COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP846-CR
2014AP847-CR
2014AP1601
2014AP1602

Cir. Ct. Nos. 2011CF4004
2011CF4192

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AMAN DEEP SINGH,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: DANIEL L. KONKOL and TIMOTHY G. DUGAN, Judges. *Affirmed.*

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Aman Deep Singh, *pro se*, appeals the order denying his motion for sentence modification. *See* ***State v. Singh***, Nos. 2014AP846-CR & 2014AP847-CR. He also appeals the order denying his WIS. STAT. § 974.06 (2011-12) motion for postconviction relief.[1] *See* ***State v. Singh***, Nos. 2014AP1601 & 1602. We reject Singh's arguments and affirm.

BACKGROUND

¶2 These consolidated appeals arise out of two circuit court cases. In Milwaukee County Circuit Court case No. 2011CF4004, Singh was charged as follows: count one, obtaining a controlled substance by misrepresentation, second and subsequent offense; count two, attempting to obtain a controlled substance by misrepresentation, second and subsequent offense; and count three, obtaining a prescription drug by fraud. In Milwaukee County Circuit Court case No. 2011CF4192, Singh was charged with one count of obtaining a controlled substance by misrepresentation, second and subsequent offense.

¶3 Singh pled guilty to counts one and three in case No. 2011CF4004 and to the count charged in case No. 2011CF4192.

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[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

By order of this court, appeal Nos. 2014AP846-CR and 2014AP847-CR and 2014AP1601 and 2014AP1602 were consolidated for disposition purposes. *See* WIS. STAT. RULE 809.10(3).

The Honorable Timothy G. Dugan accepted Singh's pleas, sentenced him, and issued the decision and order denying Singh's motion for postconviction relief pursuant to WIS. STAT. § 974.06. The Honorable Daniel L. Konkol issued the decision and order denying Singh's motion for sentence modification.

¶4 At a rescheduled sentencing hearing, Singh sought a continuance because he had a pending motion seeking Positive Adjustment Time (PAT) in a case in Waukesha County. Singh had previously been placed on probation in the Waukesha County case, but his probation was revoked as a result of the underlying offenses.[2] The circuit court denied the continuance and ordered the sentences for the offenses of obtaining a controlled substance by misrepresentation to run consecutive to the then-unknown sentence in the Waukesha County case.

¶5 There were numerous postconviction filings in these cases. Eventually, Singh, *pro se*, appealed a circuit court order denying his motion to withdraw his guilty pleas and the order denying his reconsideration motion. We summarily affirmed. *See* ***State v. Singh***, Nos. 2012AP2709-CR & 2012AP2710-CR, unpublished slip op. (WI App Dec. 10, 2013).

¶6 Singh later moved for sentence modification arguing that the unknown length of his revocation sentence in the Waukesha County case was a new factor.[3] He asserted that the length of that sentence was relevant to the circuit court's duty to order only the minimum amount of custody necessary.

¶7 In its denial of Singh's motion for sentence modification based on a new factor, the postconviction court explained:

> With regard to the defendant's new factor claim, he alleges that the sentencing court was unaware of how long he would have to serve for the revocation pending in

[2] The circuit court had previously adjourned the sentencing hearing at Singh's request.

[3] He also sought sentence credit but does not pursue this issue on appeal.

> Waukesha County case 08CF001368. Nothing in the court's sentencing comments suggests that the amount of revocation time in the Waukesha County case was relevant to the court's sentencing decision in these cases, and therefore, the court finds that the defendant has not alleged a new factor for purposes of a sentence modification under ***Rosado v. State***, 70 Wis. 2d 280, 288[, 234 N.W.2d 69] (1975).

¶8 Singh next filed a postconviction motion pursuant to WIS. STAT. § 974.06. He sought plea withdrawal asserting that he should be allowed to withdraw his pleas because he received inaccurate advice from this trial counsel about his early release eligibility. Singh alleged that prior to his pleas in November 2011, trial counsel had advised that Singh would not be eligible for early release; however, in our March 2014 decision in ***State ex rel. Singh v. Kemper***, 2014 WI App 43, 353 Wis. 2d 520, 846 N.W.2d 820, we held that the 2011 Wis. Act 38 repeal of early release was an *ex post facto* violation when applied retroactively. As such, Singh was eligible for PAT in case No. 2011CF4004 because the offense of obtaining a controlled substance by misrepresentation was committed before the repeal. Singh asserted that trial counsel performed deficiently when he advised that Singh was not eligible for early release. Singh claimed that if he had been advised correctly, he would not have accepted the plea agreement.

¶9 Additionally, Singh argued that he was entitled to plea withdrawal because he lacked knowledge of PAT eligibility. Singh asserted that early release eligibility was a direct consequence of the pleas and as such, the circuit court had a duty to inform him of it.

¶10 Singh also claimed there was a lack of subject matter jurisdiction for count three in case No. 2011CF4004, obtaining a prescription drug by fraud, and that his postconviction counsel was ineffective.

¶11 Lastly, Singh again sought sentence modification because he did not have the benefit of the ***Kemper*** decision and therefore had to serve the full duration of his confinement time.

