COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2627-CR **Cir. Ct. No. 1997CF974862**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS A. RAMIREZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Luis A. Ramirez, *pro se*, appeals the order denying his postconviction motion for sentence modification. We affirm for the reasons discussed below.

BACKGROUND

¶2 As set forth in this court's opinion resolving Ramirez's prior appeal:

> On October 26, 1997, Ramirez, then twenty-two years old, and two other males, one eighteen years old and the other fifteen years old, entered the Stop and Save food store located at 1400 South 6th Street in Milwaukee. All three were masked and carrying guns. Soon after entering the store, Ramirez put on gloves and removed the surveillance tape from the video camera. After threatening to shoot the store's manager, the three took money, lottery tickets, and a handgun. They also forced the manager to open the cash register, from which they took additional amounts of money, and took $200 and a gold necklace from another store employee. The manager's and the employee's hands and feet were then bound with duct tape. However, the robbers were unaware that the manager had activated the silent holdup alarm, so that when the three robbers were about to exit the store, they saw that the police were waiting for them. The three men frantically looked for another way to exit the store and began hiding items throughout the store. They also discussed using the manager and the store employee as hostages. After approximately thirty minutes, the three permitted the manager to call 911 and make arrangements for them to surrender. All three confessed to the crime.

State v. Ramirez, No. 2006AP967, unpublished slip op. ¶2 (WI App Dec. 27, 2006).

¶3 Ramirez was charged with and pled guilty to one count of armed robbery as a party to the crime. ***Id.***, ¶3. He was sentenced to the maximum forty years' incarceration. ***Id.***, ¶4. No direct appeal was brought on Ramirez's behalf. ***Id.***

¶4 Acting *pro se*, Ramirez subsequently brought a motion to withdraw his guilty plea. ***Id.***, ¶5. The circuit court denied his motion, and we affirmed. ***Id.***, ¶24. The Wisconsin Supreme Court denied review.

¶5 More than thirteen years after his sentencing, again acting *pro se*, Ramirez filed the postconviction motion to modify his sentence that underlies the instant appeal. Ramirez asserted that his sentence should be modified on the following bases: (1) due to a change in parole eligibility; (2) because the circuit court erroneously exercised its discretion by relying on inaccurate information at sentencing; and (3) because his sentence was unduly harsh. The circuit court denied Ramirez's motion.

DISCUSSION

¶6 Ramirez renews the latter two postconviction arguments on appeal.[1] Specifically, Ramirez submits that the circuit court relied on inaccurate information at sentencing when it considered offenses that he was never charged with, convicted of, or investigated for. He references the following statement made by the circuit court at his sentencing: "[w]hen the court takes in consideration all those factors that ha[ve] been represented, the fact that you took a lead in this—in this offense, your previous history which includes some drug dealing apparently and numerous other things…." Ramirez submits that he has never been arrested for drug dealing or charged with any drug-related offenses. Ramirez also takes issue with the circuit court's reference to "numerous other things," claiming that his only felony conviction is in this case. As for his argument that his sentence was unduly harsh, Ramirez directs our attention to the disparate sentences he and his two co-defendants received.

[1] Ramirez has not renewed his argument that his sentence should be modified due to a change in parole eligibility. We therefore deem this argument abandoned. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

¶7 We begin by setting forth the legal standard that applies to motions for sentence modification:

> A defendant can seek sentence modification in two ways. First, a defendant can file a motion under WIS. STAT. § 973.19, which permits a defendant "to move for modification of his sentence as a matter of right." ***State v. Scaccio***, 2000 WI App 265, ¶3, 240 Wis. 2d 95, 622 N.W.2d 449. Paragraph (1)(a) of § 973.19 applies to defendants who do not want to pursue an appeal yet want to seek sentence modification because, they contend, the circuit court imposed too severe a sentence. This paragraph also applies to claims that a court imposed an "unduly harsh or unconscionable" sentence. ***State v. Macemon***, 113 Wis. 2d 662, 668 n.3, 335 N.W.2d 402 (1983).
>
> ….
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> The second approach a defendant may take to seek sentence modification is to move for discretionary review, invoking the "inherent power" of the circuit court. ***Hayes v. State***, 46 Wis. 2d 93, 101, 175 N.W.2d 625 (1970), *overruled on other grounds by* ***State v. Taylor***, 60 Wis. 2d 506, 523, 210 N.W.2d 873 (1973). The court exercises its inherent power to modify a sentence only if a defendant demonstrates the existence of a "new factor" justifying sentence modification. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989).

