COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP467-CR **Cir. Ct. No. 1998CF3383**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANCIS J. MOSLEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Francis J. Mosley appeals from an order summarily denying his sentence modification motion. We conclude that Mosley is not entitled to plea withdrawal or sentence modification for the trial court's failure

to follow the parties' joint sentencing recommendation incident to their plea agreement. Therefore, we affirm.

¶2 Mosley pled guilty to armed robbery in exchange for the State's agreement to a joint sentencing recommendation of an eight-year sentence to run concurrent to the revocation sentence he was serving. During the plea colloquy, the trial court confirmed with Mosley his understanding that the trial court was not obliged to follow the parties' joint sentencing recommendation. One month later but prior to sentencing, Mosley moved to withdraw his guilty plea. The trial court denied the motion and imposed a thirty-two-year sentence to run consecutive to Mosley's revocation sentence. On direct appeal, this court addressed the denial of Mosley's presentence plea withdrawal motion and ultimately concluded that pursuing that potential issue would lack arguable merit. *See* ***State v. Mosley***, No. 99-1504-CR-NM, unpublished slip op. at 3-4 (WI App Feb. 5, 2000).

¶3 Mosley then moved for postconviction relief pursuant to WIS. STAT. § 974.06 (2001-02), challenging, among other things, the trial court's denial of his motion for presentence plea withdrawal. The trial court denied the motion and his related reconsideration motion. Mosley did not timely appeal from those orders. Thereafter, Mosley filed two more postconviction motions and two petitions for habeas corpus relief; all were denied.

¶4 Mosley now moves for sentence modification predicated on an erroneous exercise of discretion and alternatively on a new factor, namely that the trial court that imposed sentence allegedly breached the plea agreement. The trial court denied that postconviction motion by citing to the transcript of the plea colloquy during which Mosley confirmed his "understand[ing] that the judge is not part of any plea agreement and is not required to follow the recommendations

of the district attorney or your attorney or anyone else," and also explained that "[t]he court is not a party to a plea agreement and is not bound by its terms. Consequently, the court is authorized to impose the maximum penalty available under the law [for the offense for which the defendant was convicted]." It is from this order that Mosley now appeals.

¶5 Mosley's current challenge fails. The trial court considered his plea withdrawal claim initially and rejected it. We rejected the potential issue of whether Mosley was entitled to presentence plea withdrawal on direct appeal pursuant to our obligation to independently review the record to search for issues of arguable merit. *See* ***Anders v. California***, 386 U.S. 738, 744-45 (1967).

¶6 Insofar as the precise issue that Mosley now raises differs slightly from the issues he previously raised, Mosley confirmed to the trial court before he pled guilty that he understood that it was not required to follow the sentencing recommendations. "In Wisconsin, [trial] judges do not involve themselves in plea bargaining." ***State v. Hampton***, 2004 WI 107, ¶27, 274 Wis. 2d 379, 683 N.W.2d 14. In fact, "[a]ny advance understanding between prosecutor and defendant must not involve the trial judge." ***Farrar v. State***, 52 Wis. 2d 651, 657, 191 N.W.2d 214 (1971). The trial court's imposition of a sentence different from that jointly recommended by the parties cannot constitute a breach of the plea agreement because the trial court has no obligation to comply with the parties' agreement. *See* ***Hampton***, 274 Wis. 2d 379, ¶27; ***Farrar***, 52 Wis. 2d at 657.

¶7 We reject Mosley's erroneous exercise of discretion and new sentencing factor claims. As we have previously concluded, there is no arguable basis to challenge the trial court's exercise of sentencing discretion. *See* ***Mosley***, No. 99-1504-CR-NM, unpublished slip op. at 2. Mosley's claim does not

constitute a new sentencing factor.[1] His claim was known and available to him since he pled guilty in 1998.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

[1] A new sentencing 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)). Mosley's claim was "not [un]known to the trial judge at the time of original sentencing." ***Id.*** His claim was expressly addressed by the trial court during the guilty plea colloquy and before it imposed sentence, when Mosley originally moved for presentence plea withdrawal.