

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 8, 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. 2009AP566-CR**

Cir. Ct. No. 2002CF3423

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**TARAN M. JAMES,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Milwaukee County:  
TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Taran M. James appeals *pro se* from a postconviction order denying his motion to modify his sentence and from an order denying his motion to reconsider. He challenges a DNA surcharge imposed

pursuant to WIS. STAT. § 973.046(1g). The circuit court determined that James's motions were not timely filed. We agree and affirm.

### BACKGROUND

¶2 The pertinent facts are few. On April 7, 2004, the circuit court sentenced James to six concurrent thirty-two-year terms of imprisonment for six counts of armed robbery. As to count one, the circuit court required James to pay a \$250 DNA surcharge. *See* WIS. STAT. § 973.046(1g).

¶3 On February 10, 2009, James filed a *pro se* motion to vacate the DNA surcharge. James asserted that the surcharge was “in conflict with” *State v. Cherry*, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. The circuit court denied the motion and then denied James's motion to reconsider. This appeal followed.

### DISCUSSION

¶4 James asserts that the circuit court erred because it imposed a DNA surcharge without stating any reasons for doing so. In support of his claim, James relies on our decision in *Cherry*. There, we observed that the circuit court has discretion to impose a DNA surcharge pursuant to WIS. STAT. § 973.046(1g), when sentencing a defendant for any felony that does not involve certain sex crimes. *Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d at 206, 752 N.W.2d at 395. We held that the circuit court's stated reasons for imposing the surcharge in *Cherry* were not sufficient to demonstrate the exercise of discretion, and we therefore reversed the DNA surcharge and remanded for further proceedings. *Id.*, 2008 WI App 80, ¶¶9–11, 312 Wis. 2d at 206–207, 752 N.W.2d at 395–396. According to James, *Cherry* similarly mandates a reversal in this case.

¶5 James is wrong. *Cherry* is not a procedural mechanism for seeking postconviction relief. A defendant must have an avenue for pursuing sentence modification before he or she can rely on *Cherry* to obtain relief. James does not demonstrate that he has such an avenue.

¶6 Pursuant to WIS. STAT. § 973.19, a defendant may challenge a sentence on any ground within ninety days after sentencing. James's deadline for pursuing sentence modification pursuant to § 973.19, expired ninety days after the sentencing proceeding of April 7, 2004. James made no challenge to the DNA surcharge before expiration of the deadline. Pursuant to WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30, a defendant may pursue postconviction review of a sentence within the time limits for a direct appeal. James's deadline for pursuing a direct appeal pursuant to § 974.02, and RULE 809.30, expired twenty days after his sentencing when he failed to file a notice of intent to pursue postconviction relief. *See State v. Lagundoye*, 2004 WI 4, ¶20 n.13, 268 Wis. 2d 77, 93–94 n.13, 674 N.W.2d 526, 534 n.13. Pursuant to WIS. STAT. § 974.06, a defendant who is in custody may challenge a sentence after the time limits imposed by § 973.19 and RULE 809.30 have passed, but § 974.06 limits the grounds for a challenge to jurisdictional or constitutional matters. *See id.* James cannot use § 974.06 to challenge a sentence on the basis that the circuit court erroneously exercised its discretion. *See Smith v. State*, 85 Wis. 2d 650, 661, 271 N.W.2d 20, 25 (1978). James does not propose any other statutory mechanism for seeking relief from a sentence that might be applicable to his claim.

¶7 In his reply brief, James asserts that *Cherry* constitutes a new factor that can be raised at any time. *See State v. Noll*, 2002 WI App 273, ¶11, 258 Wis. 2d 573, 579, 653 N.W.2d 895, 898 (circuit court has inherent power to modify a sentence upon a showing of a new factor). He also asserts that the DNA

surcharge is illegal. “It is a well-established rule that we do not consider arguments raised for the first time in a reply brief.” See *Bilda v. County of Milwaukee*, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 229 n.7, 713 N.W.2d 661, 670 n.7. We apply that rule here.<sup>1</sup>

*By the Court.*—Orders affirmed.

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

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<sup>1</sup> Were we to address the arguments that James raises in his reply brief, we would reject them on their merits. First, James has not presented a new factor. “[A] ‘new factor’ must be an event or development which frustrates the purpose of the original sentence.” *State v. Champion*, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 786, 654 N.W.2d 242, 244 (citation and one set of quotation marks omitted). In this case, the circuit court explained during the sentencing proceeding that the sentences reflected consideration of both “the community’s interest in protection” and the need “to reduce the possibility that anyone will have to suffer this kind of crime in the future.” The purposes of James’s sentences were plainly to protect the community and to deter future criminal conduct. Nothing in *Cherry* frustrates the circuit court’s sentencing purposes.

Second, the DNA surcharge in this case is not illegal. The circuit court had statutory authority to impose the surcharge pursuant to WIS. STAT. § 973.046(1g). *Cf.* WIS. STAT. § 973.13 (penalty in excess of that authorized by statute is void).