COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP478-CR **Cir. Ct. No. 1997CF974136**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIAN ESTEVE MCKINNIE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. CONEN and DENNIS P. MORONEY, Judges. *Affirmed.*

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

¶1 PER CURIAM. Julian Esteve McKinnie, *pro se*, appeals from an order of the circuit court denying his motion for sentence modification and from an order denying reconsideration. McKinnie complains that the maximum sentence for his conviction of felony murder was twenty years' imprisonment, but

he was sentenced to a twenty-five year term. We reject McKinnie's arguments and affirm.

¶2 In 1997, McKinnie pled guilty to one count of felony murder for a death that resulted during an attempted armed robbery. The circuit court imposed an indeterminate sentence of twenty-five years' imprisonment. McKinnie appealed from the judgment of conviction, and we affirmed. *See* ***State v. McKinnie***, No. 2002AP949-CRNM, unpublished slip op. & order (WI App Sept. 9, 2002). In 2004, McKinnie filed a *pro se* postconviction motion on various grounds. Relief was denied, McKinnie appealed, and we affirmed. *See* ***State v. McKinnie***, No. 2004AP81, unpublished slip op. (WI App Dec. 28, 2005) (***McKinnie II***). In 2009, McKinnie filed a *pro se* motion seeking sentence modification. The motion was denied, but McKinnie did not appeal.

¶3 On December 28, 2011, McKinnie filed his latest *pro se* postconviction motion. He alleged a "new factor," believing that WIS. STAT. § 940.03 (1997-98)[1] provided a maximum of twenty years' imprisonment, based on this court's subsequent determination elsewhere that felony murder is a stand-alone offense and not a penalty enhancer. Thus, McKinnie sought sentence modification under WIS. STAT. § 973.13, believing his sentence exceeds the legal maximum. The circuit court denied the motion, explaining that the maximum penalty for McKinnie's offense was forty years' imprisonment. McKinnie moved for reconsideration, but that motion was also denied.[2] McKinnie appeals.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] The Honorable Jeffrey A. Conen denied the postconviction motion. The Honorable Dennis P. Moroney, as successor to Judge Conen's calendar, denied reconsideration.

¶4 "Whoever causes the death of another human being while committing or attempting to commit a crime specified in [various statutes including WIS. STAT. § 943.32(2)] may be imprisoned for not more than 20 years in excess of the maximum period of imprisonment provided by law for that crime or attempt." WIS. STAT. § 940.03. In other words, the penalty for felony murder is the "maximum period of imprisonment provided by law" for the predicate crime or attempted crime, plus up to an additional twenty years.

¶5 McKinnie's predicate offense was attempted armed robbery; armed robbery is prohibited by WIS. STAT. § 943.32(2). Armed robbery was a Class B felony in 1997, *see* WIS. STAT. § 943.32(2), punishable at the time by up to forty years' imprisonment, *see* WIS. STAT. § 939.50(3)(b). Because the armed robbery was alleged to have been attempted, the maximum penalty was reduced by half, *see* WIS. STAT. § 939.32(1), making the maximum penalty for attempted armed robbery twenty years. Thus, the maximum potential penalty McKinnie faced for felony murder was, in fact, forty years: twenty years as the penalty for the predicate attempted armed robbery offense plus up to twenty more years as authorized by WIS. STAT. § 940.03.

¶6 It appears McKinnie may believe that, because felony murder was held to be a stand-alone offense rather than a penalty enhancer, *see* ***State v. Mason***, 2004 WI App 176, ¶1, 276 Wis. 2d 434, 687 N.W.2d 526, his maximum penalty cannot be calculated by reference to another offense's maximum penalty. McKinnie would be mistaken, however, because such a belief is contrary to the express terms of WIS. STAT. § 940.03. Further, when we considered the nature of the felony murder statute in ***Mason***, we did so because the defendant in that case was being sentenced under the truth-in-sentencing scheme and the nature of the felony murder statute would impact the method of calculating the maximum initial

confinement term he faced. ***Id.***, 276 Wis. 2d 434, ¶¶6-10. McKinnie's case involves no such concerns.[3]

¶7 McKinnie's reliance on ***State v. Krawczyk***, 2003 WI App 6, 259 Wis. 2d 843, 657 N.W.2d 77, is also misplaced. Krawczyk was convicted of, and sentenced on, both the predicate armed robbery and felony murder. In that case, we explained that the predicate offense was a lesser-included charge of felony murder and, therefore, entering convictions and sentences for both offenses violated double jeopardy. ***Id.***, ¶26. We therefore affirmed the circuit court's remedy of vacating the armed robbery conviction and sentence. *See* ***id.***, ¶2. As we explained to McKinnie in one of his prior appeals, there is no double jeopardy concern here because he was not even *charged* with the attempted armed robbery; rather, he was charged with, convicted of, and sentenced for, felony murder only. ***McKinnie II***, No. 2004AP81, ¶¶2, 5. Thus, ***Krawczyk*** is inapplicable.

¶8 Finally, even if McKinnie had been sentenced in excess of the statutory maximum, the only relief available was a sentence shortened to the applicable maximum, not resentencing.[4] WISCONSIN STAT. § 973.13 provides that "[i]n any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings." That is, if McKinnie had been sentenced in excess

[3] To the extent that McKinnie believes that felony murder was a stand-alone Class B felony, this argument does not aid him: a conviction for a stand-alone class B felony would also have subjected McKinnie to a possible forty-year sentence. *See* WIS. STAT. § 939.50(3)(b).

[4] McKinnie had asked the circuit court to reduce his sentence to fifteen years' imprisonment, as defense counsel had argued for at the original sentencing hearing.

of the statutory limit, and if he were correct that the maximum was twenty years' imprisonment, we would simply order his sentence commuted to twenty years. As explained herein, however, the applicable statutory maximum was forty years' imprisonment, and McKinnie was not sentenced in excess of that limit.[5]

By the Court.—Orders affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[5] To the extent that McKinnie attempts to challenge the validity of his plea based on an "improper sentence," we note that such an argument begins from the faulty premise that the circuit court determined the wrong maximum sentence. As explained herein, it did not. Further, McKinnie made no mention of plea withdrawal in his postconviction motion: he sought only sentence modification based on WIS. STAT. § 973.13 (2009-10). We do not address issues raised for the first time on appeal. *See* ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495.