COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0448-CR **Cir. Ct. No. 85CF001463**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE BERNARD DAVIS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Affirmed*.

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

¶1 PER CURIAM. Terrance Bernard Davis was convicted in 1985 of two counts of first-degree murder while armed with a dangerous weapon, two counts of carrying a concealed weapon, and possession of a controlled substance. In the postconviction motion underlying this appeal, Davis asked the circuit court to order a new trial or to modify his sentence. The court denied the motion and

Davis's motion for reconsideration. Davis appeals. Because Davis's arguments are procedurally barred, we affirm.

Background

¶2 After his 1985 conviction, Davis filed a direct appeal in which he raised several arguments: (1) the trial judge was prejudiced against him; (2) his arrest was illegal because police lacked probable cause and his arrest occurred outside the arresting officer's home jurisdiction; (3) inculpatory statements were obtained in violation of his constitutional rights; (4) the voir dire of prospective jurors was improperly conducted; (5) the circuit court erroneously gave jurors a preliminary instruction on witness credibility; (6) the testimony of the victims' wives should have been excluded as unfairly prejudicial; and (7) the circuit court erroneously disallowed as not relevant expert testimony concerning environmental and cultural influences on Davis that caused him to fear the police.[1] This court rejected all of Davis's contentions and affirmed the judgment of conviction. ***State v. Davis***, No. 86-0844-CR, unpublished slip op. (Wis. Ct. App. Sept. 23, 1987).

¶3 On November 7, 2001, Davis filed a *pro se* WIS. STAT. § 974.06 (2001-02)[2] motion for postconviction relief in which he challenged the effectiveness of his trial counsel. Among other arguments, Davis asserted that his trial counsel did not adequately investigate Davis's mental state when he committed the crimes and that he was incompetent to stand trial. The circuit court denied Davis's motion without a hearing and he appealed.

[1] The murder victims were two police officers.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 This court summarily affirmed. ***State v. Davis***, No. 01-3177, unpublished slip op. (WI App Oct. 23, 2002). We noted that Davis "raised issues of ineffective assistance of trial counsel for the first time" in his WIS. STAT. § 974.06 motion but "did not provide the court with any justification for not raising those issues approximately fifteen years earlier in his direct appeal." ***Id.*** at 2. Citing ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994), and ***State ex rel. Dismuke v. Kolb***, 149 Wis. 2d 270, 274, 441 N.W.2d 253 (Ct. App. 1989), we concluded that "the circuit court did not erroneously exercise its discretion in determining that the alleged grounds for relief were procedurally barred." ***Davis***, No. 01-3177, unpublished slip op. at 3.

¶5 On January 13, 2004, Davis filed the postconviction motion that underlies this appeal.[3] In that motion, Davis raised two issues. First, he argued that "information highly relevant to the imposition of sentence," particularly psychological reports that cast doubt on Davis's competency to stand trial, were withheld by trial counsel, that counsel was ineffective in doing so, and that counsel's ineffectiveness constituted a new factor that justified sentence modification.

¶6 Second, Davis argued that because he cannot file a motion for sentence adjustment under WIS. STAT. § 973.195, the enactment of that statute constitutes an unconstitutional *ex post facto* change in parole policy. Davis contends that a defendant "is entitled to know … his or her chances of receiving a

[3] Although Davis's motion is couched largely in the parlance of a "new factor" sentence modification motion, his argument extends beyond sentence modification and he contends that he should receive a new trial. Regardless of whether the motion is considered to be a postconviction motion under WIS. STAT. § 974.06 or a motion for sentence modification based upon a new factor, Davis is not entitled to relief.

[sic] early release" prior to entering a plea and that an "adverse change in one's prospects for release disadvantages [sic] a prisoner just as an upward change in the minimum duration of his sentence would."

¶7 The circuit court denied Davis's motion as barred by ***Escalona***. Davis moved for reconsideration, arguing that a new factor motion for sentence modification may be made at any time, and therefore, the procedural bar of ***Escalona*** does not apply. The circuit court denied reconsideration, noting that Davis's challenge to trial counsel's conduct was "not a new factor; it is an issue that could have been raised previously." The circuit court did not expressly address Davis's *ex post facto* argument.

Discussion

¶8 A defendant seeking modification based on a new factor must first show that a new factor exists. ***State v. Champion***, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242. 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.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A new factor must be a development that frustrates the purpose of the original sentence, and it must be proved by clear and convincing evidence. ***Champion***, 258 Wis. 2d 781, ¶4. Whether something constitutes a new factor is a question of law we review independently. ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989).

¶9 The circuit court correctly held that Davis had not established a new factor. Davis contended that his trial counsel possessed psychological evidence of his incompetence but chose not to present it. Thus, Davis cannot meet one of the fundamental components of the "new factor" definition – that the fact "was unknowingly overlooked by all of the parties." ***Rosado***, 70 Wis. 2d at 288. Furthermore, Davis did not explain how the non-disclosure of the psychological evidence frustrated the purpose of the original sentence.[4] No new factor existed.

¶10 Even if Davis's motion were construed as a postconviction motion filed under WIS. STAT. § 974.06, it would still fail. Davis challenged the effectiveness of trial counsel's handling of psychological evidence in his 2001 postconviction motion. Davis cannot re-raise arguments that have already been addressed. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (Once an issue is litigated, it cannot be re-litigated in a subsequent proceeding.). We have previously held that the procedural bar of ***Escalona*** defeated Davis's challenge to the effectiveness of trial counsel. We see no reason to depart from that holding.

¶11 Davis's arguments based on WIS. STAT. § 973.195 also fail. Section 973.195 permits certain offenders to petition for sentence adjustment after serving part of their sentences. The statute was enacted in 2001 "to address sentencing disparity between TIS-I and TIS-II." ***State v. Gallion***, 2004 WI 42, ¶75, 270 Wis. 2d 535, 678 N.W.2d 197. We concur in the State's observation that Davis has "not explain[ed] how a statute that does not apply to his sentence and has never

[4] The court sentenced Davis to life in prison, plus five years on each first-degree murder count, to run consecutively. The court also imposed additional consecutive sentences totaling nineteen months on the other counts.

applied to his sentence frustrates the purpose of Davis's original sentence." Therefore, § 973.195 is not a new factor. *See* ***Champion***, 258 Wis. 2d 781, ¶4.

¶12 We also reject Davis's *ex post facto* argument. Courts examining alleged *ex post facto* clause violations must determine whether the application of the new law: (1) criminalizes conduct that was innocent when committed; (2) increases the penalty for conduct after its commission; or (3) removes a defense that was available at the time the act was committed. *See* ***State v. Kurzawa***, 180 Wis. 2d 502, 512-13, 509 N.W.2d 712 (1994). Davis's contention that his chances for parole have been "adverse[ly] change[d]" focuses on the second factor. WISCONSIN STAT. § 973.195 applies to persons who committed crimes on or after December 31, 1999. *See* WIS. STAT. §§ 973.195(1r) and 973.01(1). Davis was convicted in 1985. Because § 973.195 has no impact on Davis, his sentence cannot have been increased by its enactment. We also fail to see how § 973.195 constitutes a change in parole policy for Davis.

By the Court.—Orders affirmed.

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