COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP916-CR **Cir. Ct. No. 2002CF135**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MANUEL SERGIO MARTINEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Manuel Sergio Martinez appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues on appeal that there is a new factor that entitles him to be resentenced, that he received ineffective assistance of trial counsel, and

that the trial court erroneously exercised its discretion when it sentenced him. We conclude that he did not present a new factor, he did not establish that he received ineffective assistance of counsel, and the trial court properly exercised its sentencing discretion. We affirm the judgment and order of the trial court.

¶2 Martinez was charged with one count of delivering more than 100 grams of cocaine. He was arrested and taken into custody in Florida. While in custody in Florida, Martinez had several conversations with law enforcement officers about whether he could receive "judicial consideration" in exchange for providing information about drug trafficking. While on trial in Wisconsin, Martinez moved to suppress the statements he made during the conversations with law enforcement officials in Florida. The trial court determined that the statements made to one officer were voluntary but obtained in violation of ***Miranda v. Arizona***, 384 U.S. 436 (1966), and could not be used by the State in its case-in-chief. The case went to a jury trial and the jury found Martinez guilty. The court then sentenced him to thirteen years of initial confinement and twelve years of extended supervision.

¶3 Martinez brought a motion for postconviction relief arguing that he was entitled to be resentenced for four reasons: (1) his cooperation with the Florida officers was a new factor; (2) the trial court relied upon the unlawfully obtained statements when it sentenced him; (3) his trial counsel was ineffective because he failed to provide the court with information about how Martinez cooperated with the Florida authorities; and (4) the trial court erroneously exercised its sentencing discretion when it considered the statements he made to the Florida authorities to be an aggravating factor. The court denied the motion, and Martinez appeals.

¶4 Martinez argues that the extent of his cooperation with the Florida law enforcement authorities constitutes a new factor that entitles him to be resentenced. 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." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). We conclude that Martinez did not demonstrate the existence of such a new factor.[1]

¶5 First, the fact that Martinez had cooperated with the Florida authorities was known to the parties at the time of sentencing. The trial court had held a hearing on Martinez's motion to suppress these statements before trial. Martinez argues, however, that the result of his cooperation was not known at the time of sentencing. As the State argues, however, it appears that the information he provided did not have a major effect on law enforcement activities. More importantly, however, the fact of his cooperation did not frustrate the purpose of the original sentence. Martinez is, in essence, arguing that any information that might make the original sentence appear to be unfair frustrates the purpose of the sentence.

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[1] After briefing was completed, the appellant called the court's attention to a recent case, ***State v. John Doe***, 2005 WI App 68, No. 2004AP773-CR. The appellant argues that this case supports his position that assistance given to police by a defendant may constitute a new factor warranting sentence modification. We conclude that this case can be distinguished on two important grounds. First, in ***Doe***, the defendant provided the information to law enforcement officials after he was sentenced. ***Id.***, ¶4. When the court sentenced him, therefore, it did not know that he had provided such help. In this case, however, the court knew that Martinez had helped the law enforcement officials at the time of sentencing. And in ***Doe***, the court found that the information the defendant provided to the police was "almost entirely" the basis for the conviction of the person implicated. ***Id.*** In this case, however, the law enforcement officials testified that Martinez's help did not have a major effect on law enforcement activities. We conclude that the ***Doe*** case does not change our decision.

¶6 A new factor "must be an event or development which frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing—something which strikes at the very purpose for the sentence selected by the trial court." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). In other words, if there was a fact or circumstance that was the reason the court sentenced as it did, the purpose of the sentence will be frustrated if a new factor contravenes that fact or circumstance. In ***Michels***, the court gave such an example: a defendant was given a stayed sentence and placed on probation on the condition that he voluntarily present himself to a mental health institute. ***Id.*** at 98 (citing ***State v. Sepulveda***, 119 Wis. 2d 546, 350 N.W.2d 96 (1984)). The institute, however, denied him admission. ***Michels***, 150 Wis. 2d at 98-99. The supreme court concluded that the original sentence had been frustrated because of the failure of a primary condition, the "untreatable nature" of the defendant's personality disorder. ***Id.*** at 99.

¶7 In this case, however, Martinez argues that the sentence is just generally unfair. When sentencing Martinez, the trial court was concerned about his long-term involvement in drug dealing. The fact that he cooperated with law enforcement authorities does not frustrate this purpose. This is simply not a new factor that establishes the failure of a primary condition of the reason for the sentence. Martinez has not shown that the purpose of the original sentence has been frustrated.

¶8 Martinez also argues that the trial court erred by considering at sentencing statements he made without being given his ***Miranda*** rights. Because counsel did not object to these statements, we must consider this issue in the context of whether counsel's failure to object amounted to ineffective assistance of counsel. To establish an ineffective assistance of counsel claim, 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). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. ***Id.*** at 697. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. If the law is unsettled, then counsel is not ineffective for failing to challenge it. ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994).

¶9 We conclude that Martinez cannot establish that his counsel's performance was deficient. As Martinez's counsel admitted in his postconviction motion, the law was simply not settled at the time of sentencing. Martinez suggests that unsettled does not necessarily mean unsettled. We disagree. The rule is that "[c]ounsel is not required to object and argue a point of law that is unsettled." Law is unsettled if the point can be "reasonably analyzed in two different ways." ***Id.*** Since the law on the issue here was unsettled, counsel was not ineffective for failing to challenge it. For the reasons stated, we affirm the judgment and order of the trial court.

By the Court.—Judgment and order affirmed.

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