COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2010

A. John Voelker
Acting 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. 2009AP2826-CR **Cir. Ct. No. 2006CF5023**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE ANTONIO ALICEA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Jose Antonio Alicea, *pro se*, appeals an order denying his motion to modify his sentence as untimely. He challenges the DNA surcharge imposed by the circuit court, arguing that the circuit court failed to adequately explain why it was imposed. *See* ***State v. Cherry***, 2008 WI App 80,

¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (when the circuit court exercises discretionary power to impose a DNA surcharge, it must explain its reason for doing so). We affirm.

¶2 Alicea devotes a sizable portion of his brief to arguing what his motion was *not* meant to be. He contends his motion was not brought under WIS. STAT. § 973.19 (2007-08),[1] which allows sentence modification within ninety days of sentence, or under WIS. STAT. § 809.30, the direct appeal statute, so the circuit court's ruling that his motion was untimely under those statutes is of no import. Alicea also contends that he did not bring his motion under WIS. STAT. § 974.06, which does not permit challenges to the circuit court's sentencing discretion, and he contends that his motion *does not argue* that the ***Cherry*** decision constitutes a "new factor" allowing resentencing, an analysis we have rejected before in other cases. Instead, Alicea contends that his motion is brought pursuant to the inherent authority of the circuit court, as provided in ***State v. Noll***, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895, and therefore may be brought at any time.

¶3 Alicea misreads ***Noll***. That case provides no authority for the proposition that motions to modify a sentence may be brought at any time pursuant to the inherent authority of the circuit court. ***Noll*** provides that a circuit court may invoke its inherent authority to modify a sentence without regard to time limitations "only if a defendant demonstrates the existence of a 'new factor' justifying sentence modification." ***Id.***, 258 Wis. 2d 537, ¶11. A "new factor" is a set of facts or circumstances "highly relevant to the imposition of sentence, but not

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

known to the trial judge at the time of original sentencing, either because it was not then in existence or because … it was unknowingly overlooked by all of the parties." ***State v. Kluck***, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997). As we have already explained, however, Alicea explicitly states that he is *not arguing* that the ***Cherry*** decision is a "new factor," nor does he allege that any other new factors exist. Since there is no new factor present and Alicea has not substantiated his claim that the circuit court has inherent authority to hear his challenge absent the existence of new factors, we conclude that the circuit court properly denied the sentence modification motion as untimely.

By the Court.—Order affirmed.

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