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DISTRICT IV

December 30, 2015

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

2015AP717-CR State of Wisconsin v. John G. Dahlk (L.C. # 1993CF1604)

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

John G. Dahlk appeals an order denying a motion for sentence modification. For the reasons stated below, we reverse and remand for further proceedings on the question whether Dahlk's post-sentence cooperation with authorities constitutes a new factor that warrants sentence modification.

In 1994, Dahlk pled no contest to three counts of second-degree sexual assault and one count of false imprisonment. Two of the sexual assault charges and the false imprisonment

count included a weapons enhancer. Charges of kidnapping with a weapons enhancer and threats to injure were dismissed and read in for sentencing purposes. The circuit court sentenced Dahlk to twenty-seven years in prison followed by eighteen years of probation.

Dahlk appealed his conviction and his appointed counsel filed a no-merit report under ***Anders v. California***, 386 U.S. 738, 744 (1967). Dahlk did not file a response. This court independently reviewed the record, concluded that there were no meritorious appellate issues, and affirmed the judgment of conviction. ***State v. Dahlk***, No. 1994AP3124-CRNM, unpublished slip op. (WI App Apr. 27, 1995).

On March 24, 2006, Dahlk filed a motion to modify sentence, arguing that the sentencing court had relied on inaccurate information, namely, that he had attempted to kill his father. The circuit court denied the motion. This court summarily affirmed, noting that the record showed that the prosecutor and pre-sentence report referred to Dahlk's threats to kill his father and neither the prosecutor nor the PSI suggested that Dahlk had actually attempted to kill his father. Therefore, this court concluded that Dahlk had failed to establish that the challenged information was inaccurate.

On August 8, 2007, Dahlk filed a second motion to modify sentence. In that motion, Dahlk argued that a change to the State's parole eligibility policy constituted a new factor that warranted re-sentencing. The circuit court denied the motion. Because such a change did not constitute a new factor, *see* ***State v. Delaney***, 2006 WI App 37, ¶¶17-18, 289 Wis. 2d 714, 712 N.W.2d 368, *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, ¶¶47-48, 333 Wis. 2d 53, 797 N.W.2d 828, this court summarily affirmed the circuit court.

February 12, 2015, Dahlk filed a third motion to modify his sentence. This motion was two-fold. Dahlk again argued that the sentencing court relied on inaccurate information, pointing to the prosecutor's comment at sentencing that "there was one prior nonconsensual intercourse" between Dahlk and the victim "approximately five years earlier." Dahlk also raised a "new factor" argument, pointing to information he provided to authorities about the illegal filing of tax returns by other prisoners. The circuit court denied Dahlk's motion as procedurally barred. Dahlk appeals.

As noted above, Dahlk's 2006 sentence modification motion raised a claim that the circuit court had relied on inaccurate information at sentencing. We agree with the State that Dahlk cannot now raise a subsequent claim challenging a different piece of allegedly inaccurate information.

Under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), a defendant must "raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." *See also* WIS. STAT. § 974.06(4) (2013-14).[1] A defendant cannot raise an argument in a second postconviction motion that was not raised in a prior postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

Dahlk's current claim of inaccurate information stems from comments made by the prosecutor during sentencing. Likewise, his prior claim of inaccurate information targeted comments made by the prosecutor during sentencing. There is no reason why Dahlk could not

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

have challenged the comments regarding a prior nonconsensual sexual contact at the same time he challenged the comments regarding his father.[2]

As it did with the inaccurate information claim, the State argues that, as a general matter, Dahlk is procedurally barred from raising a "new factor" challenge to the sentence. On this point, we are not persuaded.

A defendant seeking sentence modification based on a "new factor" is invoking the inherent power of the court, and the motion may be made at any time. ***State v. Noll***, 2002 WI App 273, ¶¶11-12, 258 Wis. 2d 573, 653 N.W.2d 895. The procedural bar of ***Escalona-Naranjo*** does not preclude a new factor sentence modification motion. Therefore, we turn to the merits of Dahlk's position.

Dahlk relies upon a February 14, 2006 letter from Assistant United States Attorney Mel S. Johnson to Dahlk's counsel in which Johnson states that Dahlk "voluntarily contacted the FBI and provided information and evidence regarding the illegal filing of income tax returns … meant to fraudulently obtain income tax refunds." Johnson described Dahlk's cooperation as "valuable" and "consistently corroborated" by the authorities' investigation. Johnson stated that he "anticipated" filing charges.[3]

[2] Dahlk contends that the information about a prior nonconsensual sexual contact did not become inaccurate for purpose of challenging his sentence until the statute of limitations ran on the incident without charges being filed against him. The distinction urged by Dahlk is lost on this court. The inaccuracy, if any, arises from the nature of the prior contact, not from the State's non-pursuit of criminal charges based on that contact.

[3] The State does not raise any question about the authenticity of this correspondence.

The provision of "substantial and important assistance to law enforcement after sentencing may constitute a new factor that the circuit court can take into consideration when deciding whether modification of a sentence is warranted." ***State v. Doe***, 2005 WI App 68, ¶1, 280 Wis. 2d 731, 697 N.W.2d 101. The circuit court here did not consider whether Dahlk's conduct constituted a new factor because it ruled that this specific claim was procedurally barred because Johnson's letter predated both of Dahlk's earlier sentence modification motions.

Whether ***Escalona-Naranjo***'s procedural bar applies to a postconviction claim is a question of law that we review without deference to the circuit court. ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). Dahlk contends that he should not be held to the 2006 date because the letter on its face indicates that the investigation was ongoing and charges, while "anticipated," were not yet filed. In Dahlk's view, he should not be foreclosed from seeking sentence modification because he waited until a complete picture of his cooperation would be available to the court.

We agree with Dahlk that his motion entitles him to a hearing. In ***State v. Boyden***, 2012 WI App 38, ¶11, 340 Wis. 2d 155, 814 N.W.2d 505, we applied the holding of ***Doe*** to the claim of a defendant who gave "substantial presentence assistance" when the "fruits" of the assistance were not revealed until after the defendant had been sentenced. Thus, the ultimate outcome of a defendant's assistance is an important factor in determining whether a new factor exists, and

Dahlk has alleged a sufficient reason for not seeking sentence modification based on his cooperation before any charges were filed.[4]

In ***Doe***, this court looked to the Federal Sentencing Guidelines and identified several considerations relevant to determining whether post-sentence assistance to law enforcement constitutes a new factor for purposes of postconviction sentence modification:

> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

Doe, 280 Wis. 2d 731, ¶9.

Because it relied on the procedural bar, the circuit court has not considered the application of those factors to Dahlk's assistance. Upon remand, the circuit court should consider whether Dahlk has shown a new factor within the meaning of ***Doe*** and, if so, whether sentence modification is warranted. *See* ***Boyden***, 340 Wis. 2d 155, ¶6 (upon a showing of a new

[4] We further reject the State's contention that Dahlk did not provide sufficient details of his assistance. Johnson's letter states that Dahlk "voluntarily" provided "specific verifiable details" which allowed the FBI to "focus on one individual suspected of coordinating these crimes" and that "the investigation has consistently corroborated the credibility of his allegations." The letter is specific enough to support the existence of a new factor under the ***Doe*** test. *See* ***State v. Boyden***, 2012 WI App 38, ¶14, 340 Wis. 2d 155, 814 N.W.2d 505 (motion described the assistance given, which was described by the government attorney as "voluntar[y]," "timely," and "significant and useful").

factor, a circuit court has discretion to determine whether the new factor warrants sentencing modification).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is reversed and the cause remanded with directions, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals