

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2005

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 Nos. 04-1504-CR
04-1505-CR
STATE OF WISCONSIN**

**Cir. Ct. Nos. 01CF000011, 01CF001562,
01CF006052**

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REGINALD E. SIMS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JEFFREY A. CONEN, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Reginald E. Sims appeals¹ from orders denying his motions for sentence modification. Sims requested sentence modification to

¹ This court consolidated these appeals on September 1, 2004.

address alleged misconduct that occurred at sentencing, to reward him for his favorable adjustment to incarceration, and to remedy the absence of treatment programs in the prison system to cure his gambling addiction. Because Sims's claim alleging prosecutorial misconduct is barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and his claims regarding his adjustment and prison programming lack legal merit, we affirm the circuit court's orders.

¶2 Sims pled guilty to two counts of forgery, one count of felony bail jumping and one count of robbery by threat of force. The circuit court imposed sentences totaling fifteen years of imprisonment, comprised of six years of initial confinement followed by nine years of extended supervision, with a consecutive term of five years of probation.

¶3 Sims did not appeal from the judgments of conviction, but rather filed a series of postconviction motions seeking modification of his sentences. Sims's first postconviction motion was filed on July 9, 2002, in the robbery case.² The circuit court denied the motion on August 21, 2002. On September 30, 2002, Sims filed a second motion to modify the sentences imposed in the three underlying criminal cases. The motion was denied and Sims appealed. This court affirmed the circuit court in *State v. Sims*, No. 02-2914-CR and 02-2915-CR, unpublished slip op. (WI App Jan. 20, 2004). The Wisconsin Supreme Court denied Sims's petition for review on March 23, 2004.

¶4 On May 7, 2004, Sims filed his third motion for sentence modification, arguing that the prosecutor engaged in misconduct at the sentencing

² The robbery case underlies appeal no. 04-1505.

hearing when he informed the circuit court of certain uncharged acts allegedly committed by Sims. Sims followed up with a supplemental postconviction motion filed the same day, alleging he was entitled to sentence modification due to his favorable adjustment to imprisonment and the absence of rehabilitation programs in prison to address his gambling addiction. The circuit court denied both motions on May 10, 2004, and Sims appeals.

¶5 The record supports the State’s assertion that Sims’s third motion for sentence modification—a motion asserting prosecutorial misconduct at sentencing—is barred by *Escalona-Naranjo*. The prosecutor’s conduct was known to Sims at the time of his initial postconviction motion in 2002 and could have been raised then. Sims’s contention that his tardy prosecution of this claim is excused because his counsel was dealing with charges against Sims filed in Waukesha County, is without merit as these matters are unrelated. Sims has waived his right to its review by failing to raise it in his initial motion or stating a legally sufficient reason for raising it now. *See Escalona-Naranjo*, 185 Wis. 2d at 185, and WIS. STAT. § 974.06(4). Accordingly, we hold that the circuit court properly denied Sims’s third postconviction motion.

¶6 Sims’s challenge to the circuit court’s denial of his supplemental motion for sentence modification also fails. Sims’s supplemental motion alleged that he was entitled to sentence modification due to his favorable adjustment to incarceration and the absence of treatment within the corrections system for his gambling addiction. Neither ground amounts to a “new factor.” *See State v. Franklin*, 148 Wis. 2d. 1, 8, 434 N.W.2d 609 (1989) (“new factor” must be “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, even though it was then in existence, it was unknowingly

overlooked by all of the parties’”) (citations omitted). Institutional conduct and evidence of rehabilitation do not constitute a new factor. *See, e.g., State v. Kluck*, 210 Wis. 2d 1, 7-9, 563 N.W.2d 468 (1997). And, as the circuit court stated so succulently in its May 10 order, “the lack of resources in the prison system is not a reason to modify a sentence.”

By the Court.—Orders affirmed.

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

