

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 28, 2006**

Cornelia G. Clark  
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. 2005AP000290-CR**

**Cir. Ct. No. 2002CF000280**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DELAVAGO K. MOORE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Delavago Moore appeals from a judgment of conviction and an order denying a motion to modify his sentence. He argues that the circuit court erroneously exercised its discretion when it sentenced him and

when it denied his motion for sentence modification. Because we conclude that the motion for sentence modification was not timely, we affirm the judgment and order of the circuit court.

¶2 Moore pled guilty to robbery. On March 20, 2003, the court sentenced him to four years of initial confinement and four years of extended supervision. He appealed, but then voluntarily dismissed the appeal. On December 27, 2004, Moore filed a motion for sentence modification. The circuit court denied the motion, finding that it was not timely.

¶3 Moore argues to this court that the sentencing court erroneously exercised its discretion for a variety of reasons when it sentenced him. In ruling on the motion that is the subject of this appeal, the circuit court did not address Moore's substantive challenge to his sentence because it concluded that the motion was not timely. We agree that the motion was untimely. Under WIS. STAT. § 973.19(1) (2003-04),<sup>1</sup> a defendant must bring a motion to modify sentence when he or she has not ordered transcripts within ninety days of sentencing, § 973.19(1)(a), or when transcripts have been ordered, within the deadlines established by WIS. STAT. RULE 809.30(2)(h). Moore did not file his motion within the deadlines established by statute, and hence his motion was untimely.

¶4 Even had Moore moved to extend the postconviction motion deadlines and properly presented his challenges to this court, we would affirm. An appellate court's review of sentencing is quite limited: sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

interference with the discretion. *State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *Id.* The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for the protection of the public. *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The discretion of the sentencing judge must be exercised on a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The weight to be given the various factors is within the trial court’s discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶5 In this case, the sentencing court considered all of the appropriate factors, and imposed a sentence that was within the maximum allowed by law. Moore argues that the sentencing court improperly considered that he had complained about one of his lawyers, and that he pled guilty rather than going to trial. Moore misconstrues the court’s remarks. The court’s comments showed Moore’s familiarity with the judicial process. Further, the court stated that since Moore entered his guilty plea after the start of the trial, the court would not give him consideration for saving the State the cost of trial. These statements were not improper. Consequently, we affirm the judgment and order of the circuit court.

*By the Court.*—Judgment and order affirmed.

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

