COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0654-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ELMER W. VANBOVEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Elmer W. VanBoven appeals pro se from an order denying his sentence modification motion. Because we conclude that the motion

was not timely, was improperly brought under WIS. STAT. § 974.06 (1997-98)[1] and did not show the existence of a new factor, we affirm.

¶2 VanBoven was convicted in 1988 of first-degree sexual assault and was sentenced to twenty years in prison. He did not pursue an appeal under WIS. STAT. § 974.02 or WIS. STAT. RULE 809.30. In May 1998, VanBoven filed a pro se motion for sentence modification under WIS. STAT. § 974.06. He alleged that the circuit court misused its discretion when it imposed the maximum sentence and exhibited bias when it remarked that the maximum period of incarceration was necessary because sex offenders cannot be treated. The circuit court denied the motion after a hearing.

¶3 We hold that VanBoven's sentence modification motion was not timely filed. VanBoven was sentenced in 1988. His 1998 challenge to the court's sentencing discretion was not timely under either WIS. STAT. RULE 809.30 (direct appeal from conviction) or WIS. STAT. § 973.19 (sentence modification motion must be filed within ninety days of sentencing). We further hold that the motion was not properly brought under WIS. STAT. § 974.06.

¶4 WISCONSIN STAT. § 974.06 proceedings "cannot be used to challenge a sentence because of an alleged [mis]use of discretion." ***Smith v. State,*** 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978). "[P]ostconviction review under sec. 974.06 is applicable only to jurisdictional or constitutional matters or to errors that go directly to the issue of the defendant's guilt." ***Id.*** Misuse of discretion in sentencing cannot be raised under § 974.06 "when a sentence is within the

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

statutory maximum or otherwise within the statutory power of the court." ***Id.*** VanBoven's sentence was within the statutory maximum. Therefore, he could not invoke § 974.06 in order to challenge the court's exercise of sentencing discretion.

¶5 We also conclude that VanBoven did not establish that the enactment of WIS. STAT. ch. 980 constitutes a new factor for purposes of sentence modification.[2] A new factor is a fact relevant to the imposition of the sentence and unknown to the circuit court at the time of sentencing, *see* ***State v. Kaster***, 148 Wis. 2d 789, 803, 436 N.W.2d 891 (Ct. App. 1989), or which frustrates the sentencing court's intent, *see* ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶6 WISCONSIN STAT. ch. 980 addresses protection of the public and treatment of convicted sex offenders who are at high risk to reoffend. *See* ***State v. Carpenter***, 197 Wis. 2d 252, 271, 541 N.W.2d 105 (1995). Chapter 980 does not constitute additional punishment. *See* ***Carpenter***, 197 Wis. 2d at 271-72. We fail to see how the enactment of a treatment program would have been relevant to the sentencing of VanBoven or would have frustrated the sentencing court's intent.

¶7 Finally, we do not address VanBoven's claim that his constitutional rights were violated by the sentence and the enactment of WIS. STAT. ch. 980. These arguments are raised or developed for the first time in VanBoven's reply brief. We do not consider arguments raised for the first time in a reply brief. *See*

[2] The circuit court has inherent power to modify a criminal sentence upon a showing of a new factor. *See* ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). A new factor claim is distinct from a challenge to a sentence under WIS. STAT. RULE 809.30, WIS. STAT. § 973.19 or WIS. STAT. § 974.06. *See* ***State v. Coolidge***, 173 Wis. 2d 783, 788, 496 N.W.2d 701 (Ct. App. 1993); *see also* ***State v. Krueger***, 119 Wis. 2d 327, 332, 351 N.W.2d 738 (Ct. App. 1984).

State v. Grade, 165 Wis. 2d 143, 151 n.2, 477 N.W.2d 315 (Ct. App. 1991). We see no reason to depart from that rule here.

By the Court.—Order affirmed.

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