¶12 The postconviction court denied the motion without a hearing and the motion for reconsideration that followed.

DISCUSSION

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¶13 Singh asserts that the postconviction court erred when it stated that his revocation sentence in the Waukesha County case was not relevant to sentencing. He contends that the total incarceration for his revocation constitutes a new factor. He also argues that the legislature's repeal of PAT warrants sentence modification and that the postconviction court erroneously denied his request for judicial substitution.

¶14 Sentence modification motions require a two-step process: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) if a new factor exists, the circuit court must exercise its discretion to determine whether the new factor justifies sentence modification. ***State v. Harbor***, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. 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.'" ***Id.***, ¶40 (citation omitted). Whether a new factor exists is a question of law that we review *de novo*. ***Id.***, ¶36.

¶15 The general rule is that "revocation of probation in another case does not ordinarily present a new factor." ***State v. Norton***, 2001 WI App 245, ¶10, 248 Wis. 2d 162, 635 N.W.2d 656. In ***Norton***, this court crafted an exception to that general rule when it was "clear from the sentencing transcript that everyone understood that Norton's probation would not be revoked at the time of sentencing, or subsequent to sentencing" because of the crime for which Norton was being sentenced. ***Id.***

¶16 These circumstances were not present in this case. Here, the circuit court was aware that Singh's probation had been revoked in the Waukesha County case and that the ultimate sentence he would receive in that case was still at issue. The circuit court had previously granted the parties a continuance of the sentencing hearing to allow Singh to administratively appeal the revocation. Although both parties agreed that it would have been helpful to know the outcome of the Waukesha County case before making their sentencing arguments, the circuit court declined to adjourn the hearing for a second time.

¶17 In light of the foregoing, we agree with the State, "[t]he record shows that the court's intent was that Singh serve his sentences in Milwaukee County and Waukesha County consecutively, regardless of the length of his revocation sentence." Singh has failed to establish that the length of time he was

going to receive on his revocation sentence in the Waukesha County case was highly relevant to the sentences imposed here.

¶18 Insofar as Singh is arguing that a subsequent revocation sentence is a new factor that directly relates to the minimum custody standard, we are not convinced. As described by the State, this amounts to a proposal for a *per se* rule that a subsequent revocation sentence will always constitute a new factor when the revocation is based on the same conduct for which the defendant is being sentenced and where the underlying sentence and the revocation sentence are ordered consecutive. Singh offers no legal support for this proposal.[4]

¶19 Singh additionally contends, for the first time on appeal, that the 2011 Wis. Act 38 repeal of early release constitutes a new factor. He argues, "if not for the unconstitutional *ex post facto* application of the repeal, he was likely to be released early and therefore suffered an increase in punishment from what was otherwise ordered by the sentencing court." Because this court will not consider matters raised for the first time on appeal, we need not address this argument. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Even if we were to set aside the forfeiture of this claim, we conclude that the repeal of PAT is not a new factor because the circuit court never considered Singh's

[4] Singh's argument that the purpose of the circuit court's sentence "was frustrated when the subsequent final determination of the revocation length resulted in a total initial confinement of 3 ½ years," is a nonstarter. As he acknowledges, this analysis is not necessary to establishing a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶48, 333 Wis. 2d 53, 797 N.W.2d 828 ("We conclude that frustration of the purpose of the original sentence is not an independent requirement when determining whether a fact or set of facts alleged by a defendant constitutes a new factor."). Contrary to Singh's request, we do not view the State's lack of discussion on this point to be a concession that is of any significance.

eligibility for it at sentencing. *See* ***State v. Carroll***, 2012 WI App 83, ¶11, 343 Wis. 2d 509, 819 N.W.2d 343 ("[R]epeal of a program that was not considered at sentencing does not establish a new factor justifying sentence modification.").

¶20 We also decline Singh's invitation to grant a discretionary reversal on this issue pursuant to WIS. STAT. § 752.35; this is not the type of case that warrants such relief. *See generally* ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990) (We will exercise our discretionary reversal power only sparingly.).

¶21 Lastly, Singh asks that we review the postconviction court's order denying his motion for judicial substitution. The motion for judicial substitution was filed after the postconviction court denied his motion for sentence modification and after Singh filed his notice of appeal from that order. The general rule is that an appeal of a judgment or order does not include an order entered after that judgment or order. *See* ***Chicago & Nw. R.R. v. LIRC***, 91 Wis. 2d 462, 473, 283 N.W.2d 603 (Ct. App. 1979). We therefore do not address the postconviction court's order denying Singh's motion for judicial substitution.[5]

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¶22 In ***Kemper***, we held that the 2011 Wis. Act 38 repeal of early release was an *ex post facto* violation when applied retroactively. *See* ***Kemper***, 353 Wis.

[5] We note, however, in passing that Singh argues substitution is a matter of supervisory jurisdiction. Even if we agreed, review by the chief judge under WIS. STAT. § 801.58(2) is a necessary prerequisite to appellate review of a denial of a request for substitution. *See* ***Barbara R.K. v. James G.***, 2002 WI App 47, ¶15, 250 Wis. 2d 667, 641 N.W.2d 175.

