COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP140-CR **Cir. Ct. No. 1998CF808**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT

V.

JOSEPH H. ECKSTEIN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Joseph Eckstein, pro se, appeals an order denying his motion for sentence modification. Eckstein argues: (1) the trial court erroneously exercised its discretion in imposing an excessive sentence; (2) the court erred by denying his motion for sentence modification without a hearing;

and (3) the Parole Commission's denial of his parole is a new factor warranting sentence modification. We reject these arguments and affirm the order.

BACKGROUND

¶2 In 1999, Eckstein was convicted following a bench trial of conspiracy to commit first-degree intentional homicide and solicitation to commit first-degree intentional homicide of his estranged wife, Annamaria Eckstein. Out of a maximum possible fifty-year sentence, the court imposed concurrent sentences consisting of forty years' imprisonment on the conspiracy count and ten years' imprisonment on the solicitation count.[1] On direct appeal, Eckstein challenged the sufficiency of the evidence to support his convictions and, based on his belief that solicitation is a lesser-included offense of conspiracy, claimed the trial court erred by convicting him of both offenses. Eckstein also argued the court erroneously exercised its sentencing discretion. We rejected Eckstein's arguments and affirmed both the judgment of conviction and order denying his motion for postconviction relief. ***State v. Eckstein***, No. 2000AP117-CR, unpublished slip op. (WI App July 25, 2000).

¶3 Eckstein then filed a WIS. STAT. § 974.06[2] motion for postconviction relief alleging he was denied the effective assistance of trial counsel. That motion was denied after a hearing, and this court affirmed that denial on appeal. ***State v. Eckstein***, No. 2002AP2607, unpublished slip op. (WI App May 28, 2003).

[1] Because the offenses occurred in 1998, the court imposed indeterminate sentences. "Truth-in-sentencing" revisions were enacted in 1998 and apply to felonies committed on or after December 31, 1999. *See* 1997 Wis. Act 283, § 419.

[2] All references to the Wisconsin Statutes refer to the 2007-08 version unless otherwise noted.

Eckstein, pro se, subsequently filed the underlying motion for sentence modification, asserting various new factors. The trial court denied the motion without a hearing and this appeal follows.

DISCUSSION

I. EXCESSIVE SENTENCE

¶4 Eckstein argues he is entitled to sentencing relief on grounds the trial court imposed an excessive sentence. Specifically, Eckstein contends a lesser sentence was warranted given his age, health, and status as a first-time offender. This court, however, addressed the trial court's sentencing discretion on direct appeal and rejected a similar argument advanced by Eckstein. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.3d 512 (Ct. App. 1991). Eckstein's challenge to his sentence on these grounds therefore fails.

II. NEW FACTORS

¶5 Next, Eckstein contends the trial court improperly denied his sentence modification motion without a hearing or adequate explanation. The purpose of sentence modification is to correct an unjust sentence. ***State v. Koeppen***, 2000 WI App 121, ¶33, 237 Wis. 2d 418, 614 N.W.2d 530. "Before a sentence will be modified, the defendant must demonstrate, by clear and convincing evidence, that there is a new factor justifying the court's reconsideration." ***Id.***

¶6 A new factor is "a fact or set of facts highly relevant to the imposition of the sentence, but not known to the trial judge at the time of the

original sentencing, either because it was not then in existence, or because even though it was in existence, it was unknowingly overlooked by all of the parties." *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 243 N.W.2d 69 (1975). A new factor must be an event or development that frustrates the purpose of the original sentencing. *See* ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). This court reviews without deference the question of law of whether the facts constitute a new factor. ***Id.*** If a new factor is established, the question of sentence modification is addressed to the trial court's discretion. ***Id.*** at 96-97. Here, the court denied Eckstein's motion, concluding that it did not contain any information that would be considered a new factor. On appeal, Eckstein lists what he identifies as sixteen "new factors" justifying sentence modification.

¶7 First, Eckstein claims he is not guilty of conspiracy. This apparent challenge to the sufficiency of the evidence is not a new factor but, rather, an attempt to relitigate a legal claim that was decided against him on direct appeal. Eckstein is barred from renewing this claim now. *See* ***Witkowski***, 163 Wis. 2d at 990.

