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December 4, 2019

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

2019AP365-CR State of Wisconsin v. Johnnie Lawrence Burns, Jr.
(L.C. # 1988CF880536)

Before Kessler, Dugan and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Johnnie Lawrence Burns, *pro se*, appeals from an order of the circuit court that denied his postconviction motion for sentence modification as either untimely or barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Based upon our review of

the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] The order is summarily affirmed.

In March 1988, Burns was charged with numerous crimes for his role as one of three men who committed nine robberies within sixty to ninety minutes at six separate locations. A jury convicted Burns of one count of robbery as a party to the crime, eight counts of armed robbery as a party to the crimes, one count of operating a motor vehicle without the owner's consent, and one count of possession of a firearm by a felon. He was given concurrent and consecutive sentences totaling sixty-five years' imprisonment.

Burns had a direct appeal in which he alleged, among other things, that the sentencing court had erroneously exercised its discretion.[2] *See* ***State v. Burns***, No. 1990AP821, unpublished slip op. at 2 (WI App Feb. 5, 1991). We affirmed. In July 1992, Burns filed a *pro se* motion for sentence modification, which was denied. In January 2012, Burns filed a *pro se* postconviction motion pursuant to WIS. STAT. § 974.06 (2009-10), which was denied. Burns appealed, and we affirmed. *See* ***State v. Burns***, No. 2012AP457, unpublished slip op. and order at 1 (WI App Jan. 7, 2013).

In December 2018, Burns filed the motion for sentence modification underlying this appeal. He moved for sentence modification "based upon: abuse of discretion, due process

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] The Honorable Michael Skwierawski presided at trial and imposed the sentence; we will refer to him as the sentencing court. The Honorable Dennis R. Cimpl reviewed and denied the current postconviction motion; we will refer to him as the circuit court.

violation, interest of justice, and an illegal or void sentence." The circuit court denied the motion, as described above, without a hearing. Burns appeals.

As an initial matter, we note that Burns's motion is properly construed as something other than a motion for sentence modification. Sentence modification can be sought in one of two ways—under WIS. STAT. § 973.19 as a matter of right or by invoking the circuit court's inherent authority by showing the existence of a new factor. *See* ***State v. Noll***, 2002 WI App 273, ¶¶9, 11, 258 Wis. 2d 573, 653 N.W.2d 895. Burns has not alleged a new factor, so that leaves § 973.19 as his only sentence modification option. However, relief under § 973.19 must be sought within ninety days of sentencing or during the time for direct appeal under WIS. STAT. RULE 809.30. *See* § 973.19(1)(a)-(b). Both of those time periods have expired, which the circuit court noted, so it treated most of Burns's motion as a WIS. STAT. § 974.06 motion. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983) (courts are not bound by labels placed on documents by *pro se* prisoners).

A defendant must raise all grounds for postconviction relief in his or her first postconviction motion and/or direct appeal. *See* WIS. STAT. § 974.06(4); ***Escalona***, 185 Wis. 2d at 185. "[I]f a ground for relief was not raised in an original, supplemental or amended motion, the defendant [has] to show a sufficient reason why he or she had not asserted that ground for relief earlier; otherwise, the defendant's claim [is] barred." ***State v. Howard***, 211 Wis. 2d 269, 286, 564 N.W.2d 753 (1997), *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765; ***Escalona***, 185 Wis. 2d at 181-82.

As his first issue on appeal, Burns argues that ***Escalona***, decided in 1994, cannot be retroactively applied to his case, which was final in 1991. However, we have previously

concluded that ***Escalona*** "can be applied retroactively … because the rule is not one of criminal procedure, but rather is civil in nature" and because our supreme court "clearly intended the rule to have retroactive application." ***State ex rel. Krieger v. Borgen***, 2004 WI App 163, ¶13, 276 Wis. 2d 96, 687 N.W.2d 79. Thus, the circuit court did not err by applying the ***Escalona*** procedural bar.

Burns also contends that ***Escalona*** should not apply, because his sentence is void, and a void sentence can be challenged at any time. *See* ***State v. Crochiere***, 2004 WI 78, ¶12, 273 Wis. 2d 57, 681 N.W.2d 524. However, Burns does not make any showing that the judgment of conviction or his sentences were imposed by a court without jurisdiction or that there is any other infirmity that makes the judgment void *ab initio*; rather, he asserts that his sentence is void because the sentencing court was biased.

