COURT OF APPEALS DECISION DATED AND FILED

June 23, 2009

David R. Schanker
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. 2008AP2392-CR

Cir. Ct. No. 2001CF1328

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADRIAN T. HIPP,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. In 2002, Adrian T. Hipp was convicted of fraudulent use of a credit card and theft. At sentencing, the court ordered that Hipp "give a D.N.A. sample" and that "[c]osts of it are assessed on extended supervision." On July 30, 2008, Hipp filed a motion to vacate the DNA surcharge.

The circuit court denied the motion as not timely filed. Hipp filed a second motion that argued that the case of ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, constituted a new factor that warranted modification of his sentence. The circuit court denied Hipp's second motion, and Hipp now appeals. We affirm.

¶2 We first address the circuit court's initial order. When moving to vacate a DNA surcharge, a defendant is moving to modify his or her sentence. A motion for sentence modification must be brought within ninety days of sentencing under WIS. STAT. § 973.19(1)(a) (2007-08),[1] or within appellate time limits set forth in WIS. STAT. RULE 809.30. *See* ***State v. Norwood***, 161 Wis. 2d 676, 681, 468 N.W.2d 741 (Ct. App. 1991). Hipp's motion, filed over six years after sentencing, was not timely filed under § 973.19(1)(a). Further, the appellate time limits of WIS. STAT. § 974.02(1) and RULE 809.30 have long since expired and, therefore, Hipp's motion was also untimely under those statutes. The circuit court's initial order, denying Hipp's motion as not timely filed, was correct.

¶3 After his first motion was denied, Hipp filed a second motion, pursuant to WIS. STAT. § 974.06, in which he argued that ***Cherry*** was a "new factor" that warranted sentence modification. The circuit court denied the motion because a sentence modification motion cannot be raised in a § 974.06 motion. *See* ***State ex rel. Warren v. County Court***, 54 Wis. 2d 613, 617, 197 N.W.2d 1 (1972).

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 On appeal, Hipp calls the reference to WIS. STAT. § 974.06 "mistaken." Rather, Hipp now relies expressly upon a "new factor" argument.[2] Hipp does not, however, set forth any argument as to why ***Cherry*** would be a new factor.[3] Arguments unsupported by legal authority will not be considered.[4] ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Orders affirmed.

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

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[2] A motion for sentence modification based upon a "new factor" can be made at any time. *See* ***State v. Noll***, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895.

[3] Hipp includes in his appendix several circuit court orders addressing motions to vacate DNA surcharges. This court can only review matters of record in the trial court and cannot consider new matter attached to an appellate brief outside the record. ***South Carolina Equip. Inc. v. Sheedy***, 120 Wis. 2d 119, 125-26, 353 N.W.2d 63 (Ct. App. 1984). The inclusion of such material in the appendix is not tantamount to the development of a legal argument.

[4] Even if we were to consider a "new factor" argument, it would fail. A new factor must be "'highly relevant'" to the imposition of sentence and must "frustrate[] the purpose" of the sentence. ***State v. Michels***, 150 Wis. 2d 94, 96-97, 441 N.W.2d 278 (Ct. App. 1989) (citation omitted). The defendant must show "some connection between the factor and the sentencing—something which strikes at the very purpose for the sentence selected by the trial court." ***Id.*** at 99. The sentencing court called Hipp a "thief" who employs "manipulation and conning" to "prey[] upon vulnerable people as objects of [his] scams." The court concluded that Hipp's "track record" showed a "very strong risk of … reoffending" and that "the community need[ed] to be protected from" Hipp. The holding of ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, does not "frustrate the purpose" of the sentence which clearly was to protect the community from Hipp's criminal conduct. We also note that the facts of ***Cherry*** are distinguishable from the circumstances of Hipp's sentencing. In ***Cherry***, the defendant objected at sentencing to the imposition of the DNA surcharge, thereby preserving the issue for appeal. *See* ***Cherry***, 312 Wis. 2d 203, ¶2. Hipp, on the other hand, did not object to the imposition of the surcharge at his sentencing, and he should not be allowed to challenge it at this late date.