COURT OF APPEALS
DECISION
DATED AND RELEASED

October 12, 1995

No. 94-3281-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL L. RAISBECK,

Defendant-Appellant.

APPEAL from orders of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Vergeront, JJ.

DYKMAN, J. This is an appeal from an order denying Daniel L. Raisbeck's postconviction motion to modify the sentences imposed on him for battery, contrary to § 940.19(1), STATS., kidnapping, contrary to § 940.31(1)(a), STATS., and burglary, contrary to § 943.10(1)(a), STATS., and from an order denying his motion for reconsideration of the first order. We affirm.

BACKGROUND

Daniel L. Raisbeck and his wife, Donna L. Tabbutt, shared an apartment in Madison with their two small children. Due to marital disagreements, Raisbeck moved out and went to Arizona in early September of 1991. Tabbutt changed the key to the lock on the front door.

At about 7:00 a.m. on October 5, 1991, Tabbutt looked through a peephole in her door after hearing a knock on her door. She saw her stepdaughter, Betsy Haight. When she opened the door, Raisbeck "barged right in" and began beating Tabbutt. Tabbutt testified that Raisbeck dragged her around by the hair and pushed her head into the headboard of the children's bed. He told her that he was taking her and the children to Haight's house in Stockton, Illinois. Tabbutt resisted and said that she did not want to go to Illinois, but ultimately went because the children had been taken outside to an automobile, and she did not want them to go without her.

As a result of this incident, Raisbeck was charged with aggravated burglary, three counts of kidnapping and one count of battery. A jury trial resulted in a mistrial because the jury was unable to agree on a verdict.

In June 1992, Raisbeck entered a plea agreement. The State agreed to dismiss the aggravated burglary and two of the three kidnapping charges. In return, Raisbeck agreed to plead no contest to one count of battery and one count of kidnapping. Raisbeck also agreed to plea no contest to burglarizing a tavern which he committed on January 14, 1983. The trial court sentenced Raisbeck to seven years for the kidnapping, six years for the burglary of the tavern, and six months for the battery, all to run concurrently. Following his conviction, Raisbeck did not file any motions or direct appeals.

On September 29, 1994, Raisbeck filed a postconviction motion for modification of his sentences. But the material accompanying his motion did not assert any new factors to support a sentence modification. Instead, he claimed that there was an insufficient factual basis for the kidnapping charge, that he had been found not guilty of the kidnapping charge, that his prosecution for burglary was barred by the statute of limitations, that his trial counsel was

ineffective, and that his no contest pleas were involuntary. He asked that his sentences be modified, and if that was denied, that he be given a new trial on all of the charges. The trial court denied Raisbeck's motion as well as a later motion for reconsideration. Raisbeck appeals.

DECISION

We first address Raisbeck's motion as its title suggests—a motion for sentence modification. It is inappropriate for a trial court to change an imposed sentence unless new factors are shown. ***State v. Macemon***, 113 Wis.2d 662, 668, 335 N.W.2d 402, 406 (1983). A new factor is a fact highly relevant to the imposition of sentence, but not known to the trial court at sentencing, either because it was not then in existence or was unknowingly overlooked by all the parties. ***Id.*** We review whether a new factor has been shown *de novo*. ***State v. Toliver***, 187 Wis.2d 346, 362, 523 N.W.2d 113, 119 (Ct. App. 1994). Additionally, a trial court may review its sentence for an erroneous exercise of discretion if it concludes that the sentence was unduly harsh or unconscionable. ***Id.*** at 363, 523 N.W.2d at 119.

Raisbeck does not assert any new factors which he believes entitle him to resentencing. The errors he complains of do not bear on the length of the sentence he received but on whether he should have been found guilty in the first place. The remedy for the errors he has asserted is not resentencing, but a new trial or a dismissal of the complaint. And Raisbeck does not complain that the seven-year sentence that he received is unduly harsh or unconscionable. We conclude that no new factors have been shown entitling Raisbeck to relief. We also conclude that the sentences requiring Raisbeck to serve seven years in prison are not unduly harsh nor unconscionable. Taking Raisbeck's motion as a request for sentence modification, we affirm the trial court's denial of his motion.

