COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP441-CR **Cir. Ct. No. 2001CF6620**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. NEWSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed*.

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

¶1 PER CURIAM. James A. Newson appeals from an order summarily denying his postconviction motion for sentence modification. We conclude that Newson's motion is more accurately one for resentencing because he alleged that the trial court relied on inaccurate information when it imposed

sentence; as such, Newson was required to comply with the requisites of WIS. STAT. § 974.06(4) (2007-08) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994).[1] His failure to do so renders his motion procedurally barred. Therefore, we affirm.

¶2 A jury found Newson guilty of possessing more than 100 grams of cocaine with intent to deliver, keeping a drug vehicle, and failing to pay a controlled substance tax. For the cocaine offense, the trial court imposed a twenty-eight-year sentence, comprised of twenty- and eight-year respective periods of initial confinement and extended supervision. For the other two offenses, the trial court imposed four-year sentences, each comprised of three- and one-year respective periods of initial confinement and extended supervision. The trial court imposed the three sentences to run concurrently to each other.

¶3 Newson moved for postconviction relief, alleging that his trial counsel was ineffective for failing to move to suppress the evidence seized in an allegedly illegal search. The trial court summarily denied the motion.

¶4 Newson appealed, challenging the sufficiency of the evidence and trial counsel's effectiveness. On direct appeal, we affirmed the judgment of conviction and the postconviction order, holding that the evidence was sufficient to establish that Newson possessed the cocaine, and that by disclaiming an interest in the van ultimately searched, he destroyed his basis for objecting to the search and seeking suppression. *See* ***State v. Newson***, No. 2004AP469-CR, unpublished slip op. ¶¶1-14 (WI App Jan. 25, 2005).

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶5 Several months later, Newson filed a postconviction motion pursuant to WIS. STAT. § 974.06 (2005-06), alleging the ineffective assistance of trial counsel for failing to move to dismiss the charges for the State's failure to preserve what he claimed was exculpatory evidence. The trial court denied the motion and this court affirmed the denial on its merits. *See* ***State v. Newson***, No. 2005AP2927, unpublished slip op. ¶7 (WI App Mar. 20, 2007).

¶6 Almost two years later, Newson moved for sentence modification, contending that a new factor, namely inaccurate information on the amount of cocaine found, warranted sentence modification. The trial court summarily denied the motion, ruling that Newson's claim was not a new factor, but rather a claim of being sentenced on inaccurate information that was procedurally barred by ***Escalona*** for failing to raise it previously. Newson appeals.

¶7 The information Newson alleges was a new factor is the trial court's reference to the amount of cocaine involved in this case and in his prior case as 130 grams, when in fact, the total amount of cocaine involved was less than 108 grams: 107.67 grams for the current offense and .25 grams for a prior offense. The trial court referenced the amount of drugs from this offense and as "part of [his] prior record" as 130 grams and as a reason Newson posed a threat to the community.

¶8 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).

¶9 If the 130 grams referred to at sentencing by the trial court was "highly relevant to the imposition of sentence," it should *not* have been "unknowingly overlooked by all of the parties" because Newson was at sentencing. He should have mentioned this alleged inaccuracy to the trial court or to his trial counsel at sentencing or shortly thereafter. The time to challenge his sentence on the basis of this inaccuracy has long since passed. This amount is not a new sentencing factor. *See* ***Franklin***, 148 Wis. 2d at 8.

¶10 The referenced amount, 130 grams, is more accurately characterized as inaccurate information. A defendant has a constitutional right to be sentenced on accurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. This constitutional claim is properly raised in a postconviction motion pursuant to WIS. STAT. § 974.06(1). Section 974.06(4) however, requires a defendant filing a successive postconviction motion to provide a "sufficient reason" in that motion for failing to raise an issue in the original postconviction motion. *See also* ***Escalona***, 185 Wis. 2d at 181-82. Newson admits he did not allege a reason in his motion for failing to previously raise the issue.

¶11 Newson contends that: (1) the procedural bar does not apply to motions for sentence modification based on new factors; and (2) his reason, alleged initially in his appellate brief, should suffice. The procedural bar does not

apply to motions raising a new sentencing factor because the factor if legitimately "new" would answer the "sufficient reason" requisite. If analyzed correctly, as inaccurate information, the sufficient reason requisite applies, and must be alleged initially in the postconviction motion itself to allow the trial court to analyze the sufficiency of the reason before deciding whether the motion is procedurally barred. *See* WIS. STAT. § 974.06(4). Alleging the reason initially on appeal is too late. Consequently, Newson has not overcome the procedural bar to allow a decision on an issue that could have been raised in a prior postconviction motion or on direct appeal. *See* ***id.***; ***Escalona***, 185 Wis. 2d at 181-82.

By the Court.—Order affirmed.

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