

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 9, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0530-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TALIB AMIN AKBAR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
RICHARD J. DIETZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Talib Amin Akbar appeals an order denying his motion to modify a sentence originally imposed in 1995. Akbar argues that the sentence was unlawfully amended and enhanced without proper notice. Based on *State v. Prihoda*, 2000 WI 123, 618 N.W.2d 857, we agree with Akbar that the

deputy clerk did not have the authority to correct the sentence portion of the written judgment of conviction. But, because Akbar has had his challenge to the correction of the written judgment considered by the circuit court and by this court, we affirm.

BACKGROUND

¶2 Akbar was convicted of two counts of sexual assault, in violation of WIS. STAT. § 940.225(2)(g) (1995-96).¹ At sentencing on March 16, 1995, the trial court imposed a ten-year sentence on each count and ordered that the two counts be served consecutively. The deputy clerk of circuit court entered one judgment of conviction for each count. The judgment on the second count failed to state that the sentence was to be served consecutive to the first count. Instead, the judgments each stated that Akbar was sentenced to prison for ten years, effectively making the two sentences concurrent. *See* WIS. STAT. § 973.15(2)(a) (1995-96). The judgment of conviction on the second count was amended on March 20 of either 1995 or 1996 to state that the sentence was to be served consecutive to the sentence on the first count.

¶3 In 1999, Akbar brought a motion in the circuit court to modify sentence. Akbar alleged that a year after his 1995 sentencing, a deputy clerk, without notice to the parties, illegally entered an amended judgment on the second count of sexual assault. The amendment changed the ten-year sentence from concurrent to consecutive. Akbar alleged he did not learn of the change until he saw it mentioned in his prison file in June of 1999.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

¶4 The circuit court treated Akbar's motion as seeking a modification of sentence on the basis of a new factor warranting sentence modification. After reviewing the record, the circuit court found that the deputy clerk prepared the amended judgment of conviction on March 20, 1995, and made it *nunc pro tunc*. The court additionally found that the clerk's March 20, 1996, dating of the amended judgment was error.² The circuit court denied Akbar's motion because the amended judgment of conviction merely reflected the trial court's actual pronounced sentence and did not illegally lengthen Akbar's sentence. Akbar appealed.

¶5 We originally held that the amended judgment merely reflected the actual pronounced sentence, and any failure by the clerk to notify the parties was harmless error. We concluded there was no new factor that would result in a modification of sentence. *State v. Akbar*, No. 00-0530-CR (Wis. App. Sept. 6, 2000) (per curiam). By order dated December 12, 2000, the supreme court summarily vacated our decision and remanded for further consideration in this court in light of *Prihoda*.

DISCUSSION

¶6 In *Prihoda*, the supreme court held that the circuit court and not the clerk of circuit court has the authority to determine the merits of a request for a correction in the sentence portion of a written judgment of conviction. *Id.* 2000 WI 123 at ¶5. Additionally, the circuit court has discretion to determine whether

² The trial court, in denying Akbar's motion for sentence modification, ruled that the deputy clerk amended the judgment on March 20, 1995. However, the State concedes in its brief that the likely date the judgment was amended was on March 20, 1996. In any event, this discrepancy does not affect our analysis.

the defendant is entitled to notice and a hearing before the correction of a clerical error in the sentence portion of the written judgment of conviction is made. *Id.* at ¶6.

¶7 In *Prihoda*, a discrepancy between an oral pronouncement of sentence and the written judgment of conviction was discovered over twenty years after the sentence was imposed. *Id.* at ¶12. The clerk corrected the sentence portion to correspond to the circuit court’s oral pronouncement of sentence in the sentencing transcript. Prihoda was then notified of the correction. *Id.* at ¶13. Prihoda filed a postconviction motion seeking to vacate the corrected judgment. The circuit court denied the motion.

¶8 The supreme court in *Prihoda* adopted a bright-line rule that the clerk of circuit court, acting independently of the circuit court, has no authority to correct a clerical error in the sentence portion of a written judgment of conviction. *Id.* at ¶18. Only the circuit court may correct the clerical error or direct the clerk to do so. *Id.* at ¶17.

¶9 The supreme court also decided that the circuit court has the discretion to determine whether to provide the defendant notice and a hearing before the clerical error is corrected. *Id.* at ¶29. In doing so, “[t]he circuit court may consider such factors as the nature of the request, the state of the record, the ease by which the determination can be made that a clerical error occurred, issues of equity, and the risk and cost of transporting the offender for the purpose of attending the hearing.” *Id.* at ¶31. The supreme court upheld the denial of Prihoda’s postconviction motion because his challenges to the correction of a clerical error in his written judgment of conviction had been fully considered. *Id.* at ¶8.

¶10 Applying *Prihoda* to the present case, we conclude that the deputy clerk of circuit court did not have the authority to amend the sentence portion of Akbar's written judgment of conviction. *See id.* at ¶26. However, Akbar has had his day in court and his challenges to the correction have been fully considered. The circuit court determined that the deputy clerk of circuit court erroneously entered Akbar's sentence on the original written judgment of conviction. However, the circuit court also found that the amended written judgment of conviction correctly reflected the actual pronounced sentence. The circuit court then denied Akbar's motion.

¶11 Thus, Akbar, like Prihoda, has already had his challenges to the correction of the judgment considered by the circuit court and by this court. Akbar, like Prihoda, has had his day in court. Akbar, like Prihoda, therefore, is not entitled to remand to consider an issue already heard and decided. Accordingly, the order is affirmed.

By the Court.—Order affirmed.

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

