

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1742-CR

Cir. Ct. No. 2000CF3248

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE S. SOTO, SR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Brennan, J., Thomas Cane, Reserve Judge

¶1 PER CURIAM. Jose S. Soto, Sr., *pro se*, appeals an order denying his motion for sentence modification. Soto argues: (1) that he received ineffective assistance of trial counsel at the sentencing hearing; (2) that his due process right to be sentenced based on accurate information was violated; and (3) his 1982

diagnosis of paranoid schizophrenia is a new factor warranting sentence modification. We affirm.

¶2 Soto was convicted after a jury trial of armed robbery, robbery, false imprisonment and false imprisonment while armed, all as a party to a crime. The circuit court sentenced him to a total of thirty years of initial confinement and sixteen years of extended supervision. Soto argued on direct appeal that he was entitled to a new trial based on newly discovered evidence and ineffective assistance of trial counsel. We modified the judgment of conviction to correctly reflect the charges of which Soto had been convicted, and affirmed the judgment as modified.

¶3 Soto first argues that he received ineffective assistance of trial counsel during the sentencing hearing. Soto did not raise this argument in the motion for sentence modification from which this appeal is taken. A claim of ineffective assistance of trial counsel “cannot be reviewed on appeal absent a postconviction motion in the trial court.” *State v. Balliette*, 2011 WI 79, ¶29, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted). Therefore, we do not consider this argument further.

¶4 Soto next argues that his right to due process was violated because he was sentenced on the basis of inaccurate information. “[A] defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Travis*, 2013 WI 38, ¶17, 347 Wis. 2d 142, 832 N.W.2d 491. To be entitled to resentencing, a defendant must show that the information was inaccurate and “must establish by clear and convincing evidence that the circuit court *actually relied* on the inaccurate information.” *Id.*, ¶22 (italics added).

¶5 Soto contends that the presentence investigation report omitted information about his military history and no information was given to the circuit court about his mental health history. Assuming for the sake of argument that these alleged omissions constitute “inaccurate information,” Soto has not explained why he did not raise this argument during his direct appeal. Because Soto did not raise this argument during his direct appeal, and has not provided a sufficient reason for failing to previously raise the argument, he is procedurally barred from raising it in this collateral attack on his judgment of conviction. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 186, 517 N.W.2d 157 (1994).

¶6 Finally, Soto argues that his diagnosis as a paranoid schizophrenic in 1982, which was not made known to the sentencing court, is a new factor that entitles him to sentence modification. 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.”” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoting *State v. Rosado*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a new factor exists is a question of law that we review *de novo*. *Id.*, ¶36.

¶7 Soto’s diagnosis as a paranoid schizophrenic eighteen years before his sentencing is not a new factor because it was not highly relevant to the imposition of his sentence. The sentencing court focused on the severity of Soto’s crimes, which were violent and aggravated by the fact that they were perpetrated on a couple who were separated to increase their psychological terror because they did not know what was happening to the other person. The sentencing court also focused on the need to punish Soto and protect the community, especially in light

of Soto's negative character traits. Because Soto's mental health diagnosis nearly two decades before sentencing was not in any way important to the sentence the circuit court imposed, much less "highly relevant," it is not a new factor that entitles Soto to sentence modification.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

