COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2014

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. 2013AP1974-CR **Cir. Ct. No. 2002CF4284**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CESO SPREWELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Ceso Sprewell, pro se, appeals an order denying his motion to vacate a DNA surcharge and his motion for sentence modification. We reject Sprewell's arguments and affirm.

BACKGROUND

¶2 On April 24, 2003, a jury found Sprewell guilty of attempted first-degree intentional homicide by use of a dangerous weapon, first-degree recklessly endangering safety by use of a dangerous weapon, and being a felon in possession of a firearm as a second or subsequent offense, all as a habitual criminal. Sprewell was sentenced to a total of forty years' initial confinement and twenty-five years' extended supervision. The sentencing court ordered Sprewell to pay restitution of $165,074.20 to Capital Indemnity Corporation, $10,113.60 to the State of Wisconsin Victim Compensation Program, and $166 to Adam B., one of the victims. The judgment of conviction provided restitution would be paid "[f]rom up to 25% of [Sprewell's] prison wages[.]" In addition, Sprewell was ordered to provide a DNA sample and pay the DNA surcharge required by WIS. STAT. § 973.046, if he had not already done so.[1]

¶3 In Sprewell's direct appeal, his attorney initially filed a no-merit report. However, we subsequently granted Sprewell's motion to strike the no-merit report and discharge his attorney, and we allowed him to proceed pro se. Sprewell then filed a motion for postconviction relief in the circuit court. The court denied Sprewell's motion in December 2004, and Sprewell did not appeal.

¶4 Sprewell filed a second postconviction motion, pursuant to WIS. STAT. § 974.06, in January 2008. The circuit court denied the motion, concluding Sprewell's claims were procedurally barred because he did not demonstrate a sufficient reason for failing to raise them in his first postconviction motion. *See*

[1] Unless otherwise noted, all references to the Wisconsin Statutes are to the 2001-02 version, which was in effect at the time Sprewell was sentenced.

State v. Escalona-Naranjo, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Sprewell appealed, and we affirmed the circuit court's decision on alternative grounds.

¶5 On August 9, 2013, Sprewell filed the two motions at issue in this appeal. First, he moved to vacate the DNA surcharge, arguing the sentencing court violated ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, by failing to explain its reasons for imposing the surcharge. Second, he moved for sentence modification, arguing the following facts constituted new factors warranting modification of his sentence: (1) the sentencing court failed to give him an opportunity to stipulate to the amount of restitution, contrary to WIS. STAT. § 973.20(13)(c); (2) the sentencing court failed to consider the factors set forth in § 973.20(13)(a) when deciding whether to order restitution; and (3) the court had no authority to order that a portion of his prison wages be used to pay restitution. Sprewell also argued the sentencing court lost competency to sentence him when it failed to follow the proper procedures for ordering restitution, rendering his entire sentence invalid.

¶6 The circuit court denied Sprewell's motions in an order dated August 14, 2013. The court concluded Sprewell's motion to vacate the DNA surcharge was untimely because it was not raised "within ninety days of sentencing or pursuant to the appellate timelines set forth under [WIS. STAT. RULE] 809.30[.]" The court also noted Sprewell's motion could not be construed as a WIS. STAT. § 974.06 motion because challenges to a circuit court's sentencing discretion are not permitted under § 974.06.

¶7 The circuit court further concluded Sprewell's motion for sentence modification failed to show the existence of a new factor. In addition, the court

stated Sprewell's argument that the sentencing court lost competency to impose sentence was procedurally barred by ***Escalona-Naranjo*** and also lacked merit. Finally, the court concluded the sentencing court had authority to order that a portion of Sprewell's prison wages be used to pay restitution under WIS. STAT. § 973.05(4), as amended by 2003 Wis. Act 139, § 212. Sprewell now appeals.

DISCUSSION

I. Motion to vacate the DNA surcharge

¶8 Sprewell first argues the circuit court erred by denying his motion to vacate the DNA surcharge. However, we agree with the circuit court that Sprewell's motion was untimely. "When a defendant moves to vacate a DNA surcharge, the defendant seeks sentence modification." ***State v. Nickel***, 2010 WI App 161, ¶5, 330 Wis. 2d 750, 794 N.W.2d 765. A defendant may move for sentence modification under WIS. STAT. § 973.19 within ninety days after sentencing. ***Nickel***, 330 Wis. 2d 750, ¶5; *see also* WIS. STAT. § 973.19(1)(a). A defendant may also obtain postconviction review of his or her sentence within the time limits for a direct appeal under WIS. STAT. RULE 809.30. ***Nickel***, 330 Wis. 2d 750, ¶5. Sprewell's motion to vacate the DNA surcharge was filed more than ten years after his sentencing—far outside the time limits prescribed by § 973.19 and RULE 809.30. The motion was therefore untimely.

