COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1225-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFERY RITTENHOUSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jeffrey Rittenhouse appeals an order denying his motion to vacate an illegal sentence and to modify his sentence and an order denying his motion for reconsideration. He also appeals his original sentence. He argues that the trial court improperly considered inaccurate information at his

sentencing hearing. Rittenhouse also contends that he is entitled to a sentence modification because the State improperly transferred him to an out-of-state private, for-profit prison. Because Rittenhouse failed (1) to prove that he alerted the court that the information was inaccurate, (2) to raise the claim in earlier postconviction motions, and (3) to show a new factor, we affirm the orders.

¶2 Rittenhouse pled no contest and was convicted of being a party to the crimes of armed robbery and false imprisonment in violation of WIS. STAT. §§ 943.32(1), (2) and 940.30. He was sentenced to sixteen years in prison on the armed robbery conviction and a concurrent two-year term on the false imprisonment count.[1] He challenged the sentence in the trial court on three separate occasions.

¶3 He challenges his sentence now claiming that the trial court relied on misinformation when it sentenced him. A defendant has a right to be sentenced based on correct information. *See* ***State ex rel. LeFebre v. Israel***, 109 Wis. 2d 337, 345, 325 N.W.2d 899 (1982). However, to challenge the accuracy of the information, a defendant must show both that the information is inaccurate and that the sentencing court relied on that information. *See* ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). We will not reverse a sentence unless a trial court has erroneously exercised its discretion. *See* ***id.*** at 463. The trial court has not erred if the defendant fails to notify it of inaccurate information when afforded the opportunity to do so at the time of sentencing. *See* ***id.*** at 470. Moreover, a defendant must raise all grounds for postconviction relief at the first postconviction hearing unless there is some sufficient reason for not

[1] His maximum exposure was 42 years. *See* WIS. STAT. § 939.50 (3)(b) and (e). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

doing so. *See* WIS. STAT. § 974.06(4); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994); ***State ex rel. Schmidt v. Cooke***, 180 Wis. 2d 187, 189, 509 N.W.2d 96 (Ct. App. 1993).

¶4 Rittenhouse filed his first sentence modification motion in March 1998 and did not claim that the court relied on inaccurate information. The trial court denied his motion, and he appealed to this court. We affirmed the court's decision in December 1998. He filed modification motions again in the trial court in July 1999 and February 2000 and filed a motion for reconsideration on April 14, 2000. Because he failed to raise this claim until the second postconviction motion and provides no sufficient reason why he failed to raise this claim in the first postconviction motion, he has waived his right to claim such error. *See* WIS. STAT. § 974.06(4); ***Escalona-Naranjo***, 185 Wis. 2d at 184-85.

¶5 Furthermore, even if we do not consider his claims waived, he has failed to prove error. Rittenhouse has failed to prove that he informed the court of erroneous information when he had the opportunity to do so. He was present at the sentencing hearing and had several opportunities to correct the record. At the sentencing hearing, his counsel indicated that he had read the pre-sentence investigation report "word-for-word from start to finish" to Rittenhouse, and Rittenhouse did not contest this statement. Rittenhouse also declined the court's express invitation to read the report himself.

¶6 Rittenhouse's counsel noted some corrections in the report, but not those contested now. The prosecutor stated, "I believe that I think I read where he served eighteen months in the jail …." The court read into the record Rittenhouse's prior criminal convictions including listing "probation revocation" as occurring twice. Although Rittenhouse now claims that these statements are

inaccurate, he failed to challenge them or the pre-sentence report at the sentencing hearing.

¶7 As stated above, Rittenhouse failed to raise the present claim in the first postconviction motion. Even in the second postconviction motion, he claimed facts were incorrect but did not prove the facts were wrong other than making conclusory allegations. Because the trial court is within its discretion to deny a postconviction claim based only on conclusory statements, it properly denied this claim in Rittenhouse's second postconviction motion. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). Rittenhouse has failed to prove that he timely notified the court of erroneous information.

¶8 Rittenhouse next argues that his sentence should be modified because he was placed in a private, out-of-state prison, which he contends constitutes a "new factor." He also seems to argue that he has a liberty interest in serving his sentence in a state prison as defined in WIS. STAT. § 302.01 and that the Department of Corrections lacks legal authority to transfer him to an out-of-state for-profit prison. He is estopped from litigating these claims because the trial court decided them on September 7, 1999, and Rittenhouse did not appeal that postconviction decision. *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.") (citation omitted). His claims, therefore, must fail.

¶9 However, even if we were to address the merits, the contentions would still fail. "[I]nmates therefore possess no state-created liberty interest which might be infringed by their transfers [to public or private for-profit prisons] out of state." ***Evers v. Sullivan***, 2000 WI App. 144, ¶18, ___ Wis. 2d ___, 615

N.W.2d 680. ***Evers*** disposes of Rittenhouse's claims that he has a liberty interest to being placed in a Wisconsin prison and that the Department of Corrections has no authority to place him in an out-of-state prison. *See* ***id.*** However, ***Evers*** does not address whether this claim is a "new factor" for purposes of re-evaluating the sentence.

¶10 A sentence may be modified if a defendant demonstrates that there are new, relevant factors that justify modification. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). A "new factor" is a fact or set of facts "highly relevant to the imposition of sentence," that were not known to the trial judge. *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The defendant bears the burden of proving a new factor by clear and convincing evidence. *See* ***Franklin***, 148 Wis. 2d at 8-9. Rittenhouse fails to show that retaining him in an in-state prison was a "highly relevant" factor in his sentencing. *See* ***Rosado***, 70 Wis. 2d at 288. Accordingly, we reject his claim.

By the Court.—Judgment and orders affirmed.

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