



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/II

November 30, 2016

To:

Hon. William W. Brash
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State St.
Milwaukee, WI 53233

John S. Greene
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Cory Mendrell Welch, #481266
Fox Lake Corr. Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2015AP2334

State of Wisconsin v. Cory Mendrell Welch (L.C. #2004CF6133)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Cory Mendrell Welch appeals pro se from an order denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).¹ We affirm the order of the circuit court.

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

In 2005, Welch was convicted of numerous crimes stemming from a string of armed robberies.² The circuit court imposed an aggregate sentence of twenty-six years of initial confinement followed by eighteen years of extended supervision.

In 2008, this court affirmed Welch's convictions. *State v. Welch*, No. 2007AP1688-CR, unpublished slip op. (WI App June 17, 2008). In doing so, we rejected his arguments that the circuit court erroneously exercised its discretion in rendering severance and evidentiary rulings.

Welch subsequently filed a pro se postconviction motion under WIS. STAT. § 974.06, asserting that his postconviction counsel was ineffective in multiple ways. The circuit court denied the motion. We affirmed. *State v. Welch*, No. 2009AP2045, unpublished slip op. (WI App May 17, 2011).

Over four years later, in October 2015, Welch filed yet another pro se motion for postconviction relief. This time, he argued that the circuit court violated his double jeopardy and due process rights in sentencing him. He also alleged the existence of new factors justifying sentence modification. Specifically, Welch complained that the court relied upon three erroneous facts at sentencing—i.e., that he was the ringleader in the crimes committed that a particular witness testified at trial, and that a weapon was discharged while Welch was fleeing. Again, the circuit court denied his motion. This appeal follows.

² The crimes included six counts of armed robbery with threat of force, two counts of attempted armed robbery with threat of force, two counts of misdemeanor bail jumping, one count of conspiracy to commit armed robbery, and one count of fleeing an officer.

On appeal, Welch contends that the circuit court erred in denying his latest motion for postconviction relief. He renews the claims made in his motion and seeks an evidentiary hearing on them.

“We need finality in our litigation.” *State v. Escalona–Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, any claim that could have been raised in a prior postconviction motion or direct appeal cannot form the basis for a subsequent motion under WIS. STAT. § 974.06 unless the defendant demonstrates a sufficient reason for failing to raise the claim earlier. *Escalona–Naranjo*, 185 Wis. 2d at 185. Whether a defendant’s claim is procedurally barred by *Escalona–Naranjo* presents a question of law that we review de novo. *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

A motion based on a new factor is not subject to the *Escalona–Naranjo* bar; however, there must be an actual new factor. 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 ... it was unknowingly overlooked by all of the parties.”” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts constitutes a new factor is also a question of law that we review de novo. *See id.*, ¶33.

Applying these principles, we are satisfied that the circuit court properly denied Welch’s latest postconviction motion. Welch’s claims of constitutional error are barred by *Escalona–Naranjo* because he has not demonstrated a sufficient reason for failing to raise them earlier. As for the alleged erroneous facts at sentencing, we are not persuaded that they constitute new factors because (1) they predated sentencing and were not new; and (2) they were not

unknowingly overlooked by the parties, who were present when the circuit court explained its sentence. In any event, accusing a circuit court of relying upon inaccurate information at sentencing is a constitutional claim, *see State v. Tjepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1, and Welch has not demonstrated a sufficient reason for failing to raise it earlier.³

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

³ Welch also claims in his appellant's brief that the circuit court erroneously exercised its discretion at sentencing. We conclude that he has forfeited such an argument by not raising it in his postconviction motion preceding his direct appeal. To the extent that Welch faults postconviction counsel for failing to pursue the issue, a claim of ineffective assistance of counsel is barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).