¶9 Sprewell does not address the circuit court's conclusion that his motion to vacate the DNA surcharge was untimely.[2] Instead, he argues the court

[2] Failure to address the grounds on which the circuit court ruled constitutes a concession of the ruling's validity. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

"erroneously exercise[d] its discretion" by "labeling [his] motion … as a [WIS. STAT.] § 974.06 motion, and denying the motion as such[.]" (Capitalization omitted.) However, the court did not construe Sprewell's motion as a § 974.06 motion. Instead, after concluding the motion was untimely under WIS. STAT. § 973.19 and WIS. STAT. RULE 809.30, the court correctly noted the motion could not be construed as a § 974.06 motion because "[a] challenge to the trial court's sentencing discretion is not permitted under [§] 974.06[.]" *See* ***Nickel***, 330 Wis. 2d 750, ¶7. Sprewell's argument that the court erred by construing his motion as a § 974.06 motion therefore fails.

¶10 Sprewell next argues this court's decision in ***Cherry*** constitutes a new factor warranting modification of his sentence in order to vacate the DNA surcharge.[3] ***Cherry*** held that, in cases where imposition of a DNA surcharge is permitted but not required, a circuit court must explain its reasons for imposing the surcharge on the record.[4] *See* ***Cherry***, 312 Wis. 2d 203, ¶¶9-11. Sprewell argues the sentencing court violated ***Cherry*** by failing to explain why it imposed a surcharge in his case.

¶11 There are two problems with Sprewell's new factor argument. First, Sprewell never argued in the circuit court that ***Cherry*** was a new factor warranting sentence modification. He has therefore forfeited his right to raise this argument on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d

[3] A circuit court has inherent power to modify a sentence based on a new factor at any time. ***State v. Nickel***, 2010 WI App 161, ¶8, 330 Wis. 2d 750, 794 N.W.2d 765.

[4] Effective January 1, 2014, the statute allowing discretionary imposition of the DNA surcharge in certain cases—WIS. STAT. § 973.046(1g)—was repealed, and § 973.046(1r) was amended to make the imposition of the surcharge mandatory in all cases where a court imposes sentence or places the defendant on probation. *See* 2013 Wis. Act 20, §§ 2353-2355 & 9426.

727 (Arguments raised for the first time on appeal are generally deemed forfeited.).[5]

¶12 Second, Sprewell's argument that ***Cherry*** constitutes a new factor warranting sentence modification was rejected by this court in ***Nickel***. There, we explicitly stated ***Cherry***'s "call for the exercise of discretion on the record when imposing the DNA surcharge does not present a new factor …. [and] ***Cherry***'s holding is not a new procedural rule warranting retroactive application." ***Nickel***, 330 Wis. 2d 750, ¶8. Although Sprewell argues ***Nickel*** should be overruled, only the supreme court has the power to overrule, modify, or withdraw language from a published court of appeals opinion. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We therefore reject Sprewell's argument that ***Cherry*** constitutes a new factor warranting modification of his sentence in order to vacate the DNA surcharge.

II. Motion for sentence modification

¶13 Sprewell next argues the circuit court erred by denying his motion for sentence modification based on the existence of a new factor. A new factor for purposes of sentence modification 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

[5] In his reply brief, Sprewell argues the State forfeited several of the arguments it raises on appeal by failing to raise them in the circuit court. However, the forfeiture rule generally applies only to appellants, and we will usually permit a respondent to employ any theory or argument on appeal that will allow us to affirm the circuit court's order, even if not raised previously. *See* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds*. Moreover, the circuit court denied Sprewell's motions to vacate the DNA surcharge and modify sentence only five days after he filed them, without receiving any response from the State. Thus, it appears the State had no opportunity to raise its arguments in the circuit court.

> 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. Harbor, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts constitutes a new factor is a question of law. ***Id.***, ¶36. Once the defendant has demonstrated the existence of a new factor, whether to modify the defendant's sentence is within the circuit court's discretion. ***Id.***, ¶37.

¶14 Sprewell's principal brief on appeal does not specifically identify any fact or set of facts he believes constitutes a new factor. Instead, Sprewell repeatedly cites to his brief's appendix to incorporate by reference portions of his circuit court brief. We admonish Sprewell that this practice is impermissible. *See* ***Bank of America NA v. Neis***, 2013 WI App 89, ¶11 n.8, 349 Wis. 2d 461, 835 N.W.2d 527. We could reject Sprewell's new factor claim on this basis alone. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) ("We will not decide issues that are not, or inadequately, briefed.").

¶15 In the circuit court, Sprewell argued the following were new factors warranting sentence modification: (1) the sentencing court failed to give him an opportunity to stipulate to the amount of restitution, contrary to WIS. STAT. § 973.20(13)(c); (2) the sentencing court failed to consider the factors set forth in § 973.20(13)(a) when deciding whether to order restitution; and (3) the court had no authority to order that restitution be paid from his prison wages. We agree with the circuit court that these are not new factors warranting sentence modification. Specifically, we conclude Sprewell has not shown the sentencing court violated the statutory procedures for imposing restitution.