¶8 Second, Eckstein contends that if he is guilty of anything, one of the State's main witnesses, Crystal Graham, is guilty of aiding and abetting. Eckstein's personal opinion regarding the culpability of a witness on a different charge, however, is not a new factor warranting modification of Eckstein's sentence.

¶9 Third, Eckstein contends that if he is guilty of anything, it should be a lesser charge than conspiracy to commit first-degree intentional homicide. Again, Eckstein is barred from now challenging the sufficiency of the evidence to support his conspiracy conviction. *See* ***id.*** Moreover, the notion that the

prosecutor could have charged Eckstein differently is not a fact that would be unknown to the sentencing court.

¶10 Fourth, Eckstein claims he is a victim of revenge, coercion, entrapment and adequate provocation. This is not a new factor but, again, an attempt to cast doubt on his convictions. Further, because Eckstein specifically informed the court of his conspiracy theory at the sentencing hearing, it was known to the court at the time the sentence was imposed.

¶11 Fifth, Eckstein argues he was not read his ***Miranda***[3] rights before the presentence investigation interview. This is not a new factor justifying sentence modification. Even on the merits, ***Miranda*** warnings are only required "to the extent that [the presentence report] seeks statements from a defendant on an element upon which the State still has the burden of proof." ***State v. Heffran***, 129 Wis. 2d 156, 165, 384 N.W.2d 351 (1986). Here, there were no elements outstanding at the time of the presentence interview as Eckstein had already been convicted of his crimes.

¶12 Sixth, Eckstein challenges what he describes as an "erroneous criminal complaint and information." Eckstein has long since forfeited his various claims regarding the complaint and information. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (issues not preserved in the trial court, even alleged constitutional errors, generally will not be considered on appeal); *see also* ***State v. Escolana-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (claim that could be raised in prior postconviction or appellate proceedings

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

is barred absent defendant articulating a sufficient reason for failing to raise the claim in the earlier proceedings).

¶13 Even on their merits, Eckstein's claims fail: (1) the complaint was signed and filed by the assistant district attorney on September 4, 1998, days after the witness statements supporting the complaint were taken; (2) contrary to Eckstein's assertion, there was an information filed on the solicitation charge to commit first-degree intentional homicide; and (3) contrary to Eckstein's assertion, there is no statutory requirement that an information be filed under oath and state grounds upon which the charge is based. *See* WIS. STAT. § 971.01. Even assuming the charging documents suffered from a technical defect, Eckstein has not shown any prejudice and, therefore, is not entitled to relief. *See* WIS. STAT. § 971.26 (judgment shall not be affected by any defect or imperfection in matters of form which do not prejudice defendant).

¶14 Seventh, Eckstein's claim that the sentence imposed was unduly harsh is not a new factor but, rather, a repeat of his first argument in this appeal and another attempt to relitigate a legal claim that has already been decided against him. He is barred from renewing it now. *See* ***Witkowski***, 163 Wis. 2d at 990.

¶15 Eighth, Eckstein points out that he was preparing for a divorce hearing at the time of the offenses. Eckstein therefore submits that if his wife was to be killed, there would have been no need for him to prepare for the hearing. To the extent this appears to be another challenge to the sufficiency of the evidence supporting his convictions, he is barred from relitigating that claim. *See* ***id.*** In any event, because the sentencing court was aware of Eckstein's claims of innocence, it is not a new factor justifying sentence modification.

¶16 Ninth, Eckstein contends he was prejudiced by his trial counsel, the judge and the State. Eckstein's challenge to the effective assistance of his trial counsel, sufficiency of the evidence and the court's sentencing discretion were all raised and rejected by this court in earlier proceedings. Eckstein is barred from relitigating them now. ***Id.*** Eckstein's claim regarding the State of Wisconsin—specifically, the Parole Commission—will be discussed below. *See infra*, ¶¶25-27.

¶17 Tenth, Eckstein complains the news media "had [him] guilty before trial." If Eckstein is suggesting that news media coverage warranted either a change in venue or a mistrial, he has forfeited the objection and is procedurally barred from raising it now. *See* ***Huebner***, 235 Wis. 2d 486, ¶10; ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

¶18 Eleventh, Eckstein's claim that he was "in fear for his life and safety" is not a new factor warranting sentence modification. As the State notes, it is unclear how Eckstein's alleged fear is a fact highly relevant to the imposition of the sentence or how such fear would frustrate the purpose of the original sentencing. This court will not consider arguments that are inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶19 Twelfth, Eckstein's claim of "erroneous charging information and trial presentations" is not sufficiently developed. Therefore, we will not consider it further. ***Id.***

¶20 Thirteenth, Eckstein notes that Graham was paid $200 by the Green Bay police. A police report indicates the witness was given $200 after the statements were signed. The report continues: "At no time did she ever ask for any money, nor did we ask if she wanted any money. This occurred after this part

of the case was concluded." As the State points out, the unsolicited payment received by the witness after the fact is not highly relevant to Eckstein's sentence, nor does it frustrate the purpose of the original sentence.

¶21 Fourteenth, Eckstein contends Graham was not credible per her own words. Again, this court has concluded there was sufficient evidence to support Eckstein's convictions and he cannot challenge that now. *See* ***Witkowski***, 163 Wis. 2d at 990. Further, this court has noted that the trial court was "aware of Graham's mental condition, and in fact stated that Graham's testimony may not have been credible absent corroboration by the tape recordings and physical evidence." Therefore, even if Graham's credibility was highly relevant to Eckstein's sentence, it was known to the court when the sentence was imposed.

¶22 Fifteenth, the fact that Eckstein's wife had phobias and nightmares was brought to the sentencing court's attention and, therefore, is not a new factor justifying sentence modification.

¶23 Finally, Eckstein's sixteenth "new factor" is his claim that he is actively pursuing involvement in restorative justice. This statement represents nothing more than an alleged change in Eckstein's attitude. Such a change does not qualify as a new factor as a matter of law. *See, e.g.*, ***State v. Wuensch***, 69 Wis. 2d 467, 478, 230 N.W.2d 665 (1975); ***State v. Prince***, 147 Wis. 2d 134, 136, 432 N.W.2d 646 (Ct. App. 1988).

¶24 To the extent Eckstein challenges the denial of his motion without a hearing, a postconviction motion may be denied without a hearing if the motion presents only conclusory allegations or if the record otherwise conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. As noted above, the record

demonstrates that Eckstein was not entitled to relief. Therefore, the trial court properly denied the motion without a hearing.

III. PAROLE DENIAL

¶25 Eckstein's final argument is that the Parole Commission's decision to deny his parole is a new factor warranting sentence modification. According to Eckstein, the trial court intended to sentence him to the minimum amount of time before parole eligibility—ten years—and the Parole Commission frustrated that intent by denying his parole, ostensibly due to a 1994 letter issued by then Governor Tommy Thompson to the Department of Corrections Secretary.[4] We are not persuaded.

¶26 First, this court has already concluded that the 1994 letter is not a new factor warranting sentence modification. *See* ***State v. Wood***, 2007 WI App 190, ¶11, 305 Wis. 2d 133, 738 N.W.2d 81. Second, the Parole Commission's denial of parole did not frustrate the purpose of Eckstein's sentence. At sentencing, the court's remarks were focused on Eckstein's intentional plan to take another human being's life, his utter lack of remorse, and the ongoing danger he presented to his wife. In light of these stated concerns, the Parole Commission's decision to deny Eckstein's parole did not frustrate the purpose of the sentence imposed.

4 The letter discussed changes in the law concerning mandatory release on parole. Specifically, Thompson acknowledged the 1994 statutory change replacing mandatory release on parole with "presumptive mandatory release" for serious felonies. Thompson further directed the Department "to pursue any and all available legal avenues to block the release of violent offenders who have reached their mandatory release date." ***State v. Wood***, 2007 WI App 190, ¶11 n.4, 305 Wis. 2d 133, 738 N.W.2d 81.

¶27 At one point in its remarks, the court did state: "I'm satisfied, given the severity of this offense and given the danger that you've posed to your wife and perhaps others, that the minimum amount of time before parole eligibility is an appropriate sentence in this case and it's the least required." In making this statement, however, the court was neither promising nor endorsing an early release for Eckstein. Rather, the court was recognizing the possibility of an early parole and accounting for that possibility when imposing the sentence.

¶28 Because Eckstein failed to establish that a new factor exists to justify sentence modification, we conclude the trial court properly denied his motion.

By the Court.—Order affirmed.

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