COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 1997

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. 96-1054-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK DREW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J. and Vergeront, J.

PER CURIAM. Mark Drew appeals from a judgment and an order sentencing him to an indeterminate term of up to four years' imprisonment resulting from a jury finding that he was guilty of manufacturing and delivering THC, contrary to § 161.41(1)(h), STATS., as a habitual criminal, contrary to § 939.62, STATS. For the reasons set forth below, we affirm.

BACKGROUND

On or about April 13, 1994, Drew sold Roger Hein a quarter of a pound of marijuana. Hein was arrested, agreed to cooperate with authorities, and gave a statement implicating Drew. In late 1994, Hein pleaded guilty to, and was convicted of, dealing in marijuana.[1] In May 1995, charges were brought against Drew for the sale to Hein. Thereafter, Drew moved to dismiss the charges against him on the grounds that the thirteen-month charging delay created "actual prejudice" and was for an improper tactical purpose. The court denied the motion. Before this court, Drew argues that the circuit court erred in denying his motion to dismiss the complaint because of excessive preaccusatory delay, that a new trial is required in the interest of justice, and that the court erroneously exercised its discretion in sentencing Drew to four years' imprisonment. We disagree.

DELAY

In order to prevail, Drew would have to show both[2] that he has suffered actual prejudice and that the delay arose from an improper motive or purpose, such as to gain a tactical advantage over the accused. ***State v. Wilson***, 149 Wis.2d 878, 905, 440 N.W.2d 534, 544 (1989). All parties agree that the delay occurred because prosecutors wanted Roger Hein's[3] time to appeal to have run before charging Drew, in order to prevent Hein from asserting his Fifth

[1] In early 1995, another man, Eli Shedivy, was also convicted of dealing marijuana. It appears from the record that Shedivy was a witness against Drew at Drew's subsequent trial, necessary to establish chain-of-custody matters.

[2] Drew argues that the test is disjunctive. However, his argument is based on older case law, and he does not explain why a disjunctive test remains good law after ***Wilson***.

[3] Apparently, Shedivy's time for appeal was also allowed to run before charges were brought against Drew.

Amendment right to prevent self-incrimination. The trial court found that the thirteen-month delay was "actually prejudicial," but concluded that the State's motive was proper.

Drew argues that the delay was "improper" for the prohibited purpose of gaining a tactical advantage over him. However, as the State argues, Drew's definition of "tactical" as working in some manner to the government's advantage is broad enough to encompass many actions that are not objectionable. Contrary to Drew's assertion, the test is not whether an advantage is gained, but whether the delay was created to obtain a "sinister" advantage or to hold a "club" over the defendant's head. *See* ***State v. Davis***, 95 Wis.2d 55, 62 n.5, 288 N.W.2d 870, 873 (Ct. App. 1980). Examples of such unfair advantages include deliberately withholding charges to harass or punish the defendant. ***Id***. at 62, 288 N.W.2d at 873. By contrast, delay has specifically been found acceptable to permit further investigation or to permit the appearance of a key witness. *See* ***United States v. Lovasco***, 431 U.S. 783, 796 (1977) (investigation); ***Barker v. Wingo***, 407 U.S. 514, 531 (1972) (availability of witness). Because a thirteen-month delay to obtain testimony from key witnesses is not improper, we reject Drew's argument.

INTEREST OF JUSTICE

Drew argues that his conviction must be reversed and the charges dismissed in the interest of justice. However, this argument relies on his previous argument that the delay was improper. Because we conclude that there was no improper delay, we need not consider this argument further. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (this court need not address other issues when one is dispositive).

SENTENCING

Drew argues that the circuit court erred in sentencing him to four years' imprisonment. However, Drew failed to raise this argument before the circuit court. Issues not raised before the trial court will not be considered for the first time by this court. ***Zeller v. Northrup King Co.***, 125 Wis.2d 31, 35, 370 N.W.2d 809, 812 (Ct. App. 1985).[4] *See also* ***Sears v. State***, 94 Wis.2d 128, 140, 287 N.W.2d 785, 790-91 (1980) (defendant who failed to move trial court for sentence modification lost the right to appellate court review absent compelling circumstances).[5]

[4] Citing § 973.19(1)(a), STATS., Drew incorrectly argues that a motion for sentence modification may be brought only as an alternative to appeal. Paragraph (1)(a) applies to those litigants who are not bringing an appeal, yet wish to move for sentence modification. By contrast, paragraph (1)(b) makes clear that a litigant, like Drew, who is planning an appeal (i.e., one who has ordered transcripts) "may move for modification of a sentence ... under s. 809.30(2)(h)." RULE 809.30(2)(h), STATS., in turn, provides that a postconviction motion seeking relief must be filed within sixty days of the service of transcripts.

[5] In support of his argument that he received a disproportionate sentence, Drew attaches Hein's and Shedivy's judgments of conviction. However, these were not made part of the record before the circuit court in Drew's case, and we therefore do not consider them. To the extent that Hein's and Shedivy's sentences were orally brought to the circuit court's attention at Drew's sentencing hearing, no argument was made as to why Drew was similarly situated to either Hein or Shedivy.

By the Court.—Judgment and order affirmed.

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