COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2926-CR **Cir. Ct. No. 2001CF4831**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE G. SANTIAGO,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Jose G. Santiago, *pro se*, appeals an order denying his motion to modify his sentence. He challenges the DNA surcharge imposed by the circuit court, arguing that the court failed to adequately explain why it was

imposed. *See* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (when the circuit court exercises discretionary power to impose a DNA surcharge, it must explain its reasons for doing so). We affirm.

¶2 Santiago was convicted of first-degree intentional homicide in 2002. After a direct no-merit appeal and three subsequent *pro se* postconviction motions, including two appeals taken from the circuit court's orders denying those motions, Santiago filed the current motion, arguing for a second time a DNA surcharge should not have been assessed against him. Santiago contends that he should be allowed to bring this challenge to his sentence nearly nine years after his conviction, despite all of his prior motions, because it is based on a "new factor," the ***Cherry*** case decided by our court in 2008. A motion for sentence modification based on a "new factor" can be made at any time. ***State v. Noll***, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895. "The term 'new factor' refers to 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. Kluck***, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997).

¶3 Our recent decision in ***Cherry*** does not qualify as a new factor. The supreme court has previously held that a post-sentencing change in the law is not a new factor for purposes of sentence modification because it is not highly relevant to the imposition of the original sentence. *See* ***State v. Trujillo***, 2005 WI 45, ¶30, 279 Wis. 2d 712, 694 N.W.2d 933 (a reduction in the maximum confinement time made in the truth-in-sentencing law does not constitute a new factor because the change was not highly relevant to the imposition of the original sentence). While our decision in ***Cherry*** is not so much a change in the law as it is an application of existing law in a particular fact situation, even if it could be characterized as a

"change" in the law, the ***Cherry*** court's ruling that the circuit court did not adequately explain its sentencing decision in *that* case was not highly relevant to the circuit court's sentencing decision, made years earlier, in *this* case. Since Santiago has not shown that a new factor exists, his motion to modify his sentence is untimely.

By the Court.—Order affirmed.

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