COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP977-CR **Cir. Ct. No. 1996CF961362**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH M. GRAY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Kenneth M. Gray, *pro se*, appeals an order denying his motion to modify his sentence. He argues that: (1) the State breached the plea bargain; (2) the State used a falsified petition to waive him to adult court; and (3) there is a new factor that entitles him to resentencing. We affirm.

¶2 Gray first contends that the State breached the plea bargain. Gray already raised this issue in his postconviction motion brought in 2003. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991). Gray is barred from raising this claim.

¶3 Gray next argues that the State used a falsified petition to waive him to adult court. Since Gray could have previously raised this issue, he is barred from now raising it by WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 163–164 (1994). ***Escalona*** teaches that "[s]ection 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." ***Escalona***, 185 Wis. 2d at 185, 517 N.W.2d at 163–164. All grounds for relief not so raised are barred unless the person requesting relief provides a sufficient reason for not previously raising the issue. ***Id.***, 185 Wis. 2d at 185, 517 N.W.2d at 164. Gray contends the fact that he was fourteen years old when he committed the crime is a sufficient reason for not previously raising the issue. Assuming for the sake of argument that being only fourteen years old constituted a sufficient reason, Gray has not explained why he did not raise the issue when he brought his postconviction motion in 2003, when he was twenty-two. Since Gray has not presented a sufficient reason for failing to previously raise his claim, it is barred.

¶4 Finally, Gray argues that there is a "new factor" entitling him to resentencing: the fact that the circuit court judge was perplexed by Gray's young age when he sentenced Gray. "The term 'new factor' refers to 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 … it was unknowingly overlooked by all of the parties." ***State v. Kluck***, 210 Wis. 2d 1, 7, 563 N.W.2d 468, 470 (1997). It is "an event or development [that] frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Gray's young age at the time of sentencing is not a "new factor" because it existed at the time of sentencing. Therefore, we reject this argument.

By the Court.—Order affirmed.

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