

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 12, 2010

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1221-CR

Cir. Ct. No. 1997CF970742

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JIMMIE SARGENT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
M. JOSEPH DONALD, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Jimmie Sargent, *pro se*, appeals from an order denying his motion for sentence modification. The circuit court denied the motion as procedurally barred. We affirm.

BACKGROUND

¶2 A jury convicted Sargent of one count of child enticement, two counts of first-degree sexual assault of a child, and one count of second-degree sexual assault of a child. On June 5, 1997, the circuit court imposed four consecutive twenty-year sentences.

¶3 With the assistance of counsel, Sargent filed a postconviction motion contending that the circuit court erroneously exercised its sentencing discretion. The circuit court denied the motion, and Sargent pursued a direct appeal of his convictions pursuant to WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30 (2007-08).¹ This court summarily affirmed. *See State v. Sargent*, No. 1998AP1090-CR, unpublished slip op. (Wis. Ct. App. Dec. 27, 1999) (*Sargent I*). In 2000, Sargent filed a *pro se* postconviction motion pursuant to WIS. STAT. § 974.06, challenging his convictions and seeking a new trial. The circuit court denied the motion, and this court affirmed. *See State v. Sargent*, No. 2001AP0590, unpublished slip op. (WI App. Aug. 13, 2002) (*Sargent II*).

¶4 On April 16, 2009, Sargent filed the postconviction motion underlying this appeal. He asserted that the circuit court erroneously exercised its discretion by imposing consecutive rather than concurrent sentences. He also contended that new factors warrant sentence modification. The circuit court denied the motion, and this appeal followed.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

DISCUSSION

¶5 Sargent argues that the circuit court erroneously exercised its sentencing discretion by imposing consecutive sentences. In his view, the sentences are unduly harsh. His arguments are untimely.

¶6 Pursuant to WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30, a defendant may raise any grounds for postconviction relief from a sentence within the time limits for a direct appeal. Sargent exhausted his direct appeal rights in *Sargent I*, and the appellate time limits of § 974.02(1) and RULE 809.30 thus expired long before he filed his most recent motion.

¶7 A defendant who does not pursue a direct appeal may challenge a sentence within ninety days of sentencing pursuant to WIS. STAT. § 973.19(1)(a). For such a defendant, § 973.19(1)(a) “provides the mechanism for asserting an erroneous exercise of discretion based on excessiveness, undue harshness, or unconscionability.” *State v. Noll*, 2002 WI App 273, ¶10, 258 Wis. 2d 573, 653 N.W.2d 895. Sargent may not proceed under § 973.19(1)(a), both because he pursued a direct appeal and because the deadline imposed by that statute passed many years ago. Thus, his arguments that the circuit court erroneously exercised its sentencing discretion are time-barred.

¶8 Sargent contends, however, that the circuit court has inherent power to modify his sentences on the basis of alleged new factors. A motion to modify a sentence based on new factors is not governed by a time limitation and may be made at any time. *Noll*, 258 Wis. 2d 573, ¶12.

¶9 As new factors, Sargent alleges that the sentencing court imposed consecutive sentences for multiplicitous charges, overlooked evidence of his

substance abuse, and considered evidence of his other sexual misconduct.² He also contends that media attention to his case influenced the circuit court's sentencing decisions. These arguments do not demonstrate the existence of any new factors.

¶10 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. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (citation omitted). Additionally, a new factor “must be an event or development which frustrates the purpose of the original sentence.” *State v. Champion*, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242 (citation omitted).

¶11 When pronouncing sentence in this case, the circuit court explained that Sargent's conduct was “reprehensible” and that he needed “to learn what's right and what's wrong.” The court further stated that the sentence imposed would “protect the community and also punish the defendant.” The factors that Sargent identifies as “new” do not in any way frustrate the stated purposes of the sentences.

¶12 WISCONSIN STAT. § 974.06 is a potential alternate avenue for Sargent to pursue relief from his sentences. The statute permits defendants to raise constitutional and jurisdictional claims after the time for an appeal has passed. *State v. Evans*, 2004 WI 84, ¶¶32-33, 273 Wis. 2d 192, 682 N.W.2d 784,

² The circuit court correctly noted at sentencing that it had the right “to consider what happened in other cases.” See *State v. Leitner*, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341 (sentencing court may consider offenses that are uncharged and unproven and facts underlying offenses for which defendant was acquitted).

abrogated on other grounds by State ex rel. Coleman v. McCaughtry, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. Sargent, however, is procedurally barred from raising challenges under § 974.06. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Claims that could have been raised in a direct appeal or an original postconviction motion are procedurally barred in later litigation absent a sufficient reason for failing to raise the issues earlier. *Id.* at 181-82; *see also* WIS. STAT. § 974.06(4) (“Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived ... in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion,” absent sufficient reason.).

¶13 Sargent pursued both a direct appeal and a later postconviction motion. He offers no reason, much less a sufficient reason, that he could not have raised all of his constitutional challenges to his sentences during those earlier proceedings. Accordingly, he is procedurally barred from pursuing any claims under WIS. STAT. § 974.06, in the instant litigation. *See Escalona-Naranjo*, 185 Wis. 2d at 181-82.

By the Court.—Order affirmed.

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

