

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 27, 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. 96-2218-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES E. JONES,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County:
MARK A. FRANKEL, Judge. *Affirmed.*

VERGERONT, J.¹ James E. Jones appeals from a judgment imposing a sentence for one count of misdemeanor battery in violation of § 940.19(1), STATS., as a repeater. Jones pleaded no contest and was placed on probation. After his probation was revoked he was resentenced to twenty months in the Wisconsin State Prison System, to be served consecutive to a sentence of twenty months for another conviction for misdemeanor battery as a repeater imposed in another case.² Jones contends on appeal that the trial court

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

erroneously exercised its discretion in sentencing him because the court was under the mistaken impression that it was sentencing Jones for a more serious offense, a Class E felony battery under § 940.19(2), STATS.

We do not reach the merits of Jones' appeal because we agree with the State that his failure to raise this issue before the trial court precludes him from raising it on appeal. Jones is asking that his sentence be modified because the trial court erroneously exercised its discretion. He must bring a motion for modification in the trial court as a prerequisite to his appeal. *State v. Meyer*, 150 Wis.2d 603, 604, 442 N.W.2d 483, 484 (Ct. App. 1989). He did not do so. He did bring a postconviction motion to vacate his sentence on the ground that the State failed to prove the prior convictions that supported the repeater enhancement, and the trial court denied the motion. However, that motion did not mention modification of the sentence based on the trial court's erroneous exercise of discretion, and nothing in the record indicates that such a motion was brought.

The importance of first bringing a motion to modify a sentence in the trial court is vividly illustrated by this case. Jones argues that certain of the trial court's comments indicate that it was mistaken about the crime for which it was imposing punishment. Yet the trial court has had no opportunity to consider whether it was mistaken and, if so, to consider whether it should modify the sentence accordingly.

Because Jones has failed to take the steps necessary in the trial court to raise the issue on appeal, we affirm the sentence.

By the Court.—Judgment affirmed.

(. . . continued)

² There were two separate cases before the trial court, 93-CF-1870 and 94-CM-245, and in each Jones pleaded no contest to one count of misdemeanor battery as a repeater. Jones was initially placed on probation in both, probation was revoked in both, and sentences were imposed in both at the same sentencing hearing. The twenty-month sentence imposed in 93-CF-1870 was to be served consecutive to the sentence Jones was then serving, and the twenty-month sentence imposed in 94-CM-245 was to be served consecutive to the 93-CF-1870 sentence. Each case has proceeded separately on appeal. This appeal concerns 94-CM-245.

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