The trial court concluded that Raisbeck had really brought a § 974.06, STATS., postconviction motion for relief. We agree. The question that then arises is whether Raisbeck is precluded from bringing this motion because he could have brought the issues to this court by direct appeal. In ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994), the court concluded that a defendant who could have raised a claim by direct appeal or by a

postconviction motion pursuant to § 974.02, STATS., was prohibited from raising that claim under § 974.06. The court said:

> The issue in this case is whether Escalona-Naranjo is prohibited from raising his claim of ineffective assistance of trial counsel in a postconviction motion under sec. 974.06, Stats., if such a claim could have been raised in a previously filed sec. 974.02 motion and/or on direct appeal. We conclude that Escalona-Naranjo could have raised the ineffective assistance of trial counsel claim in postconviction motions under sec. 974.02, Stats. Therefore, we hold that Escalona-Naranjo is precluded from raising that issue in a sec. 974.06 motion.

Id. at 173, 517 N.W.2d at 158-59 (footnote omitted).

By its terms, § 974.06, STATS., is limited to addressing issues of constitutional deprivation, lack of jurisdiction or a sentence in excess of the statutory maximum. Raisbeck does not assert that the trial court lacked jurisdiction or that his sentences were in excess of the statutory maximum. We are faced with the issue whether ***Escalona-Naranjo*** prohibits a defendant from filing a § 974.06 motion to raise issues that he or she could have raised had a direct appeal been taken. ***Escalona-Naranjo*** does not directly answer that question because in that case, the defendant filed postconviction motions and took a direct appeal before filing his § 974.06 motion.

We are reluctant to reach this issue. Neither the parties nor the trial court addressed it. The State does not cite ***Escalona-Naranjo*** or make an argument based on that case. ***Escalona-Naranjo*** and ***State v. Debra A.E.***, 188 Wis.2d 111, 135-36, 523 N.W.2d 727, 736 (1994), contain language from which conflicting conclusions can be drawn. It is unlikely that those cases are based upon jurisdictional considerations, requiring us to address this issue *sua sponte*. We conclude that we should not decide whether Raisbeck was prohibited from bringing this § 974.06, STATS., motion, and instead, we will address the issues that he raises.

Though Raisbeck's brief is only four pages long, it is not easy to decipher. We conclude that Raisbeck is probably asserting that the statute of limitations bars prosecution for the burglary of the tavern. He also asserts that the complaint alleging that he kidnapped his wife and children, burglarized their home and battered his wife was not sworn to by a person having personal knowledge of the facts. He asserts that these errors deprived him of due process of law.

Raisbeck asserts: "The judgment of conviction shows the Burglary pursuant to Wis. Stats., 943.10(1), (2)(d) was committed in 1983 and now being prosecuted in 1991, some eight (8) years later beyond the statutory ... limitation of six (6) years." Raisbeck is correct that the statute of limitations for burglary is six years. Section 939.74(1), STATS. But he fails to recognize that the same statute which sets out the six-year limitation period also defines when a criminal action is commenced, thereby tolling the statute of limitations. Section 939.74(1) also reads: "Within the meaning of this section, a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed."

The burglary of the tavern occurred on January 14, 1983. Therefore, the State had six years, or until January 13, 1989, to issue a warrant. The warrant pertaining to the tavern burglary was issued by J.M. Amenda, a court commissioner, on March 18, 1983, and filed with the LaFayette County Clerk of Courts on that same day. Slightly more than two months of the six-year period had passed when the State began prosecuting Raisbeck. Once the warrant was issued, the statute of limitations was tolled. The time that passed between the issuance of the warrant and Raisbeck's court appearance was irrelevant for statute of limitations purposes.

Raisbeck next attacks the issuance of the complaint by citing § 906.02, STATS., which provides in relevant part:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.

Section 901.01, STATS., provides: "Chapters 901 to 911 govern proceedings in the courts of the state of Wisconsin ...." The complaint alleging that Raisbeck kidnapped Tabbutt and her two children, battered Tabbutt and burglarized her apartment, was signed by detective Alix Olson and sworn to before Gretchen Hayward, an assistant district attorney. This procedure is not a proceeding in a court. Indeed, a complainant usually signs the complaint in the district attorney's office. The inapplicability of § 906.02, STATS., to the procedure used to sign complaints is also revealed in ***State v. Chinavare***, 185 Wis.2d 528, 534, 518 N.W.2d 772, 774 (Ct. App. 1994), where we noted that when a complaint is based upon hearsay, there must be adequate underlying facts to permit a reasonable inference that the source of the information was probably truthful. In ***Chinavare***, a complaint based upon a detective's interview of a citizen witness was valid even though the detective did not have personal knowledge of the matter. ***Id.*** at 532, 518 N.W.2d at 773-74.

We conclude that Raisbeck's assertions of error are without merit. We therefore affirm the trial court's orders.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.