COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2251-CR **Cir. Ct. No. 1997CF974685**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH FOWLER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kenneth Fowler, *pro se*, appeals from orders denying his motions for postconviction relief and for reconsideration. We conclude that the issues Fowler raises are either procedurally barred, are based on

statutes that were not in effect at the time of his sentencing, or are not cognizable under WIS. STAT. § 974.06 (2009-10).[1] Accordingly, we affirm.

BACKGROUND

¶2 In 1998, after entering ***Alford*** pleas, Fowler was convicted of burglary and kidnapping.[2] On each count he was sentenced to forty years, with the sentences to run consecutively. Fowler filed a direct appeal from the judgment of conviction and from the orders denying his motions for postconviction relief. We affirmed. *See* ***State v. Fowler***, No. 2000AP2292-CR, unpublished slip op. (WI App Sept. 5, 2001).

¶3 On August 3, 2010, Fowler filed a "Motion for Sentence Modification" raising the issues he now argues on appeal. Citing WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), the postconviction court denied the motion after concluding that Fowler was alleging constitutional violations which should have been raised during his direct appeal.

¶4 On August 19, 2010, Fowler filed two additional motions: a "Motion for Post-Conviction Relief" and a "Motion to Reconsider Sentence Modification Motion." The postconviction court denied the motions and reiterated its conclusion that Fowler's claims were procedurally barred.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

DISCUSSION

¶5 Fowler argues seven issues on appeal. First, that the sentencing court had no authority to impose a consecutive sentence under WIS. STAT. § 973.15(1). Second, that the sentencing court failed to consider the felony sentencing guidelines or provide its reasoning for departing from them. Third, that the prosecutor and the presentence report writer provided the sentencing court with erroneous information about Fowler's prior record. Fourth, that the prosecutor breached the plea agreement. Fifth, that the sentencing court improperly considered his juvenile record. Sixth, that the Department of Corrections used his juvenile record for sex offender treatment purposes. And seventh, that his convictions were multiplicitous.

¶6 For reasons set forth in the remainder of this opinion, Fowler's appeal cannot succeed.

I. A number of the issues Fowler raises are barred.

¶7 We agree with the State that four of the seven issues argued by Fowler are barred by ***Escalona-Naranjo***. These are the first, third, fourth, and seventh issues identified above.

¶8 At the outset, Fowler argues that the sentencing court had no authority to impose a consecutive sentence under WIS. STAT. § 973.15(1). This amounts to a claim that his sentence exceeded the maximum term allowed under state law, which is a viable claim under WIS. STAT. § 974.06(1). *See* ***State v. Allen***, 2010 WI 89, ¶22, 328 Wis. 2d 1, 786 N.W.2d 124 ("Section 974.06(1) allows prisoners to move to vacate, set aside, or correct a sentence where the

prisoner is claiming that … the sentence was in excess of the maximum or otherwise subject to collateral attack.").

¶9 WISCONSIN STAT. § 974.06(1) also allows a prisoner to raise claims that his or her sentence was imposed in violation of the federal or state constitution. In this regard, Fowler contends that the prosecutor and the presentence investigation report writer provided the sentencing court with erroneous information about Fowler's prior record. This is a claim that he was sentenced on the basis of inaccurate information, which is cognizable under § 974.06. *See generally* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 ("A defendant has a constitutionally protected due process right to be sentenced upon accurate information."). Fowler's assertion that the prosecutor breached the plea agreement likewise raises a claim that falls within the scope of § 974.06. *See generally* ***State v. Wills***, 187 Wis. 2d 529, 536-37, 523 N.W.2d 569 (Ct. App. 1994) (Once a negotiated plea is entered, the defendant has a constitutional right to enforcement of the plea bargain.). The same is true of Fowler's contention that his convictions are multiplicitous and violated double jeopardy. *See generally* ***State v. Derango***, 2000 WI 89, ¶26, 236 Wis. 2d 721, 613 N.W.2d 833 (The double jeopardy clauses of our federal and state constitutions protect against multiple punishments for the same offense.).

¶10 However, because Fowler could have raised all of these claims in his direct appeal, he is barred from raising them now unless he can show a sufficient reason for failing to previously do so. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185; *see also* WIS. STAT. § 974.06(4). Fowler has provided no such reason. In an effort to avoid the procedural bar of ***Escalona-Naranjo***, Fowler claims that he is challenging the circuit court's sentencing discretion and is presenting a claim that sentence modification is warranted based on new factors. *See* ***Smith v. State***, 85

Wis. 2d 650, 661, 271 N.W.2d 20 (1978) (Section 974.06 proceedings "cannot be used to challenge a sentence because of an alleged [mis]use of discretion."); *see also* ***State v. Noll***, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895 (A motion to modify a sentence based on new factors invokes the circuit court's inherent authority and may be made at any time.).

¶11 Unfortunately for Fowler, he has missed his window for challenging the circuit court's exercise of sentencing discretion.[3] *See* WIS. STAT. RULE 809.30(2) (1997-98). In addition, the issues he raises do not constitute "new factors" under Wisconsin law. As the State points out, the facts giving rise to these issues were all in existence at the time of Fowler's sentencing, and there is no indication that that they were unknowingly overlooked by the parties. *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975) (a new factor is defined as the fact or 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"). Accordingly, these claims were properly denied under ***Escalona-Naranjo***.

II. The sentencing court was not required to consider the felony sentencing guidelines.

¶12 Fowler submits that the sentencing court failed to consider the felony sentencing guidelines or provide its reasoning for departing from them. He

[3] Fowler asserts that the circuit court improperly considered his juvenile record at sentencing and his refusal to admit guilt or express remorse for the crimes. These are challenges to the circuit court's exercise of sentencing discretion, which as explained, he can no longer pursue.

relies on WIS. STAT. §§ 973.011, 973.012, and 973.017 despite the fact that these statutes were not in effect at the time of his sentencing in 1998. Sections 973.011 and 973.012 were repealed by 1995 Wis. Act 27, §§ 7251, 7252, effective July 29, 1995. Section 973.017 was created by 2001 Wis. Act 109, § 1135, effective February 1, 2003. Consequently, this argument fails, and we affirm, though on a different basis than that relied on by the postconviction court.[4] *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) ("[W]e may affirm on grounds different than those relied on by the trial court.").

III. Fowler's remaining claim is not cognizable under WIS. STAT. § 974.06(1).

¶13 Fowler claims that the Department of Corrections used his juvenile record for sex offender treatment purposes. This claim falls outside the scope of WIS. STAT. § 974.06(1), which allows a prisoner to argue "that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack." ***Id.*** As the State points out, Fowler appears to be challenging the conditions of his confinement—a claim that is not recognized under § 974.06. *See* ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981) ("The sentencing court has no jurisdiction to place conditions on a prison sentence."). Accordingly, the claim was properly rejected, and again we affirm on a basis other than that relied on by the postconviction court. *See* ***Vanstone***, 191 Wis. 2d at 595.

[4] As previously stated, the circuit court concluded that all of the issues raised by Fowler were barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

By the Court.—Orders affirmed.

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