2d 520, ¶10. At issue here is whether the implications of that ruling undermine Singh's original convictions in a manner requiring plea withdrawal. Specifically, Singh asserts that he is entitled to withdraw his pleas based on manifest injustice both because trial counsel was ineffective and because the circuit court in its plea colloquy did not adequately advise him regarding his eligibility for PAT.

¶23 To withdraw a plea after sentencing, a defendant must establish by clear and convincing evidence that refusal to allow withdrawal would result in a manifest injustice. ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482. "A manifest injustice occurs when there has been 'a serious flaw in the fundamental integrity of the plea.'" ***State v. Cross***, 2010 WI 70, ¶42, 326 Wis.2d 492, 786 N.W.2d 64 (citation omitted).

¶24 Singh's postconviction motion was a dual-purpose motion insofar as it contained claims that he is entitled to plea withdrawal under the rationale set forth in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and pursuant to ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972). The ***Bangert*** analysis addresses defects in the plea colloquy, while ***Nelson***/***Bentley*** applies where the defendant alleges that "factors extrinsic to the plea colloquy" rendered his or her plea infirm. *See* ***State v. Hoppe***, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794.

¶25 Singh's postconviction motion implicated ***Bangert*** when he alleged that the circuit court in its plea colloquy did not adequately advise him regarding his eligibility for PAT. He asserted that this violated the circuit court's duty to notify Singh of the "direct consequences" of his plea. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 636, 579 N.W.2d 698 (1998) ("[C]ourts are only

required to notify [defendants] of the 'direct consequences' of their pleas," not the "collateral" consequences.) (citation omitted).

¶26 Singh's claims based on the ineffective assistance of counsel, which can constitute a manifest injustice justifying plea withdraw after sentencing, implicated ***Nelson*/*Bentley***. *See* ***Bentley***, 201 Wis. 2d at 311. To establish ineffective assistance, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If we conclude that a defendant has failed to demonstrate one of the prongs, we need not address the other. ***Id.*** at 697.

¶27 In its decision denying Singh's motion, the postconviction court explained:

> In this instance, the court finds that the defendant ha[s] not set forth a viable ineffective assistance claim. First, counsel had no duty to advise the defendant about any statutory early release provisions. Even assuming that counsel advised the defendant prior to his pleas that he would not be eligible for early release based on PAT because of the 2011 Act, counsel cannot be deemed deficient in this regard because counsel could not reasonably have anticipated an *ex post facto* challenge to the 2011 Act or the ***Kemper*** decision. As of August 3, 2011, section 973.198, Stats., precluded prison inmates from earning positive adjustment time. Consequently, trial counsel's advice was accurate when considered in the context of the law that was in effect at the time the defendant entered his pleas.
>
> ….
>
> Next, the defendant argues that PAT eligibility is a direct consequence of his plea and therefore the court had a duty to inform him about PAT eligibility at the plea hearing. A court is required only to inform a defendant of

> the direct consequences of his plea. "Direct consequences of a plea have a 'definite, immediate, and largely automatic effect on the range of the defendant's punishment.'" ***State v. Yates***, [2000 WI App 224, ¶7], 239 Wis. 2d 17, [] 619 N.W.2d 132 [(citation omitted)]. An offender's eligibility for PAT offers the offenders no more than an *opportunity* for an early release; an early release is not a guarantee or a right…. Consequently, it is not a direct consequence of an offender's plea and a court has no duty to inform a defendant about his eligibility for PAT prior to accepting a guilty or no contest plea.

We agree and adopt this reasoning. *See* WIS. CT. APP. IOP VI(5)(a) (Jan. 1, 2013) ("When the [circuit] court's decision was based upon a written opinion ... of its grounds for decision that adequately express the panel's view of the law, the panel may incorporate the [circuit] court's opinion or statement of grounds, or make reference thereto."). Because Singh has not shown that counsel's performance was deficient, we do not address prejudice. ***Strickland***, 466 U.S. at 697. Singh has not established either a ***Bangert*** or a ***Nelson***/***Bentley*** violation.[6]

¶28 Singh's additional claims—not related to our decision in ***Kemper***—also fail. To the extent that he is attempting to cast old claims in a fresh light, they will not be re-addressed. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). To the extent that Singh disagrees that his claims are merely repackaged, they are nonetheless procedurally barred because they could have been raised previously, and Singh has a failed to establish a sufficient reason for

[6] Once again, we decline Singh's invitation to grant a discretionary reversal of the denial of his motion for plea withdrawal because he has not convinced us that this case warrants such relief. *See* WIS. STAT. § 752.35.

failing to raise them earlier. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 617 N.W.2d 157 (1994) ("[I]f the defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a sec. 974.06 motion.").[7]

By the Court.—Orders affirmed.

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

[7] In his brief, Singh submits a one-paragraph argument that a new factor warranting sentence modification is present: "Singh argues for sentence modification based on early release that he was denied the opportunity to earn as a result of unconstitutional activity on the part of the [S]tate. The argument is already adequately developed in briefs for Appeal [Nos.] [20]14AP846 and [20]14AP847." We conclude that no further discussion of this issue is necessary.