¶16 Sprewell first complains the sentencing court violated WIS. STAT. § 973.20(13)(c), which states:

> The court, before imposing sentence or ordering probation, shall inquire of the district attorney regarding the amount of restitution, if any, that the victim claims. The court shall give the defendant the opportunity to stipulate to the restitution claimed by the victim and to present evidence and arguments on the factors specified in par. (a).

Sprewell argues the sentencing court violated this statute by failing to give him an opportunity to stipulate to the amount of restitution. However, during its sentencing argument, the State specifically requested restitution of $165,074.20 to Capital Indemnity Corporation, $10,113.60 to the State of Wisconsin Victim Compensation Program, and $160 to Adam B.[6] Sprewell had ample opportunity to dispute these amounts during his own sentencing argument, but he failed to do so. "[I]n the absence of a defendant's specific objection at the time restitution is ordered, the trial court may proceed with the understanding that the defendant's silence is a 'constructive' stipulation to the restitution order, including its amount." ***State v. Hopkins***, 196 Wis. 2d 36, 44, 538 N.W.2d 543 (Ct. App. 1995).

¶17 Sprewell next complains that the sentencing court failed to consider the factors set forth in WIS. STAT. § 973.20(13)(a) when determining whether to order restitution. Section 973.20(13)(a) directs a court to consider:

1. The amount of loss suffered by any victim as a result of a crime considered at sentencing.

2. The financial resources of the defendant.

3. The present and future earning ability of the defendant.

[6] For reasons not explained by the parties, the judgment of conviction indicates Sprewell was ordered to pay $166 in restitution to Adam B.

> 4. The needs and earning ability of the defendant's dependents.
>
> 5. Any other factors which the court deems appropriate.

Sprewell did not object to the amount of restitution claimed by the State during the sentencing hearing. Accordingly, the sentencing court did not need to address the first factor listed in § 973.20(13)(a) "because the amount of loss suffered by any victim as a result of the crime [was] not an issue before the court." *See* ***State v. Szarkowitz***, 157 Wis. 2d 740, 749, 460 N.W.2d 819 (Ct. App. 1990). In addition, because Sprewell did not offer any evidence regarding his ability to pay restitution, the sentencing court did not err by failing to address factors two through four. *See* ***id.*** at 749-50 (A defendant has the burden to present evidence regarding his or her ability to pay restitution; if the defendant fails to do so, the court "need not make detailed findings with respect to factors two through four[.]"). Regarding the fifth factor, Sprewell does not identify any "other factors" he believes the sentencing court should have considered. We therefore reject Sprewell's argument that the court erred by failing to discuss the factors listed in § 973.20(13)(a) on the record.

¶18 We also reject Sprewell's argument that the sentencing court lacked authority to order that restitution be paid from his prison wages. The circuit court concluded the sentencing court had authority to make that order under WIS. STAT. § 973.05(4), as amended by 2003 Wis. Act 139, § 212. Sprewell argues the circuit court erred because 2003 Wis. Act 139, § 212, did not go into effect until March 2004—approximately nine months after his sentencing. However, Sprewell does not address whether the version of § 973.05(4) that *was* in effect at the time of sentencing gave the sentencing court authority to order that restitution be paid

from his prison wages.[7] Moreover, in ***State v. Baker***, 2001 WI App 100, ¶17, 243 Wis. 2d 77, 626 N.W.2d 862, we held that a court may order restitution to be paid from prison wages pursuant to WIS. STAT. § 303.01(8)(b). Sprewell's claim that the sentencing court could not order restitution to be paid from his prison wages therefore lacks merit.

¶19 Sprewell argues the circuit court "erroneously exercise[d] its discretion when denying [his] sentence modification motion[.]" (Capitalization omitted.) However, a court exercises its discretion in determining whether to modify sentence only after it concludes the defendant has shown the existence of a new factor. *See* ***Harbor***, 333 Wis. 2d 53, ¶37. Here, the circuit court properly concluded Sprewell failed to demonstrate the existence of a new factor. Consequently, the court did not need to exercise discretion in denying Sprewell's motion.

¶20 Finally, Sprewell argues the sentencing court lost competency to sentence him when it failed to follow the statutory procedures for imposing restitution. As a result, he argues his entire sentence is invalid. As explained

[7] At the time of Sprewell's sentencing, WIS. STAT. § 973.05(4) provided, in relevant part:

> If a defendant fails to pay the fine, assessment, surcharge or restitution payment within the period specified under sub. (1) or (1m), the court may do any of the following:
>
> ….
>
> (b) Issue an order assigning not more than 25% of the defendant's commissions, earnings, salaries, wages, pension benefits, benefits under ch. 102 and other money due or to be due in the future to the clerk of circuit court for payment of the unpaid fine, assessment, surcharge or restitution payment. In this paragraph, "employer" includes the state and its political subdivisions.

above, the sentencing court did not violate the applicable statutes. Moreover, as the circuit court correctly noted, Sprewell's competency claim could have been raised in his previous postconviction motions. Because Sprewell has not provided a sufficient reason for failing to raise this claim earlier, it is procedurally barred. *See* ***Escalona-Naranjo***, 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. (2011-12).