COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1725-CR **Cir. Ct. No. 92-CM-454**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VONNIE D. DARBY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

¶1 NETTESHEIM, P.J.[1] Vonnie D. Darby appeals pro se from a judgment of conviction and an order denying his postconviction motion for a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version. Although Darby was convicted and sentenced in 1993, the statutory provisions germane to this appeal remain unchanged.

resentencing hearing. Darby contends that he is entitled to a resentencing hearing following our decision in ***State v. Darby***, No. 97-2095, unpublished slip op. (Wis. Ct. App. April 8, 1998), in which we commuted his sentence to the maximum permitted by law. Although we could conclude that Darby's appeal is barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994), we nevertheless choose to dispose of his argument on the merits.

¶2 Darby's history with this court is a lengthy one. We limit the facts to those relevant to this particular appeal.[2] On April 19, 1993, Darby was convicted on five counts of misdemeanor theft as a habitual criminal with enhanced penalties (ranging from nine months to three years) on each theft count. ***Darby***, No. 97-2095, unpublished slip op. at 2. Due to the habitual offender enhancers, Darby's maximum sentence increased from forty-five months to fifteen years pursuant to WIS. STAT. § 939.62(1)(a) and (2). ***Darby***, No. 97-2095, unpublished slip op. at 1. The trial court imposed consecutive sentences totaling seven and one-half years. ***Id***. Darby appealed, arguing that his sentence was void because the habitual criminality was not established by the State. ***Id***. at 1-2.

¶3 In ***Darby***, No. 97-2095, we held that the enhanced sentence was void as a matter of law because the State failed to prove Darby's prior convictions or have him admit to them pursuant to the requirements of WIS. STAT. § 973.12(1). ***Darby***, No. 97-2095, unpublished slip op. at 6. We therefore commuted Darby's

[2] Neither party has provided in the briefs on appeal adequate citations to the record to corroborate the facts set out in those briefs. Such failure is a violation of WIS. STAT. RULE 809.19(1)(d) and (3) of the rules of appellate procedure, which requires parties to set out facts "relevant to the issues presented for review, with appropriate references to the record." An appellate court is improperly burdened where briefs fail to cite to the record. ***Meyer v. Fronimades***, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957). While we are not surprised by Darby's failure to provide record cites, we expect that the State would do so.

sentence, "without further proceedings," to forty-five months, the maximum permitted on the five misdemeanor convictions of theft. ***Id***. The matter was remanded back to the trial court to amend the judgment of conviction.

¶4 Following our April 8, 1998 decision, Darby filed a postconviction motion in January 2000, again challenging his sentences and raising claims that he was denied his right to effective assistance of counsel and his right to allocution at the original sentencing. The trial court denied his motion on April 12, 2000, as untimely.

¶5 Later, on February 28, 2002, Darby filed yet another motion for postconviction relief requesting a resentencing following our decision in ***Darby***.[3] Darby argued that he was entitled to a resentencing hearing pursuant to ***State v. Holloway***, 202 Wis. 2d 694, 551 N.W.2d 841 (Ct. App. 1996). Darby reasoned that he was originally sentenced to fifty percent (seven and one-half years) of his maximum exposure, with penalty enhancers, of fifteen years. Therefore, Darby argued that the trial court should commute his sentence to fifty percent of his maximum exposure, without penalty enhancers, of forty-five months.

¶6 The trial court, Judge Paul Malloy presiding, denied his request following a hearing on June 27, 2002. Judge Malloy rejected Darby's contention that Darby's sentencing judge, Judge Swietlik, had based his sentencing decision on a "percentage of available maximum" and, in the alternative, determined that it could not revisit the court of appeals ruling. Darby appeals.

[3] Darby additionally filed a writ of habeas corpus on June 3, 2002. The trial court quashed that writ and we affirmed the trial court's decision in ***State ex rel. Darby v. Litscher***, 2002 WI App 258, No. 02-1018.

¶7 We begin by noting that Darby offers no explanation for failing to raise the issue of a resentencing hearing in his January 2000 postconviction motion.[4] We therefore conclude that Darby's claim is barred by ***Escalona-Naranjo***, which provides that a claim for relief that could have been raised in a prior postconviction motion or on direct appeal, but was not, is procedurally barred absent a sufficient reason for failing to previously raise it. ***Escalona-Naranjo***, 185 Wis. 2d at 173. *See also* WIS. STAT. § 974.06(4). We nevertheless briefly address and dispose of Darby's challenge on the merits.

¶8 Darby relies on ***Holloway*** in support of his contention that he is entitled to a resentencing hearing following the court of appeals decision in ***Darby***, No. 97-2095. In ***Holloway***, we held that "when a sentence is commuted pursuant to § 973.13, STATS., the sentencing court may, in its discretion, resentence the defendant if the premise and goals of the prior sentence have been frustrated." ***Holloway***, 202 Wis. 2d at 700.

¶9 Darby contends that the trial court erroneously exercised its discretion in denying him a resentencing hearing because the premise of his prior sentence was frustrated by our decision in ***Darby***, No. 97-2095. Darby's argument is based upon his belief that by sentencing him to seven and one-half years, the original sentencing court intended that he receive only fifty percent of his

[4] At the June 27, 2002 hearing on Darby's motion for a resentencing hearing, the trial court raised the issue of whether his claim was barred by WIS. STAT. § 974.06, which requires all grounds for relief to be raised in a defendant's original motion. Darby explained and the court agreed that Darby could not have raised the resentencing issue until after the court of appeals decision in ***State v. Darby***, No. 97-2095, unpublished slip op. (Wis. Ct. App. April 8, 1998). Apparently, the trial court was not aware of Darby's January 2000 postconviction motion and the State, when asked to weigh in on the issue, did not claim that Darby's motion was barred by § 974.06 or ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994).

maximum exposure—at that time fifteen years due to the repeater enhancer. Darby contends that the trial court's intent was frustrated when the court of appeals commuted his sentence to forty-five months, one hundred percent of the maximum permitted without the repeater enhancers. Darby is wrong. It is evident from Darby's original sentence that Judge Swietlik intended Darby to receive the maximum penalty on the underlying offense.

¶10 Darby was convicted of five counts of Class A misdemeanor theft in violation of WIS. STAT. § 943.20(1)(a) and (3)(a). The maximum prison time on each count was nine months. WIS. STAT. § 939.51(3)(a). In order for the trial court to impose the repeater enhancers on all five counts as it did, it would have had to impose the maximum penalty of nine months on all five counts. *See* WIS. STAT. § 939.62(1) (if the actor is a repeater the *maximum* term of imprisonment prescribed by law for that crime may be increased).

¶11 Implicit in the trial court's sentence is its intent that Darby be sentenced to *at least* the maximum permitted on each underlying offense. Darby's commuted sentence is consistent with that intent. Contrary to Darby's assertions, there would be nothing to be gained by a resentencing hearing. We therefore uphold the trial court's order denying Darby's motion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.