

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2006

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. 2004AP819-CR

Cir. Ct. No. 1994CF942338

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LEROY MOORE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MARY M. KUHNMUENCH, Judge. *Affirmed.*

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

¶1 PER CURIAM. Leroy Moore appeals *pro se* from a postconviction order summarily denying his successive sentence modification motion. We conclude that Moore's alleged new factor – his co-defendants' previous

incarcerations for other convictions – was previously rejected by this court, barring Moore’s motion. Therefore, we affirm.

¶2 Moore pled guilty to first-degree reckless homicide as a party to the crime, in violation of WIS. STAT. §§ 940.02(1) and 939.05 (1993-94), in 1994. The trial court imposed a twenty-year sentence. Moore filed a postconviction motion for plea withdrawal and alleged the ineffective assistance of counsel. The trial court denied the motion, and this court affirmed the judgment of conviction and the postconviction order. *See State v. Moore*, No. 95-3353-CR, unpublished slip op. at 6 (Wis. Ct. App. July 14, 1997).

¶3 Moore then filed a postconviction motion pursuant to WIS. STAT. § 974.06 (1997-98), challenging his guilty plea and his trial counsel’s effectiveness. The trial court summarily denied the motion because Moore had previously raised these issues. This court dismissed Moore’s appeal as untimely.

¶4 Moore filed a request for sentence modification predicated on his rehabilitative progress.¹ The trial court, while commending Moore on his progress, denied the request because rehabilitative progress is an invalid basis for sentence modification. *See State v. Prince*, 147 Wis. 2d 134, 136, 432 N.W.2d 646 (Ct. App. 1988).

¶5 Moore filed another sentence modification motion, this time asserting that his sentence was unduly harsh, as compared to those of his co-defendants, and claiming that, unlike him, his co-defendants had been

¹ This and another filing are characterized as requests rather than motions because Moore requested relief in correspondence. The trial court, however, decided each filing by written order.

previously incarcerated, which was allegedly unknown to the trial court at sentencing, and thus constituted a new factor, pursuant to *State v. Ralph*, 156 Wis. 2d 433, 437-38, 456 N.W.2d 657 (Ct. App. 1990). The trial court denied the motion. Moore filed another request for sentence modification, which the trial court denied as previously litigated. Moore sought reconsideration of that order, which was also denied. This court affirmed. *See State v. Moore*, No. 01-2043, unpublished slip op. (WI App Dec. 18, 2002). We characterized Moore's new factor issue as follows: "Moore claims that because, unlike his co-defendants, he had not served jail time prior to Adams' beating and death, his sentence, which he claims is greater than those imposed on his co-defendants, is unduly harsh." *Id.* at 4. Moore failed, however, to specify his co-defendants' criminal histories and to compare their respective culpabilities for the current offense to his. *See id.* at 4-5. We explained the record support for the trial court's imposition of a lengthier sentence for Moore's "primary role" in the beating and homicide, and why that sentence was not unduly harsh. *See id.* at 5.

¶6 Moore raises the same issue in his current sentence modification motion as the one we previously rejected. Moore attempts to distinguish his current motion from his previous motion, predicated on *Ralph*, by emphasizing that the trial court did not know that his co-defendants had been previously incarcerated. He also explains that he was not more culpable than his co-defendants in committing this offense. His claimed distinctions notwithstanding, we previously rejected these precise issues. *See Moore*, No. 01-2043, unpublished slip op. at 1-6.

¶7 A successive postconviction motion may not be used to resurrect previously rejected issues. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). This principle applies to sentence modification

motions in which defendants raise the same “new” factor that had been previously litigated, as Moore did. We will not consider it, yet again.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

