

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 25, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0926-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CURTIS L. GOLSTON,

Defendant-Appellant.

APPEAL from an order of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

SNYDER, J. Curtis L. Golston appeals from a trial court order denying his pro se motion for sentence modification.¹ Golston raises a number of legal issues challenging the imposition of sentence, including: (1) a statutory time bar to the filing of the complaint; (2) that the criminal complaint

¹ Golston currently has another appeal pending in this case, No. 96-0655-CR-NM, filed by appellate counsel, which is taken from two judgments of conviction and an order denying postconviction relief.

was invalid because he was in prison when the complaint was made; (3) that the trial court's denial of a substitution of judge "forced" him to plead no contest; (4) that the trial court relied on improper factors when it considered certain information contained in the presentence report; (5) that he was improperly sentenced as a repeater; and (6) that he was advised by a correctional facility social worker that he could send a letter to his former wife and therefore did not knowingly violate the injunction. Because we conclude that the first five issues are not properly brought under a request for sentence modification, and that the final issue is not a new factor within the meaning of *Rosado v. State*, 70 Wis.2d 280, 234 N.W.2d 69 (1975), we affirm the trial court.

The procedural status of the case is key to understanding this appeal.² Golston was convicted of two counts of violating a restraining order.³ Following his convictions, Golston filed a notice of intent to pursue postconviction relief and was appointed counsel. With the assistance of counsel, Golston has pursued various claims for postconviction relief. However, during the pendency of those proceedings, Golston himself has filed several pro se motions requesting sentence modification. The most recent of Golston's pro se motions for sentence modification is the subject of this appeal.

² The record filed in this appeal consisted of Golston's pro se motion for sentence modification, the trial court's denial of that motion and the notice of appeal. Because this motion must be addressed within the context of the entire case, we have reviewed the record of No. 96-0655-CR-NM, and we take judicial notice of that record.

³ The first trial resulted in a conviction on one count and a hung jury with regard to the second count. Before retrial on the second count, Golston made a plea agreement and pled no contest. The separate judgments of conviction were entered on October 6 and December 15, 1994.

On January 19, 1996, while Golston was awaiting the trial court's decision on a motion for postconviction relief filed by appellate counsel, Golston filed a pro se "MOTION FOR RECONSIDERATION OF POSTCONVICTION RELIEF BASED ON NEW FACTORS" with this court. We directed this motion to the attention of his appellate counsel. On February 9, 1996, Golston filed an amended motion for sentence modification, again directed to this court. The resulting order from this court stated that such motions were properly directed to the trial court. After the trial court denied Golston's subsequent pro se motion, concluding that it presented no new factors for consideration, this appeal followed.

There are three bases upon which an individual can seek sentence modification. Under § 973.19(1)(a), STATS., a person who does not seek to appeal any other issue can make a motion to the trial court for a modification of sentence. See § 973.19(5). If, however, an individual has other issues to raise in an appeal, § 973.19(1)(b) requires that the request for sentence modification be brought under § 809.30(2)(h), STATS. The request for sentence modification then becomes a part of the individual's request for postconviction relief and/or any subsequent appeal.

The only other means of seeking sentence modification is through the demonstration of a new factor. See *State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). A trial court may, in its discretion, modify a criminal sentence based upon a showing of a new factor. *State v. Michels*, 150 Wis.2d 94, 96, 441 N.W.2d 278, 279 (Ct. App. 1989). Whether a set of facts is a new

factor is a question of law which we review without deference to the trial court. *Id.* at 97, 441 N.W.2d at 279.

A new factor is a fact, or a set of facts, highly relevant to the sentence imposed, but not known by the judge at the time of sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. *Rosado*, 70 Wis.2d at 288, 234 N.W.2d at 73. If the defendant successfully demonstrates the existence of a new factor, the court must then determine whether the new factor justifies modification of the sentence. *See Michels*, 150 Wis.2d at 96-97, 441 N.W.2d at 278. This determination is committed to the discretion of the circuit court. *Id.* at 97, 441 N.W.2d at 278.

An examination of the challenges Golston presents reveals that only one need be considered under the new factor test. The other issues, as we understand them, all ask the court to correct his sentence because of due process violations or that the sentence imposed was in violation of the law. These issues are governed by § 974.06, STATS., not by the new factor test. *See State v. Coolidge*, 173 Wis.2d 783, 788, 496 N.W.2d 701, 704-05 (Ct. App. 1993).

As issues properly raised under § 974.06, STATS., they are precluded by the fact that Golston currently has an appeal pending before this court from the same case. That appeal, filed by his appellate counsel, is No. 96-0665-CR-NM. As we stated in *State v. Redmond*, No. 94-1544-CR, slip op. at 11 (Wis. Ct. App. June 12, 1996, ordered published July 29, 1996), “[T]he plain language of § 974.06, STATS., precludes a defendant from bringing a motion for

postconviction relief under that statutory section before the conclusion of any proceedings related to a [pending appeal brought under § 974.02, STATS.].” Golston's pending appeal is brought under § 974.02, and thus the § 974.06 issues in this appeal are subject to the *Redmond* bar.

The single remaining issue Golston brings before this court is his claim that the testimony of a social worker would exonerate him of the charged violation. According to Golston, a social worker at the Racine Correctional Institution gave him permission to write to his wife, and therefore, he did not knowingly violate the restraining order. Golston claims that he inquired whether he could write the letter “because I wasn't sure if the restraining order was still in effect ... and Mr. Feldman told me that he could think of [no] reasons why I couldn't.”

The trial court determined that this information failed to satisfy the new factor test under *Rosado*. We agree. This evidence was in existence both at the time of trial and at sentencing. Golston himself testified as to this issue at trial:

I wasn't for certain that the injunction was still in effect. I knew that she had taken out a restraining order, but at the time I wrote, I didn't know whether the restraining order was still in effect because of her visit to the institution. That gave me the impression ... since they allowed her to come in and visit me, that perhaps there was no more injunction.

While the social worker did not testify at trial, Golston's testimony at trial clearly indicates that he submitted this as an issue through his testimony. The trial court was aware that Golston was confused as to whether the injunction

was still in effect. The presentation of additional evidence relating to this is not a new factor under *Rosado*.

We affirm the trial court's denial of Golston's motion for sentence modification. We conclude that Golston is barred from raising issues that are properly brought through a § 974.06, STATS., motion during the pendency of an appeal. Furthermore, the testimony of the social worker does not satisfy the new factor requirements of *Rosado*.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.