State v. Noll, 2002 WI App 273, ¶¶9-11, 258 Wis. 2d 573, 653 N.W.2d 895 (footnote omitted).

¶8 Because the time limit set forth in WIS. STAT. § 973.19(1)(a) (2009-10) has expired, the only available avenue for Ramirez to seek sentence modification was under the second approach.[2] *See* ***id.*** (motion must be made ninety days after sentence). However, it is only on appeal that he argues, for the

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

first time, that the purportedly inaccurate information used at his sentencing constitutes a new factor.[3] Ramirez did not present this argument to the circuit court; as such, we will not address it. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (we do not consider issues raised for the first time on appeal). Because Ramirez failed to establish the existence of a new factor, the circuit court properly denied his postconviction motion for sentence modification.[4]

¶9 As a final matter, we briefly address whether the circuit court should have converted Ramirez's motion for sentence modification to a motion for resentencing. A defendant has a due process right to be sentenced on the basis of accurate information and may seek resentencing upon a showing that the sentencing court actually relied on inaccurate information. ***State v. Tiepelman***,

[3] Ramirez argues that a defendant can bring a motion for sentence modification beyond the ninety-day limit of WIS. STAT. § 973.19 if there is a new factor *or* if the circuit court erroneously exercises its discretion at sentencing or both. He cites ***State v. Noll***, 2002 WI App 273, 258 Wis. 2d 573, 653 N.W.2d 895, for this proposition. In that opinion, the court quoted Noll's statement "that his claims were brought 'pursuant to the circuit court's inherent power to modify a sentence on the basis of either a new factor, not considered at defendant's original sentencing or an abuse of the court's discretion at the time of sentencing, or both.'" ***Id.***, ¶5. The court then clarified the distinction between a § 973.19 modification motion and a motion based on a new-factor analysis, which invokes the inherent power of the court, ***id.***, ¶¶8-11, before concluding that Noll's motion invoked the circuit court's inherent authority to modify his sentence based on new factors, ***id.***, ¶12. Contrary to Ramirez's contention, ***Noll*** does not do away with the new-factor requirement, which is a prerequisite for the circuit court to exercise its inherent power to modify a sentence.

[4] Even if we were to conclude that the circuit court based Ramirez's sentence on inaccurate information, we fail to see how that information qualifies as a new factor. It is difficult to conceive how Ramirez could have "unknowingly overlooked" the fact that he had never been arrested for drug dealing or charged with any drug-related offenses. *See* ***State v. Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (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.") (internal quotation marks and citation omitted).

2006 WI 66, ¶¶9, 26, 291 Wis. 2d 179, 717 N.W.2d 1. Resentencing, however, may pose a risk to defendants that sentence modification does not entail, because, in resentencing, the circuit court approaches the sentencing process anew and "is not required to defer to the original sentencing objectives." ***State v. Wood***, 2007 WI App 190, ¶6, 305 Wis. 2d 133, 738 N.W.2d 81. We do not lightly construe a motion for sentence modification as a request for resentencing. *See* ***id.***, ¶¶15-17 (explaining that "in the absence of a clear, unequivocal and knowing stipulation by the defendant," the circuit court should not have converted a motion for sentence modification to a motion for resentencing).

¶10 At no point in his postconviction motion did Ramirez ask to be resentenced. Rather, he limited his claim to one for sentence modification. The closest Ramirez comes to basing his claim for relief on a due process violation can be found in the following general statements:

> At a sentencing hearing a defendant has three (3) due process rights. (1) The right to be present [and] … to [be] afforded the right of allocution; (2) the right to be represented by counsel; (3) the right to be sentenced on the basis of true and accurate information. Ergo, a sentence is invalid if it is premised on incorrect information or unwanted assumptions.

(Citations, some uppercasing, and some punctuation omitted.) To the extent this can be described as an argument, it is not sufficiently developed, and we will not address it further. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (we will not develop a party's arguments).

¶11 Based on the foregoing, we conclude that the circuit court properly denied Ramirez's motion.[5]

By the Court.—Order affirmed.

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

[5] Ramirez points out that one of the headings in the State's brief references a different defendant. As a consequence, he submits that the argument following the heading should not be considered. We disagree. It is the substance of the arguments presented that drives our analysis, not the headings. *See generally* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).