

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 07, 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. 2004AP1750-CR

Cir. Ct. No. 1997CF970522

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT ANTHONY JOSHUA,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Robert Anthony Joshua, *pro se*, appeals from an order denying a motion to modify sentence premised upon a new factor. Because we agree with the circuit court that no new factor exists, we affirm.

¶2 On January 27, 1998, the circuit court, the Honorable Dennis P. Moroney presiding, sentenced Joshua to five years of imprisonment for robbery. In pronouncing sentence, Judge Moroney stated “[t]he Court is going to give you five years in the Wisconsin State prison system consecutive to any and all other period of incarceration being given in this or any other sentence.”

¶3 In 1991, Joshua had been sentenced in circuit court case No. F-903525.¹ In that case, the court imposed an eight-year sentence for Count One and a seven-year sentence for Count Two. The sentence for Count Two was stayed, and the court placed Joshua on probation. The sentence for Count Two was to be served consecutively to the sentence for Count One.

¶4 Joshua states that he was paroled on April 16, 1996. After his January 27, 1997 arrest on the robbery charge, Joshua’s parole was revoked on April 1, 1997, and he was returned to prison to serve the two years and twenty-nine days remaining on the eight-year sentence for Count One.

¶5 Joshua was paroled for a second time in 2002 and subsequently revoked. In 2004, Joshua filed a motion to modify the five-year sentence imposed in 1998 for robbery. Joshua argued that a new factor that frustrated the intent of the sentencing court existed, and therefore, the five-year sentence that had been ordered to run consecutively to any other sentence should be modified to run concurrently with the sentence for Count Two in case No. F-903525 or, alternatively, to a “time served” disposition.

¹ The State notes that the record on appeal does not contain any documentation for circuit court case No. F-903525. The State, however, does not challenge Joshua’s recounting of the sentence and subsequent events in that matter nor does Joshua challenge the circuit court’s description of the sentence.

¶6 A defendant seeking sentence modification based on a new factor must first show that a new factor exists. *State v. Champion*, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242. A “new factor” is

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.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A new factor must be a development that frustrates the purpose of the original sentence, and it must be proved by clear and convincing evidence. *Champion*, 258 Wis. 2d 781, ¶4. Whether something constitutes a new factor is a question of law we review independently. *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989).

¶7 According to Joshua, he completed serving the eight-year sentence for Count One in F-903525 on March 3, 1999, and the seven-year sentence for Count Two “was activated” on that date. Joshua also suggests that the five-year sentence imposed by Judge Moroney “was to be activated” at that time. Joshua contends that his “dilemma is that [his] five year sentence began prior to the expiration of [his] seven year probation sentence.” Joshua asserts that Judge Moroney’s intent when he imposed the five-year consecutive sentence “was frustrated when the 5 year robbery was commenced at the same time the 7 year probation term had begun.”

¶8 Joshua’s argument is difficult to decipher. At several points in his appellate briefs, he asserts that the five-year sentence should not have commenced until after expiration of the seven-year sentence, and that because he believes that it did commence before that point, Judge Moroney’s intent in imposing a

consecutive sentence has been frustrated. The record before this court does not shed adequate light on the interplay between those two sentences, or how the Department of Corrections has calculated Joshua's sentence structure. Suffice it to say that if indeed Joshua is serving the sentences concurrently, we fail to see how Joshua is aggrieved.²

¶9 The circuit court “may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously.” WIS. STAT. § 973.15(2)(a) (2003-04). A court may impose a sentence consecutive to a previously imposed and stayed sentence even if the previous sentence is to be served only upon revocation of probation and probation has not yet been revoked. *See State v. Thompson*, 208 Wis. 2d 253, 256-57, 559 N.W.2d 917 (Ct. App. 1997). That is what Judge Moroney did when he sentenced Joshua to “five years in the Wisconsin State prison system consecutive to any and all other period of incarceration being given in this or any other sentence.” The sentence structure was not illegal, nor does Joshua's subsequent revocation constitute a new factor.

By the Court.—Order affirmed.

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

² Because Joshua repeatedly refers to the seven-year sentence as a “probation sentence,” it is possible that Joshua believes that he should spend seven years on probation, rather than in custody, before he serves the five-year prison sentence imposed in 1998. As noted by the circuit court in its decision, the sentence for Count Two in F-903525 was a seven-year sentence that was imposed and then stayed. Upon revocation, execution of the imposed and stayed sentence was triggered. *See State v. Thompson*, 208 Wis. 2d 253, 256-57, 559 N.W.2d 917 (Ct. App. 1997).

