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**DISTRICT I**

May 8, 2014

To:

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You are hereby notified that the Court has entered the following opinion and order:

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2013AP1514-CR

State of Wisconsin v. Freddie Lee Carter (L.C. #1997CF970383)

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

Freddie Lee Carter appeals from a order denying his motion for sentence modification. The circuit court's written decision properly analyzes and disposes of the issues raised by Carter's motion. Therefore, we affirm for the reasons explained in the circuit court's decision. *See WIS. CT. APP. IOP VI (5)(a) (Nov. 30, 2009)* ("When the trial court's decision was based upon a written opinion ... the panel may ... make reference thereto, and affirm on the basis of that opinion."). A copy of the circuit court's decision is attached to this order and incorporated by reference.

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21(1) (2011-12).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

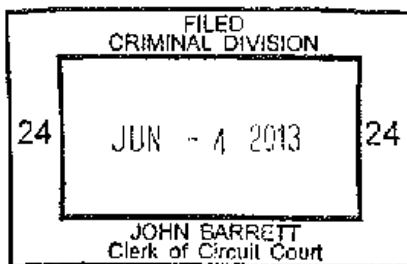
STATE OF WISCONSIN,

Plaintiff,

vs.

FREDDIE L. CARTER,

Defendant.



Case No. 97CF970383

**DECISION AND ORDER  
DENYING MOTION FOR SENTENCE MODIFICATION**

On May 29, 2013, the defendant filed a *pro se* motion for sentence modification based upon the existence of new factors. The defendant was convicted of first-degree reckless injury, while armed.<sup>1</sup> The facts of this case are set forth in the Court of Appeals' decision dated July 31, 2003, affirming the judgment of conviction and postconviction orders. In its decision, the appellate court addressed the defendant's claims of trial counsel ineffectiveness and newly-discovered evidence. In his current motion, the defendant raises additional ineffective assistance of counsel claims. He also asserts that the sentencing court erred in its consideration of the primary sentencing factors and that mitigating information revealed during postconviction hearings warrants a sentence modification.

Before a court may modify a sentence, it must be persuaded that a new factor has arisen -- i.e. "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."

<sup>1</sup> Judge Michael Barron sentenced the defendant on April 25, 1997. This court is the successor to Judge Barron's felony calendar.

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*Rosado v. State*, 70 Wis.2d 280, 288 (1975). A claim that counsel provided ineffective assistance does not allege a new factor but rather a violation of the Sixth Amendment right to the effective assistance of counsel.

In this instance, the defendant alleges that trial counsel was ineffective for failing to present the sentencing court with information about his mental health and intellectual functioning because of its mitigating value.<sup>2</sup> The defendant is precluded from raising his current ineffective assistance of counsel claims. *State v. Escalona-Naranjo*, 185 Wis. 2d 169, 178 (1994), as it interprets section 974.06, Stats., requires a defendant to raise all grounds for postconviction relief in his original motion or appeal. Failure to do so precludes a defendant from raising additional issues, including claims of constitutional or jurisdictional violations, in a subsequent motion or appeal where those issues could have been raised previously. To the extent that the defendant failed to raise his current ineffective assistance of counsel claims previously, they are deemed waived under *Escalona-Naranjo, supra*.

The defendant is also precluded from challenging the sentencing decision on the basis that the court failed to appropriately consider the primary sentencing factors or articulate on the record the rationale for its sentencing decision. A claim of this nature alleges an abuse of sentencing discretion, which must be raised within 90 days of sentencing under section 973.19, Stats., or pursuant to the appellate timeframe of section 809.30, Stats. These time limits have expired. A

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<sup>2</sup> The defendant also asserts that counsel was deficient for failing to interview witnesses, failing to call potentially exculpatory witnesses and failing to believe that Otha Donelson was a real person. The Court of Appeals found these omissions raised questions about counsel's performance but that the defendant failed to demonstrate that any of the omissions mattered. While the defendant acknowledges that the appellate court found that these claims of ineffective assistance were insufficient to warrant a new trial, he argues that they are sufficient to warrant a sentence modification. Again, a claim of ineffective assistance of counsel may not be raised as a new factor and is not a legal basis for a sentence modification. The defendant also faults counsel for failing to request a presentence investigation or to conduct a presentence investigation of his own; however, he has not demonstrated how he was prejudiced by these omissions.

challenge to the court's sentencing discretion is not permitted under section 974.06, Stats. See *Smith v. State*, 85 Wis. 2d 650, 661 (1978).

The defendant asserts that the sentencing court failed to consider his mental disability and limited intellectual functioning. He states that in 1993 he became eligible for social security disability benefits for the diagnoses of intellectual disorder and affective/mood disorder. He states that most recently he has been diagnosed with psychotic disorder and PTSD and that he takes antidepressant and antipsychotic medication. The defendant states that he functions with a 4<sup>th</sup> grade reading level and a 2<sup>nd</sup> grade level in language and math. He states that these factors were not presented at the sentencing hearing and that they demonstrate that he was not capable of appreciating the seriousness of his actions. The defendant has not provided the opinion of an expert to support his contention that he was unable to appreciate the seriousness of his actions because of a mental illness or limited intellectual functioning. Consequently, he has not demonstrated that these factors are highly relevant to the sentencing court's assessment of his culpability or rehabilitative needs. In short, the defendant has not demonstrated that these factors qualify as a new factor under *Rosado*.

Finally, the defendant argues that mitigating information revealed through postconviction proceedings impacts on the sentencing court's assessment of his character and culpability. First, the defendant argues that testimony presented at the postconviction hearings undermines the sentencing court's belief that he was the shooter. The defendant's role in the shooting was disputed at trial. At least two witnesses, including the victim, testified that the defendant was the shooter. The defendant's brother testified that Otha Donelson was the shooter. The postconviction hearings did not establish as a matter of fact that the defendant was not the shooter. The issue presented at those hearings was whether the defendant should be granted a

new trial based upon trial counsel's performance and/or newly-discovered evidence (i.e. the victim's recantation). Even if the sentencing court had believed that the defendant was not the shooter, there is no reasonable probability that it would have imposed a lesser sentence given evidence of the defendant's active involvement in the shooting. The defendant also submits that there has been a post-sentencing reconciliation between himself and the victim and that the "bad blood" that existed between their families at the time of the offense has been put to rest. The sentencing court recognized the role that the family conflict played in this incident but punished the defendant for his conduct in this case. The fact that the family conflict has been resolved does not mitigate the defendant's culpability -- i.e. it does not qualify as a new factor for purposes of sentence modification.

**THEREFORE, IT IS HEREBY ORDERED** that the defendant's motion for sentence modification is **DENIED**.

Dated this 4<sup>th</sup> day of June 2013 at Milwaukee, Wisconsin.

BY THE COURT:

  
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Charles F. Kahn, Jr.  
Circuit Court Judge