COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3364-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARYL THOMAS GRIFFIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DANIEL L. LaROCQUE, Reserve Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Daryl Griffin appeals from his sentences on two counts of delivery of marijuana, and from an order denying his motion for sentence modification. He claims: (1) the Department of Corrections violated his due process rights by failing to commence revocation proceedings against him in a

timely manner; (2) the delay in the revocation proceedings was a new factor justifying sentence modification; (3) his revocation should have been barred under the doctrine of laches; and (4) the trial court should have affirmatively advised him of his right to request a substitution of judge. However, we reject each of these contentions and affirm.

BACKGROUND

Griffin was convicted of two counts of delivery of marijuana on April 13, 1995. Judge Aulik sentenced Griffin to four years of probation, with the condition that he serve seven months in the county jail. Rather than reporting to serve his jail time, however, Griffin fled the state and Judge Aulik issued a bench warrant for his arrest.

Griffin was apprehended by federal officials in Florida on December 16, 1996, and was subsequently returned to Wisconsin. He was held in the Dane County jail pending the outcome of federal charges for trafficking in cocaine and state charges for failing to appear in the instant case. On August 6, 1997, Griffin was sentenced to fifty-two months in prison on the federal charges.

On August 15, 1997, the Department of Corrections issued Griffin a Notice of Violation, Recommended Action and Statement of Hearing Rights. Griffin waived his right to a hearing and consented to the revocation of his probation. On September 29, 1997, Reserve Judge LaRocque, sitting for Judge Aulik, sentenced Griffin to two years in prison on the first count and one year in prison on the second count, to be served consecutively to his federal sentences and to each other. Griffin filed a motion for sentence modification, which was denied on November 5, 1998. This appeal followed.

STANDARD OF REVIEW

As an initial matter, we need to clarify the standard of our review on this appeal. Griffin's notice of appeal states that he is appealing from the sentence imposed on September 29, 1997, and from the order denying his motion to modify the sentence. The probation revocation proceeding is not, and could not properly be, part of this appeal. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis.2d 376, 384, 260 N.W.2d 727, 732 (1978) (probation revocation is independent from the underlying criminal action) *and* ***State ex rel. Johnson v. Cady***, 50 Wis.2d 540, 550, 185 N.W.2d 306, 311 (1971) (judicial review of probation revocation is by way of certiorari to the court of conviction). We therefore lack jurisdiction to consider whether Griffin's probation revocation proceeding was untimely or should have been barred by laches, and we will not further discuss those issues.

Whether a certain set of circumstances constitutes a new sentencing factor is a question of law, which we review *de novo*. ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). However, we will not overturn a trial court's decision about whether a new factor justifies sentence modification unless the trial court failed to rationally apply the proper standard of law to the facts of record. *See* ***State v. Smet***, 186 Wis.2d 24, 34, 519 N.W.2d 697, 701 (Ct. App. 1994).

Whether Griffin has been denied his right to a substitution of judge presents a question of statutory interpretation which we may independently review. *See* ***State ex rel. Town of Delavan v. Circuit Court***, 167 Wis.2d 719, 723, 482 N.W.2d 899, 900-01 (1992).

ANALYSIS

New Sentencing Factor

A defendant may move for sentence modification under § 973.19, STATS., based upon a set of facts highly relevant to the imposition of sentence which were not known to the trial judge at the time of original sentencing, even though they were then in existence. ***Franklin***, 148 Wis.2d at 8, 434 N.W.2d at 611. Griffin claims that the State's delay in initiating the probation revocation proceedings until after he had been sentenced on the federal charges constituted a new sentencing factor, apparently on the theory that the trial court was unaware that imposing consecutive sentences would interfere with Griffin's access to federal rehabilitative programs. However, the record shows that the trial court was well aware that the probation revocation had been delayed pending the outcome of the federal charges, and defense counsel explicitly pointed out to the court that Griffin would not be eligible for release to a halfway house on the federal charges unless concurrent sentences were imposed. We therefore conclude that the delay in the probation revocation proceedings was not a new factor which the trial court was obliged to consider as a basis for sentence modification.

Substitution of Judge

A defendant may request one substitution of judge as of right during a criminal proceeding. Section 971.20(1), STATS. When a new judge is assigned to a case without notification to the defendant, and the defendant has not previously exercised his right to substitution, the defendant may make an oral or written request for substitution prior to the commencement of the first proceeding at which the new judge is presiding. *See* § 971.20(5), STATS. Griffin claims that it is implicit in § 971.20(5) that a defendant must be informed of his right to

substitute when he learns that a new judge has been assigned. However, we see nothing in the plain reading of the statute which would support Griffin's contention. Moreover, by failing to raise any objection to the new judge in the trial court, either before or after the sentencing hearing, Griffin has waived the issue. ***State v. Monje***, 109 Wis.2d 138, 325 N.W.2d 695, 327 N.W.2d 641, 641 (1982) (on reconsideration) (for any issue other than the sufficiency of the evidence to be raised as a matter of right on appeal, it must first be preserved by a postconviction motion under RULE 809.30, STATS.).

By the Court.—Judgment and order affirmed.

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