COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP273-CR

Cir. Ct. Nos. 2005CM5679
2005CM5833

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ZACKORY J. KERR,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

¶1 CURLEY, P.J.[1] Zackory J. Kerr, *pro se*, appeals an order denying his postconviction motion to modify sentence and the subsequent order denying

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

his motion to reconsider.[2] Kerr—who was convicted of repeatedly violating a domestic abuse injunction in 2006, and whose first postconviction motion did not raise any sentencing issues—filed a motion to modify sentence in 2013, arguing that a 2010 unpublished case, ***State v. Gerondale***, 2010 WI App 1, 322 Wis. 2d 737, 778 N.W.2d 172 (unpublished), required that the trial court modify his sentence. On appeal, Kerr argues that the trial court erred in determining that his motion to modify sentence was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), because ***Gerondale*** and another unpublished case, ***State v. Ash***, 2012 WI App 106, 344 Wis. 2d 299, 821 N.W.2d 413 (unpublished), constitute "new factors." This court disagrees and affirms.

BACKGROUND

¶2 In 2006, Kerr was convicted of two counts of violating a domestic abuse injunction, including one count as a repeater. The complaint regarding the first count charged Kerr with twenty counts of violating a domestic abuse injunction as a habitual criminal. Nineteen of the charges in that case were later dismissed. The complaint regarding the second count was filed a few days after the first complaint and did not include a repeater charge.

¶3 On April 24, 2006, Kerr was sentenced for both cases.[3] The trial court sentenced Kerr to two years in the Wisconsin State prison system, bifurcated as one of year initial confinement and one year of extended supervision, on the

[2] The State of Wisconsin Department of Corrections Offender Locator website shows that Kerr is currently on "active community supervision." *See State of Wisconsin Department of Corrections Offender Locator*, available at http://offender.doc.state.wi.us/lop/detail.do (last visited July 3, 2013).

[3] The Honorable Frederick C. Rosa sentenced Kerr.

enhanced misdemeanor, and to six months House of Correction on the unenhanced charge. The sentences were to be served consecutive to any other sentences.

¶4 On August 10, 2006, Kerr, *pro se*, filed a motion seeking dismissal of his convictions for lack of subject matter jurisdiction. The trial court denied the motion,[4] and Kerr appealed. This court summarily affirmed on December 19, 2007.

¶5 Several years later, this court issued two unpublished opinions regarding the application of ***State v. Volk***, 2002 WI App 274, ¶¶2, 35-36, 258 Wis. 2d 584, 654 N.W.2d 24 (holding, in a felony case, that penalty enhancers may not be imposed as extended supervision),[5] to misdemeanor sentences. The first case, ***Gerondale***, attempted to harmonize ***Volk*** and a successor case—***State v. Jackson***, 2004 WI 29, ¶¶11, 30, 270 Wis. 2d 113, 676 N.W.2d 872 (reaffirming ***Volk***'s holding in unclassified felony context)—with the misdemeanor sentencing rules outlined in WIS. STAT. § 973.01. ***Gerondale*** concluded that "a misdemeanor prison sentence based on a penalty enhancer may be bifurcated only to the extent required to comply with the [statutory] 25% minimum extended supervision requirement." ***Id.***, 322 Wis. 2d 737, ¶11. The second case, ***State v. Ash***, 344 Wis. 2d 299, ¶¶2-5, 13-14, applied ***Gerondale***'s ruling to a defendant who had been resentenced following revocation in 2010.

¶6 Subsequently, on January 7, 2013, Kerr, relying on ***Gerondale***, filed a motion to modify sentence. The trial court denied Kerr's motion, concluding, as

[4] The Honorable William W. Brash, III presided over Kerr's first postconviction motion.

[5] *See also* ***State v. Jackson***, 2004 WI 29, ¶¶11, 30, 270 Wis. 2d 113, 676 N.W.2d 872 (reaffirming ***Volk***'s holding in unclassified felony context).

relevant here, that Kerr's motion was prohibited by ***Escalona-Naranjo***. On January 17, 2013, Kerr filed a motion to reconsider, which was also denied. Kerr now appeals.

ANALYSIS

¶7 On appeal, Kerr argues that the trial court erred in concluding that his motion to modify sentence was barred by ***Escalona-Naranjo***. Whether a defendant's claims are prohibited by ***Escalona-Naranjo*** presents a question of law that this court reviews *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶8 In ***Escalona-Naranjo***, our supreme court held that WIS. STAT. § 974.06(4) requires criminal defendants "to consolidate all their postconviction claims into *one* motion or appeal." ***Escalona-Naranjo***, 185 Wis. 2d at 178 (footnote omitted; emphasis in ***Escalona-Naranjo***). "Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. "[I]f the defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a § 974.06 motion." ***Escalona-Naranjo***, 185 Wis. 2d at 181.

¶9 There is no provision in the relevant statutes or case law that exempts Kerr's motion from this rule. Kerr claims he could not have relied upon ***Gerondale*** or ***Ash*** to challenge his sentence earlier because they were not issued until after he was sentenced; however, as noted, these cases were not published. ***Gerondale*** and ***Ash***, as unpublished cases, are not new law. *See* WIS. STAT.

§ 809.23(2). The sentencing statutes that ***Gerondale*** and ***Ash*** discuss were in effect at the time Kerr was sentenced. Kerr does not explain why he failed to identify the issue of misdemeanor bifurcation in his previous litigation.

¶10 Moreover, contrary to what Kerr argues, neither ***Gerondale*** nor ***Ash*** constitutes a "new factor." 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." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). ***Gerondale*** and ***Ash***, on the other hand, are merely persuasive authority that courts remain free to reject. *See* WIS. STAT. § 809.23(2) (unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value, but are not precedent, and are "not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.").

¶11 Therefore, because the ***Gerondale*** and ***Ash*** cases are not new factors, this court concludes that the trial court did not err in applying ***Escalona-Naranjo*** to Kerr's motion to modify sentence. Kerr should have consolidated all of his postconviction claims into a single appeal, and any claims not raised in his first postconviction motion were barred from being raised in his subsequent motion. *See* ***id.*** at 181-82.

By the Court.—Orders affirmed.

This appeal will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.