claim of its “newness.” See *Rosado*, 70 Wis. 2d at 288. Second, there are no sentencing guidelines for felony murder. Realizing this, Tillery claims that the trial court should have considered the guideline for armed robbery because that was the predicate offense.

¶12 The trial court was not required to consider a sentencing guideline for the predicate offense underlying a felony murder conviction. The trial court is required to exercise its sentencing discretion by considering the primary sentencing factors, assessing those factors and applying them as implicated by the particular crime committed by the particular defendant, and imposing a reasoned and reasonable sentence. See *State v. Gallion*, 2004 WI 42, ¶¶38-42, 270 Wis. 2d 535, 678 N.W.2d 197. We previously decided that there was no arguably meritorious basis to challenge the trial court’s exercise of sentencing discretion. See *Tillery*, No. 2003AP3406-CRNM, unpublished slip op. at 4-5. We affirm the trial court’s order denying Tillery’s claim that the trial court was obliged to consider the sentencing guidelines (for the predicate offense) when it imposed sentence for felony murder, for which there was no guideline.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

