

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. **98-3531**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JANE I. PECKHAM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jane Peckham appeals an order denying her motion for sentence modification. She claims that her sentences on convictions for theft, issuing a worthless check and multiple counts of forgery as a habitual offender—which total twenty years in prison followed by thirty-two years on probation—are

unduly harsh, are a result of improper application of the sentencing guidelines, and deprive her of rehabilitative services. We conclude, however, that Peckham's current challenges to her sentences are untimely and procedurally barred. Accordingly, we affirm.

¶2 Peckham was convicted on September 1, 1994, and sentenced on November 2, 1994. She filed a timely postconviction motion under RULE 809.30(2)(h), STATS., challenging the conditions of her probation. After the trial court denied her motion, this court set aside some of the conditions of probation on appeal. Nearly two years then passed before Peckham filed the present motion to modify her sentence.

¶3 A defendant may challenge the trial court's use of discretion in the imposition of sentence by means of a postconviction motion filed under § 974.02, STATS. Once the time for doing so has passed, however, the defendant may only ask the trial court to modify the sentence based on the presentation of a new factor, or to set aside or correct the sentence if it was unlawful. *See State v. Machner*, 101 Wis.2d 79, 82-83, 303 N.W.2d 633, 636 (1981), and § 974.06(1), STATS.

¶4 Here, the time for Peckham to bring a postconviction motion challenging the trial court's use of sentencing discretion has long since passed. *See* RULE 809.30(2)(h), STATS. Her grounds for relief from her sentences are therefore limited to a modification based upon the presentation of a new factor or the correction of any constitutional or jurisdictional irregularities or matters that go directly toward guilt.

¶5 The objections which Peckham raises to her sentences do not fall within the category of new sentencing factors. A new sentencing 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, which operates to frustrate the purpose of the original sentence. *See State v. Johnson*, 210 Wis.2d 196, 203, 565 N.W.2d 191, 194-95 (Ct. App. 1997). The availability of treatment programs in prison and the other factors Peckham now cites as affecting the appropriate length of her sentence under the guidelines were all duly litigated and known to the trial court when it imposed sentence.

¶6 Nor do Peckham's claims appear to be challenges to the legality of her sentences which could appropriately be brought under § 974.06, STATS. She argues that the sentences were unduly harsh, but not that they exceeded the maximum penalties provided by statute or in any other way violated the constitution or laws of this state. Furthermore, even if Peckham's claims could be construed to fall within the scope of § 974.06(1), § 974.06(4) prohibits any issue which could have been raised in a direct appeal or in a postconviction motion under § 974.02, STATS., from being raised as the basis for a subsequent § 974.06, STATS., motion unless there was a sufficient reason for failing to raise the issue earlier. *See State v. Escalona-Naranjo*, 185 Wis.2d 168, 185, 517 N.W.2d 157, 164 (1994). Peckham has provided no sufficient reason to explain why she failed to raise her length-of-sentence issues in her prior postconviction motion and appeal. We will not consider them at this late date.

By the Court.—Order affirmed.

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

