COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP921-CR **Cir. Ct. No. 1990CF902433**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES L. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. James L. Johnson appeals *pro se* from an order denying his sixth postconviction motion. We conclude that a change in parole policy does not constitute a new factor for sentence modification purposes, and

that Johnson's remaining claims are procedurally barred because they were previously decided, or could have been previously raised. Therefore, we affirm.

¶2 In 1991, a jury found Johnson guilty of two armed robberies, as a party to each crime, contrary to WIS. STAT. §§ 943.32 (1989-90) and 939.05 (1989-90), and possessing a firearm as a felon, contrary to WIS. STAT. § 941.29(2) (1989-90). For the armed robberies, the trial court imposed two, twenty-year concurrent sentences; for possessing the firearm, the trial court imposed a two-year consecutive sentence.

¶3 Following the denial of two postconviction motions, one on the admissibility of evidence at trial, and the other seeking a new trial, Johnson pursued a direct appeal. This court affirmed, and the supreme court denied Johnson's petition for review. Thereafter, Johnson brought a third postconviction motion, which the trial court denied. Johnson did not appeal. Johnson then brought a fourth postconviction motion, this time with the assistance of postconviction counsel, which the trial court denied pursuant to ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). We summarily affirmed that order. Johnson then filed another postconviction motion for a new trial, which the trial court denied; we summarily affirmed that denial.

¶4 Johnson then filed a *pro se* motion for sentence modification. In that motion, Johnson also sought reversal of the trial court's evidentiary ruling at trial on an unrelated issue. The trial court denied the sentence modification issue on its merits, and the evidentiary issue as procedurally barred by ***Escalona***. It is this postconviction order from which Johnson now appeals.

¶5 In this *pro se* postconviction motion, Johnson's principal issue involves sentence modification; he claims that changes in parole policy, namely

restricting parole eligibility for violent offenders, and a "new" mechanism for sentence adjustment pursuant to WIS. STAT. § 973.195 (created Feb. 1, 2003), constitute new factors, each entitling 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. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial court must determine whether that "new factor … frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). "[A] change in parole policy cannot be relevant to sentencing unless parole policy was actually considered by the [trial] court." ***Franklin***, 148 Wis. 2d at 14.

¶6 Johnson has not shown that the purported policy restricting parole eligibility for violent offenders had any effect on his parole eligibility. Even if he had, he has not overcome ***Escalona***'s procedural bar, which requires a criminal defendant to raise all grounds for postconviction relief in his or her original, supplemental or amended postconviction motion, or on direct appeal. *See* ***Escalona***, 185 Wis. 2d at 185-86; WIS. STAT. § 974.06(4) (2003-04). If a criminal defendant files a successive postconviction motion, he or she must allege a "*sufficient reason*" for failing to previously raise the belated issue. ***Escalona***, 185 Wis. 2d at 185; § 974.06(4) (emphasis added). Whether a successive postconviction claim is procedurally barred is a question of law entitled to

independent review. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶7 Johnson's omnibus reason for failing to raise this and various other issues previously is the ineffective assistance of trial counsel, and of the appellate counsel who represented him on direct appeal. These reasons, however, do not account for the failure to raise this issue in his fourth postconviction motion in which he was represented. We independently conclude that Johnson's reason for failing to raise this issue previously is insufficient to overcome ***Escalona***'s procedural bar.

¶8 Johnson also claims that ***Escalona***'s procedural bar postdates his direct appeal and thus should not apply. "[W]e adhere to the concept that a decision that overrules or changes a rule of law is to be applied retrospectively unless it is established there are compelling judicial reasons for not doing so." ***Fitzgerald v. Meissner & Hicks, Inc.***, 38 Wis. 2d 571, 579-80, 157 N.W.2d 595 (1968). If compelling judicial reasons warrant only prospective application of the new rule, they are addressed in the opinion announcing the new rule.[1] ***Escalona*** does not address prospective application. Consequently, we follow ***Fitzgerald***'s general rule, 38 Wis. 2d at 575, and conclude that ***Escalona***'s procedural bar retrospectively applies. Moreover, even if ***Escalona*** did not apply, the procedural bar of WIS. STAT. § 974.06(4) (2003-04), requires a sufficient reason for failing to raise these issues in prior postconviction motions. Consequently, Johnson is procedurally barred from raising this issue.

[1] *See, e.g.*, ***Koback v. Crook***, 123 Wis. 2d 259, 277, 366 N.W.2d 857 (1985) (imposes liability on social hosts serving liquor to minors after August 31, 1985); ***Theama v. City of Kenosha***, 117 Wis. 2d 508, 528, 344 N.W.2d 513 (1984) (recognizes recovery by minor child for loss of parent's society and companionship after March 7, 1984).

¶9 WISCONSIN STAT. § 973.195 (created Feb. 1, 2003) involves sentence adjustment, and applies only to prisoners sentenced pursuant to WIS. STAT. § 973.01 (amended Feb. 1, 2003) (Truth-In-Sentencing).[2] Indisputably, Truth-In-Sentencing and § 973.195 (created Feb. 1, 2003) do not apply to Johnson's sentences imposed for offenses committed in 1990. A change in parole policy, which is inapplicable to Johnson, is most definitely not a new factor; thus, he is not entitled to sentence modification.

¶10 Johnson's next issue challenges the exclusion of potential evidence from Johnson's brother. We decided that and related issues in our decision affirming the trial court's order denying Johnson's motion for a new trial, in Johnson's direct appeal. *See* ***State v. Johnson***, No. 93-0735-CR, unpublished slip op. at 6-14 (Wis. Ct. App. Dec. 28, 1993). We also rejected Johnson's interests of justice contention on direct appeal. *See* ***id.*** at 20-21. A successive postconviction motion may not be used to resurrect previously rejected issues. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). We will consequently not consider them again.

¶11 The remaining issues are procedurally barred by ***Escalona*** and WIS. STAT. § 974.06(4) (2003-04). As we decided previously, Johnson's reason—the ineffectiveness of counsel—is not sufficient for failing to previously raise these issues in the two postconviction motions filed in the decade subsequent to Johnson's direct appeal, one of which he was represented. We independently conclude that Johnson's reason for failing to raise these issues previously is

[2] Truth-In-Sentencing I replaced indeterminate with determinate sentencing. 1997 Wis. Act 283. It applies to offenses committed after December 31, 1999. The sentences Johnson seeks to modify were imposed for offenses committed on July 15, 1990.

insufficient to overcome the procedural bar of ***Escalona*** and WIS. STAT. § 974.06(4) (2003-04). *See* ***Escalona***, 185 Wis. 2d at 185.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).