Burns first claims his sentence was illegal or void based on the sentencing court's "ignoring of manda[t]ory language and the court's strong personal feelings, as evidenced by some of the court's sentencing comments." To the extent this claim is a challenge to the court's exercise of sentencing discretion, such a challenge cannot be made by a WIS. STAT. § 974.06 motion. *See* ***State v. Nickel***, 2010 WI App 161, ¶7, 330 Wis. 2d 750, 794 N.W.2d 765. While Burns also claims that the sentence is void because the sentencing court's comments violated certain Supreme Court Rules within the Code of Judicial Conduct, the code "governs the ethical conduct of judges; it has no effect on their legal qualification or disqualification to act." *See* ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis. 2d 175, 185, 443 N.W.2d 662 (1989). In other words, even if the judge's comments did reflect bias, the comments do not render the sentence void.

To the extent that Burns is also raising a due process claim relating to the sentencing court's comments, he offers no sufficient reason for failing to raise this issue earlier. While he asserts that he only recently obtained his sentencing transcript, this allegation is not contained within his motion.[3] *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433 (court reviews four corners of motion for adequacy). Thus, this claim is barred by ***Escalona***.

Burns's second issue on appeal is that he should receive sentence modification based on the sentencing court's "refusal to disclose the PSI REPORT to defendant." To deny a defendant access to his presentence investigation report "is to prejudicially deny him an essential factor of due process." ***State v. Skaff***, 152 Wis. 2d 48, 57, 447 N.W.2d 84 (1989). Burns thus complains that the sentencing court's "failure to adhere to the mandatory, non-discretionary statutory duty constitutes fraud." ***Skaff***, however, "did not impose an affirmative or *sua sponte* duty on the trial court to provide the defendant access to the presentence report." ***State v. Thompson***, 158 Wis. 2d 698, 700, 463 N.W.2d 402 (Ct. App 1990). It simply holds that a circuit court cannot deny a defendant access to a presentence investigation report based on a blanket rule, nor can denial of access be excused just because defense counsel had access to the report. *See* ***id.*** at 700-01. Like Thompson, though, Burns does not assert that he requested access to his presentence investigation report at or prior to sentencing. *See* ***id.*** at 700. Burns also fails to explain his failure to raise this issue earlier. Thus, this claim is barred by ***Escalona***.

Burns's third issue on appeal is his claim that under ***United States v. Jackson***, 32 F.3d 1101, 1108-09 (7th Cir. 1994), he should have received "advance notice" before the sentencing

[3] In any event, the transcript was originally filed on August 17, 1989.

court deviated from the sentencing guidelines, as a matter of due process. ***Jackson***, however, deals with the requirements of the federal sentencing guidelines scheme. *See* ***id.*** at 1106-07. Burns cites no authority applicable to Wisconsin's guideline scheme, and we note that a sentencing court in Wisconsin was expressly not required to impose a sentence that falls within the sentencing guidelines. *See* ***State v. Lechner***, 217 Wis. 2d 392, 425, 576 N.W.2d 912 (1998). Burns also does not identify a sufficient reason for failing to raise this issue earlier, so it is also barred by ***Escalona***.

Burns's fourth claim is that he is entitled to sentence modification "based on an 'abuse of discretion'" because the sentencing court relied on inaccurate information regarding the facts of the case. Again, the sentencing court's exercise of discretion cannot be raised by a WIS. STAT. § 974.06 motion. The constitutional issue of a defendant's due process right to be sentenced on accurate information, *see* ***Lechner***, 217 Wis. 2d at 419, is procedurally barred by ***Escalona***.

Finally, Burns claims again that his sentence is void, this time alleging that the sentencing court improperly applied a penalty enhancer because it found Burns's use of a gun during the armed robberies was an aggravating circumstance. Burns asserts this is improper because use of the gun was an element of armed robbery.[4]

Application of a penalty enhancer under WIS. STAT. § 939.63 increases the maximum sentence to which a defendant may be subjected. A sentence imposed in excess of the statutory maximum is void.[5] *See* WIS. STAT. § 973.13. Burns was not charged with any penalty

[4] Armed robbery is a robbery committed while using a dangerous weapon. *See* WIS. STAT. § 943.32(2) (1987-88).

[5] The remedy for such a sentence is commutation to the maximum term authorized by statute.

enhancers, nor was he given even the base maximum sentence on any of his convictions, so none of his sentences were enhanced. To the extent that Burns is raising any sort of constitutional challenge, he does not give any reason for not raising it earlier, so it is barred by ***Escalona***. To the extent that Burns is actually taking issue with the sentencing court's consideration of and weight given to various sentencing factors, like the nature and gravity of the offense, *see* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695, as reflected in Burns's choice of dangerous weapon, this is another challenge to the sentencing court's exercise of discretion that cannot be raised by a WIS. STAT. § 974.06 motion.

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals