

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 30, 1998

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. 97-0553**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**OSVALDO R. DURRUTHY,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Dane County:  
GEORGE NORTHRUP, Judge. *Affirmed.*

Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Osvaldo R. Durruthy appeals from an order denying his motion for sentence modification. We affirm.

Durruthy pled no contest to several crimes, including possession of cocaine with intent to deliver, second offense, and while possessing a dangerous

weapon. The underlying crime carried a potential penalty of thirty years in prison. The court sentenced Durruthy to twenty years.

On appeal, Durruthy argues that he should be resentenced due to the holding in *State v. Peete*, 185 Wis.2d 4, 517 N.W.2d 149 (1994), which required that a nexus be shown between the underlying offense and the possession of the weapon. He argues that such a nexus could not be shown in his case, and therefore the weapon penalty enhancer is inapplicable.

We reject the argument because the sentencing court sentenced Durruthy to less than the maximum amount on the underlying charge, and therefore the enhancer was not used in setting his sentence. *See State v. Harris*, 119 Wis.2d 612, 350 N.W.2d 633 (1984) (holding that enhancer penalties are not available unless maximum sentence is imposed). Therefore, even if we agreed that the enhancer is inapplicable, there would be no grounds to change his sentence. Furthermore, the sentence on this count is being served concurrently with other sentences which would not be affected by this argument.

*By the Court.*—Order affirmed.

This opinion will not be published.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



