

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 24, 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 No. 2004AP1395-CR

Cir. Ct. No. 1986CF6680

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CARL J. JOHNSON, JR.,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Carl J. Johnson, Jr., appeals from a circuit court order denying his motion for sentence modification. Johnson requested sentence modification, arguing that an alleged change in parole policy constituted a new

factor warranting such relief. Johnson also argued that the change in parole policy violated the prohibition against *ex post facto* laws and the equal protection and due process clauses of the United States Constitution. The circuit court denied the motion, concluding it was barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 169, 178, 517 N.W.2d 157 (1994). Because the circuit court properly concluded that *Escalona* barred Johnson's motion to modify his sentence, we affirm the circuit court's order.

¶2 Johnson was convicted on February 16, 1988, of two counts of first-degree sexual assault, one count of false imprisonment, and one count of taking a hostage, all while armed with a dangerous weapon. The circuit court subsequently sentenced Johnson to concurrent and consecutive sentences totaling forty-five years of imprisonment.

¶3 In 1992, Johnson moved the court for sentence modification or a new trial. One of his claims asserted that a change in parole policy implemented after he was sentenced adversely affected his eligibility for discretionary parole. The circuit court denied the motion and Johnson appealed. This court affirmed the circuit court's order in an unpublished decision, *State v. Johnson*, No. 92-2023-CR, unpublished slip op. (Wis. Ct. App. May 4, 1993). Our decision held that the circuit court had not erroneously exercised discretion at Johnson's sentencing. *Id.* at 4-5. We also determined that a change in parole policy did not entitle Johnson to sentence modification unless parole policy was actually considered by the circuit court at Johnson's sentencing hearing. *Id.* at 6. We concluded that the "record does not show that parole policy was a factor that the trial court considered when sentencing the defendant. Thus, Johnson's sentence will not be modified on that ground." *Id.*

¶4 On November 26, 2003, Johnson again moved the circuit court for sentence modification. Johnson argued that parole policy had changed again. As proof of an alleged change in parole policy, Johnson pointed to a letter from former Governor Tommy G. Thompson to former Department of Corrections Secretary Michael J. Sullivan, instructing him to “pursue any and all available legal avenues to block the release of violent offenders who have reached their mandatory release date.” The letter went on to state that “[t]he policy of this Administration is to keep violent offenders in prison as long as possible under the law.” Johnson argued that this alleged change in parole policy amounted to a new factor under *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989), entitling him to resentencing. He also contended that the letter amounted to a policy violating the prohibition against *ex post facto* laws. Finally, Johnson also complained that he was treated differently from prisoners sentenced under “Truth in Sentencing” and that the sentences imposed on him were unduly harsh.

¶5 The circuit court denied the motion in a written order entered December 12, 2003. The circuit court rejected Johnson’s second and third claims, concluding that neither was actionable in the context of a motion for sentence modification. The circuit court also rejected Johnson’s first claim, determining that the change in parole policy alleged by Johnson was not a new factor warranting resentencing because Johnson’s sentences were not premised on the sentencing court’s expectation that Johnson would be paroled prior to reaching his mandatory release date. The circuit court relied on *Franklin*, 148 Wis. 2d at 14, where the Supreme Court wrote: “The sentencing court did not sentence Franklin with the expectation that he would receive an early parole. It sentenced Franklin with the goal of protecting society. We conclude that a change in parole policy cannot be relevant to sentencing unless parole policy was actually considered by

the circuit court.” The circuit court rejected Johnson’s complaint that his sentences were too harsh on its merits.

¶6 Johnson subsequently moved the court to reconsider its order. The circuit court denied the motion on January 14, 2004.

¶7 Undeterred, Johnson filed another motion for sentence modification on April 27, 2004. The motion renewed Johnson’s contention that former Governor Thompson’s April 28, 1994, correspondence to former Secretary Sullivan amounted to a change in parole policy that constituted a new factor warranting his resentencing. He also argued that the alleged change in parole policy violated the prohibition against *ex post facto* laws and the equal protection and due process clauses of the United States Constitution.

¶8 The circuit court denied the motion, explaining:

On April 27, 2004, the defendant filed a second *pro se* motion to modify sentence after filing two separate motions to reconsider the court’s decision denying his first motion to modify sentence. I already considered the defendant’s argument related to the change in parole policy and decline to revisit this issue. Moreover, anything the defendant has set forth in his current motion could have been raised in his first motion. To the extent that he did not raise an argument in his prior motion, the argument is deemed waived. See State v. Escalona-Naranjo, 185 Wis.2d 169, 178 (1994) (defendant must raise all grounds for postconviction relief in his original motion or appeal).

This appeal followed.

¶9 When a claim was raised in a prior motion for sentence modification, denied by the circuit court and not appealed, the claim may not be relitigated. *State v. Crockett*, 2001 WI App 235, ¶12, 248 Wis. 2d 120, 635 N.W.2d 673. It follows that Johnson may not raise claims that he raised in a prior

motion for sentence modification. To the extent that Johnson seeks to raise new issues supporting his request for sentence modification, the new claims are barred because Johnson failed to show a sufficient reason for not raising these arguments in his prior motion for sentence modification. *See Escalona-Naranjo*, 185 Wis. 2d at 181-82.

¶10 Even if Johnson’s arguments regarding the alleged change in parole policy were cognizable, we would reject them. A change in parole policy “cannot be relevant to sentencing unless parole policy was actually considered by the circuit court.” *Franklin*, 148 Wis. 2d at 14. This court and the circuit court have both previously concluded that nothing in the sentencing record shows that parole policy was a factor in the trial court’s calculus. Our review of the sentencing transcript confirms the circuit court’s and our prior determinations. It follows that the circuit court’s order denying Johnson’s current motion for sentence modification must be affirmed.

By the Court.—Order affirmed.

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

