COURT OF APPEALS
DECISION
DATED AND RELEASED

June 7, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 94-0044-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH L. FENDERSON,

Defendant-Appellant.

APPEAL from an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

NETTESHEIM, J. Keith L. Fenderson appeals pro se from the denial of his fifth postconviction motion seeking modification of his sentences. We hold that all of Fenderson's appellate issues are waived. Despite Fenderson's waiver, we address one issue. We hold that the court of appeals'

ruling in ***State v. Halbert***, 147 Wis.2d 123, 432 N.W.2d 633 (Ct. App. 1988), remains the controlling law despite the Wisconsin Supreme Court's purported overruling of ***Halbert*** by an evenly divided court in ***State v. Spear***, 176 Wis.2d 1101, 501 N.W.2d 429 (1993) (3-3 decision). ***Halbert*** holds that a sentencing court's failure to sentence within the sentencing guidelines is not a matter for court of appeals jurisdiction. ***Halbert***, 147 Wis.2d at 132, 432 N.W.2d at 637.

Pursuant to a plea agreement, Fenderson was convicted upon his pleas of no contest to three armed robbery charges. On March 28, 1990, the trial court sentenced Fenderson to two concurrent fifteen-year terms of imprisonment on two of the convictions and a consecutive, but stayed, twenty-year sentence on the remaining conviction. Other offenses were read in.

Over the next three years and four months, Fenderson filed five consecutive motions to modify his sentences. These motions were filed on October 15, 1991; April 14, 1992; August 31, 1992; October 5, 1992; and July 1, 1993. Three of these motions were denied, including the latest one of July 1, 1993, which is before us on this appeal. Fenderson did not pursue the other two motions.

Fenderson's first four motions variously claimed that: (1) new factors warranted a reduction in the sentences, (2) the sentences exceeded the sentencing guidelines, (3) the sentencing court had not explained its reasons for

sentencing outside the guidelines and (4) the sentencing court had otherwise not sufficiently explained the sentences. His latest motion contended that: (1) Fenderson was sentenced on the basis of inaccurate information, (2) the sentences were tainted because of a later determination that the original sentencing judge, the Honorable Jon B. Skow, was suffering from a disability, (3) Fenderson was denied access to the presentence report, (4) Fenderson was denied effective assistance of counsel and (5) the sentences exceeded the sentencing guidelines. The trial court rejected Fenderson's arguments and confirmed the original sentences. Fenderson appeals.

The State contends that all of Fenderson's appellate issues are waived because: (1) if the latest motion is construed as a motion to modify a sentence, it was not timely and (2) if any of the prior motions are construed as a § 974.06, STATS., motion, the latest motion is barred by the ruling in ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994), holding that a defendant is required to consolidate all grounds for relief in the original motion. *See* ***id***. at 185, 517 N.W.2d at 163-64.

Pursuant to § 973.19(1), STATS., a defendant who has not filed a notice of intent to pursue postconviction relief and ordered transcripts pursuant to § 809.30(2), STATS., may seek a sentence modification. However, such action must be brought within ninety days from the date the sentence is ordered. The record does not reveal that Fenderson filed a notice of intent to pursue postconviction relief or sought any transcripts pursuant to § 809.30(2) prior to

his first motion to modify his sentences. In fact, Fenderson did not file his first motion until nearly eighteen months after the sentencing.

It is thus apparent that the only vehicle available to Fenderson to pursue his sentencing grievances was § 974.06, STATS. Of necessity then, all of Fenderson's postconviction motions must be construed as applications for § 974.06 relief. However, that statute requires that the prisoner must combine all grounds for relief in the original, supplemental or amended motion. Unless the prisoner shows sufficient reason why the grounds for relief in a successive § 974.06 proceeding were not asserted or adequately raised in the original proceeding, the law will accord no relief. ***Escalona-Naranjo***, 185 Wis.2d at 184-85, 517 N.W.2d at 163-64.

Here, Fenderson has failed to demonstrate why the grounds asserted in his latest motion were not raised in the prior proceedings. We thus hold that all of his appellate issues are waived.

Waiver, however, is a rule of judicial administration. ***Waukesha County v. Pewaukee Marina, Inc.***, 187 Wis.2d 18, 22, 522 N.W.2d 536, 538 (Ct. App. 1994). We may choose to address a waived issue where the parties have fully briefed the issue and there are no disputed issues of fact. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 444, 287 N.W.2d 140, 146 (1980). We properly overlook waiver as to issues which are likely to recur. ***Pewaukee Marina***, 187 Wis.2d at 22, 522 N.W.2d at 538.

One of Fenderson's appellate arguments is that the sentencing court's alleged failure to sufficiently explain its deviation from the sentencing guidelines constitutes reversible error. This argument pits the court of appeals' decision in ***Halbert*** squarely against the supreme court's purported overruling of ***Halbert*** in ***Spear***. We have seen this issue in prior cases, and it will recur in future cases unless it is resolved. Moreover, the parties have briefed the question. We choose to address it.

In ***Halbert***, the court of appeals rejected an appellate challenge to a sentence which did not fall within the sentencing guidelines set out in § 973.011, STATS. The court observed that § 973.012, STATS., expressly states that "[t]here shall be no right to appeal on the basis of the trial court's decision to render a sentence that does not fall within the sentencing guidelines." ***Halbert***, 147 Wis.2d at 132, 432 N.W.2d at 637. The court stated, "Simply put, a trial court's compliance or non-compliance with sec. 973.012, STATS., is not an appellate issue here, because the Court of Appeals has no jurisdiction." ***Halbert***, 147 Wis.2d at 132, 432 N.W.2d at 637.

However, in ***Spear***, three justices in the lead opinion purported to overrule ***Halbert***. ***Spear***, 176 Wis.2d at 1123, 501 N.W.2d at 436. However, the concurring opinion of the other three justices,[1] while agreeing with the lead opinion on all other issues, specifically rejected the lead opinion's overruling of ***Halbert***. ***Spear***, 176 Wis.2d at 1132, 501 Wis.2d at 441 (Day, J., concurring, joined by Ceci and Steinmetz, JJ.). A general principle of appellate practice is

[1] Only six justices participated in the ***Spear*** opinion.

that a majority must have agreed on a particular point for it to be considered the opinion of the court. *See* ***State v. Dowe,*** 120 Wis.2d 192, 194, 352 N.W.2d 660, 662 (1984) (per curiam). Thus, ***Halbert*** has not been overruled.

Pursuant to ***Halbert,*** we have no jurisdiction to address Fenderson's appellate claim that the sentencing court failed to adequately explain its deviation from the sentencing guidelines.

By the Court.—Order affirmed.

Recommended for publication in the official reports.