COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1789-CR **Cir. Ct. No. 2000CF5889**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON C. LANE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN A. DIMOTTO, Judge. *Affirmed*.

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

¶1 PER CURIAM. Aaron C. Lane, *pro se*, appeals a circuit court order denying his motion for sentence modification. The circuit court concluded that Lane's claim is procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree and affirm.

¶2 A jury found Lane guilty in 2002 of armed robbery with use of force and as a party to a crime. The sentencing court imposed a twenty-five year term of imprisonment. Lane pursued a direct appeal, and this court summarily affirmed his conviction. *See* ***State v. Lane***, No. 2003AP1079-CR, unpublished op. and order (WI App Dec. 5, 2003). Lane then moved for relief from a DNA surcharge, and he unsuccessfully sought reconsideration of the order denying such relief. He next filed a postconviction motion pursuant to WIS. STAT. § 974.06 (2011-12).[1] We affirmed the order denying relief. *See* ***State v. Lane***, No. 2011AP577, unpublished slip op. (WI App Dec. 13, 2011).

¶3 In 2012, Lane filed the postconviction motion underlying this appeal, seeking sentence modification on the ground that the sentencing court relied on inaccurate information. In support of his claim, Lane argued, first, that the sentencing court's remarks implied that he used "an actual dangerous weapon" when the evidence showed that he used a pellet gun with a BB cartridge. Second, he argued that the sentencing court erroneously believed that the victim was "in fear of losing [her] life" during the incident. He claimed that the sentencing court's reliance on allegedly incorrect information violated his constitutional rights. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (stating that "[a] defendant has a constitutionally protected due process right to be sentenced [based] upon accurate information"). The circuit court rejected his claim as procedurally barred, explaining that Lane "failed to set forth a sufficient reason for failing to raise this claim previously." *See* WIS. STAT. § 974.06(4).

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 Pursuant to WIS. STAT. § 974.06, a defendant may raise constitutional claims after the time for a direct appeal has passed. *See* ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. The goal of § 974.06, however, is finality. ***Henley***, 328 Wis. 2d 544, ¶53. Therefore, successive postconviction motions raising constitutional claims that could have been raised in a prior postconviction proceeding are barred unless the defendant presents a sufficient reason for why the claim was not asserted or was inadequately raised earlier. ***Escalona-Naranjo***, 185 Wis. 2d at 184. Lane offered no reason for failing to raise his constitutional claim in his earlier motions. The circuit court therefore applied a procedural bar.

¶5 Lane argues that the circuit court should not have applied the rules governing motions filed under WIS. STAT. § 974.06, because he cited only WIS. STAT. § 973.19 as the procedural vehicle for his postconviction motion. We disagree. "Pursuant to Wis. Stat. § 973.19, a defendant may move for sentence modification within ninety days after sentencing." ***State v. Nickel***, 2010 WI App 161, ¶5, 330 Wis. 2d 750, 794 N.W.2d 765. Lane filed his sentence modification motion ten years after his 2002 sentencing. Accordingly, he could not obtain relief under § 973.19. The circuit court therefore looked beyond the label that Lane selected for his motion. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983) (court should look beyond the label on a *pro se* prisoner's document to determine if the prisoner is entitled to relief upon proof of the facts alleged). Because § 974.06 is the tool for convicted defendants such as Lane who wish to raise constitutional claims after the time for a direct appeal has expired, the circuit court properly considered his claim in light of that statute. Lane failed to satisfy the requirements for proceeding under § 974.06, however, and the circuit court thus did not err in rejecting his claim.

¶6 In this court, Lane asserts that his postconviction motion stated a claim for sentence modification based on "new factors." He argues that the claim therefore is not barred because a motion for sentence modification based on a new factor may be brought at any time. *See* ***Nickel***, 330 Wis. 2d 750, ¶8. Lane, however, never suggested in his circuit court motion that he relied on alleged new factors. We normally do not consider issues raised for the first time on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

¶7 For the sake of completeness, however, we have considered whether Lane's postconviction motion arguably supports a claim for sentence modification based on alleged new factors. 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 ... 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 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court considers *de novo*. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, no further analysis is required. *See* ***id.***, ¶38.

¶8 Here, Lane's trial counsel reminded the court at sentencing that "the gun was a BB gun." Thus, the information about the gun that Lane offers now was squarely before the sentencing court. The information is not "new." As to his remaining contention, he relies on the victim's trial testimony to support his argument that the victim was not "in fear of losing [her] life." The victim's trial testimony, however, flatly contradicts his position. The victim testified that she "thought [she] was going to die" when she was held at gunpoint. Accordingly, Lane offers no basis for concluding that a new factor exists in this case. For all of these reasons, we affirm.

By the Court.—Order affirmed.

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