COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2674-CR **Cir. Ct. No. 2009CF262**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AUSTIN RICHARD PEDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Austin Pederson appeals an order[1] denying his "Motion to Modify Defendant's Sentence." He argues that the court used the wrong legal standard because it construed his motion as a "new factor motion." He contends the motion should have been construed as a motion under WIS. STAT. § 974.06 for resentencing based on the court's reliance on inaccurate information. We conclude the court correctly construed the motion and, even if the motion raised the issue Pederson argues on appeal, the motion would fail because Pederson did not establish that the court actually relied on inaccurate information.

BACKGROUND

¶2 The court imposed consecutive sentences of four years' initial confinement and four years' extended supervision for two counts of homicide by negligent operation of a vehicle. Based on information in the Presentence Investigation Report (PSI), the court indicated that Pederson would be eligible for a risk reduction sentence, the Earned Release Program (ERP) and the Challenge Incarceration Program (CIP). Three months later, the Department of Corrections informed Pederson's counsel that Pederson was statutorily ineligible for the ERP and CIP.

¶3 Pederson's counsel filed the motion from which this appeal arises, titled "Notice of Motion and Motion to Modify Defendant's Sentence." The motion sought a reduction in the sentence based on Pederson's ineligibility for

[1] The notice of appeal also purports to appeal the judgment of conviction. No notice of intent to pursue postconviction relief was filed from the judgment of conviction. Therefore, this is not an appeal under WIS. STAT. RULE 809.30(2)(j). Our review is limited to the August 23, 2011 order denying the motion. All references to the Wisconsin Statutes are to the 2009-10 version.

ERP and CIP. The State filed a response opposing the motion, arguing that ineligibility for these programs did not constitute a new factor. By substitute counsel, Pederson then filed an "Addendum Motion for Re-Sentencing and/or Modification of Sentences." The addendum states that some of the attachments to the initial motion were missing and it supplied the missing documents. The addendum requested the court to correct or modify the sentence based on the error in the PSI. In his "Brief on Resentencing," Pederson argued that WIS. STAT. § 972.15(2b) and (2c) required the author of the PSI to inform the court of a defendant's eligibility for these programs. The brief also argued Pederson's right to be sentenced on the basis of accurate information and faulted Pederson's trial counsel for failing to correct the error in the PSI. The brief closed with an argument that ineligibility for ERP and CIP constituted a new factor justifying sentence reduction. The State's brief responded that the PSI writer's error did not affect the sentencing court's decision, the effective assistance of Pederson's trial counsel was not properly before the court and ineligibility for ERP and CIP does not constitute a new factor. The court denied the motion without a hearing, limiting its discussion to whether Pederson established a new factor justifying sentence reduction.

¶4 Pederson then moved for reconsideration, arguing the court relied on inaccurate information presented in the PSI and the court missed the point by limiting its discussion to new factors. The court denied the motion for reconsideration. The order denying the motion for reconsideration is not identified in the notice of appeal as the subject of this appeal.

DISCUSSION

¶5 The circuit court correctly construed the motion as a "new factor motion." The initial motion did not request setting aside the original sentence and starting over with a new sentencing proceeding, the hallmark of a motion for resentencing. *See* ***State v. Wood***, 2007 WI App 190, ¶4, 305 Wis. 2d 133, 738 N.W.2d 81. Rather, it explicitly requested sentence modification. A court may modify a sentence for three reasons: (1) to correct a void or illegal sentence; (2) to account for the existence of a new factor; and (3) to address a sentence that is unduly harsh or unconscionable. *See* ***State v. Crochiere***, 2004 WI 78, ¶12, 273 Wis. 2d 57, 681 N.W.2d 524. Because Pederson did not allege that the sentence was void, illegal or unduly harsh, the court appropriately construed the motion as a claim that Pederson's ineligibility for ERP and CIP constituted a new factor.

¶6 Pederson contends the motion should have been construed as a motion under WIS. STAT. § 974.06, which would apply to a constitutional claim such as a claim that the court violated Pederson's due process right by basing the sentence on inaccurate information. He bases this argument on the fact that the time for commencing postconviction proceedings under WIS. STAT. RULE 809.30 expired. However, RULE 809.30 and § 974.06 do not provide the exclusive mechanisms for seeking sentence modification. A new factor motion can be filed at any time. ***State v. Noll***, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895. Therefore, the timing of the motion does not suggest that it was a motion under § 974.06 or that it attempted to raise a constitutional issue.

¶7 The addendum to the motion did not amend the motion, despite its relabeling of the title: "Addendum Motion for Re-Sentencing and/or Modification of Sentences." The addendum merely provided documents that counsel believed

should have been appended to the initial motion. Despite reference to "resentencing" in the title, the addendum did not contain an argument for resentencing, did not cite § 974.06, cited no authority and closed with a request that the sentence "be corrected/modified."

¶8 The first suggestion that Pederson's motion was something other than a new factor motion came in his "Brief on Resentencing" in which he asserted his right to be sentenced on the basis of correct information and alleged ineffective assistance of counsel. As the State noted in its reply brief in the circuit court, the issues briefed were not the issues raised in the motion with the exception of new factors. Therefore, the court properly reviewed the motion as a new factor motion.

¶9 Even if Pederson's motion were generously construed as a motion alleging that the court based its sentence on incorrect information, the record does not support that argument. To be entitled to relief, Pederson must show that inaccurate information was presented to the court and the court relied on it. ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1. To prove actual reliance, Pederson must prove that the court "gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14.

¶10 At the sentencing hearing, the court identified five factors that influenced the sentences it imposed: rehabilitation, punishment, the seriousness of the offenses, deterrence, and protection of the public. It did not specifically mention ERP or CIP when discussing any of these factors. When discussing rehabilitation, the court referred to its "plan" to have Pederson go through programs while incarcerated or general prison programming. Those comments are

consistent with the court's imposition of a risk reduction sentence and do not suggest that the length of the sentences was in any way based on Pederson's eligibility for ERP and CIP. The court did not mention those programs until after it stated its reasons for the sentences and imposed the sentences, informed Pederson of the effect of prison disciplinary actions and frivolous civil lawsuits, imposed the conditions for extended supervision and set the amount of restitution. The court then referred to ERP and CIP as "optional" programs that, if Pederson volunteered for them and successfully completed them, could result in a reduction in the length of confinement. The court gave no indication that the availability of those programs affected its determination of the length of the sentences.

By the Court.—Order affirmed.

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