

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 25, 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. 03-3374
STATE OF WISCONSIN**

Cir. Ct. No. 95CF954791

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES WARE,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. James Ware appeals *pro se* from an order denying his motion seeking sentence modification. The trial court denied the motion as untimely and did not address the merits. Ware contends the trial court erred in denying his motion without addressing the merits. Because Ware's claim is procedurally barred, we affirm.

BACKGROUND

¶2 On March 4, 1996, Ware was sentenced to forty years in prison for second-degree intentional homicide. On July 24, 1996, his postconviction counsel filed a motion seeking to modify his sentence. This motion was denied. He pursued a direct appeal to this court. On July 29, 1997, we affirmed the judgment and order denying postconviction relief.

¶3 On October 9, 2002, Ware filed a *pro se* motion for postconviction relief under WIS. STAT. § 974.06 (2001-02).¹ In that motion, he alleged that his postconviction counsel provided ineffective assistance. The trial court denied the motion and Ware appealed. Before the appeal could be decided, however, Ware voluntarily dismissed his appeal.

¶4 On November 13, 2003, Ware filed a *pro se* motion to modify his sentence. The trial court denied the motion in a November 19, 2003 order, ruling that Ware's motion was procedurally barred based on time limits. The trial court also ruled that Ware could not pursue an alleged erroneous sentence decision under WIS. STAT. § 974.06 because such claim did not include a constitutional or jurisdictional issue. Ware now appeals.

DISCUSSION

¶5 Ware contends that the trial court erred in denying his sentence modification motion based on time limits. He argues that his motion is based on the inherent power of the trial court to modify his sentence, and thus was not

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

bound by any time limits. The State responds that Ware's argument is flawed because invoking the inherent power of the court would require that Ware allege a new factor exists or that the sentence is unduly harsh. Ware argued neither; instead, he contended that the trial court relied on erroneous information at sentencing.

¶6 We conclude that the State's analysis is correct. The trial court may invoke its inherent power to modify a sentence when it has been presented with a new factor, *see State v. Wuensch*, 69 Wis. 2d 467, 472-73, 479, 230 N.W.2d 665 (1975), or when it concludes that the sentence imposed was unduly harsh, *see State v. Crockett*, 2001 WI App 235, ¶12, 248 Wis. 2d 120, 635 N.W.2d 673. Neither scenario is presented here.²

¶7 Rather, Ware's claim is that the sentence should be modified because the prosecutor presented incorrect information during the sentencing hearing. This claim raises a constitutional issue because Ware has a due process right to be sentenced based on accurate information. *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). Accordingly, the correct method for presenting this issue would be through WIS. STAT. § 974.06. Thus, the trial court's ruling to the contrary was incorrect. Nonetheless, we conclude that the trial court reached the correct result and affirm the order. *See State v. Horn*, 139 Wis. 2d 473, 490, 407 N.W.2d 854 (1987).

² We reject any attempt by Ware to suggest that the incorrect information presented at sentencing constitutes a new factor. He has failed to make any showing that the trial court relied on the incorrect information or that the parties unknowingly overlooked it at sentencing, two requirements necessary to satisfy the new factor test. *See State v. Grindemann*, 2002 WI App 106, ¶22, 255 Wis. 2d 632, 648 N.W.2d 507. Moreover, Ware was present when the prosecutor presented the allegedly incorrect information to the court. He did nothing to correct the error.

¶8 WISCONSIN STAT. § 974.06 permits defendants to bring constitutional or jurisdictional claims after the time for filing a direct appeal has passed. WIS. STAT. § 974.06(1). Thus, the trial court’s determination that Ware did not file this motion within the requisite time limits was incorrect. Nevertheless, although Ware’s claim is not time-barred, it is barred on a different procedural ground.

¶9 A criminal defendant may not raise claims in WIS. STAT. § 974.06 motions that could have been raised on direct appeal or in previous § 974.06 motions unless he can show “sufficient reason” for failing to do so. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Ware brought two previous motions in which he could have raised the issue that the trial court relied on incorrect information at sentencing. He could have raised this issue in his direct appeal and he could have raised this issue in his first § 974.06 motion. Thus, he is procedurally barred from raising this issue in a third postconviction motion unless he presents a sufficient reason for failing to raise the issue previously.

¶10 In his direct appeal, Ware raised sentencing issues—both that his remorse constituted a new factor and that his sentence was unduly harsh. These issues were rejected. In his WIS. STAT. § 974.06 motion, Ware sought sentence modification on the grounds that his postconviction counsel was ineffective for failing to introduce exculpatory evidence at the sentencing hearing. The trial court rejected this argument.

¶11 Thus, both previous motions raised sentencing issues. There is no reason why this additional sentencing issue could not have been raised in either motion. Ware fails to provide this court with “sufficient reason” for such failure.

Accordingly, his claim is procedurally barred, and we affirm the trial court's order.

By the Court.—Order affirmed.

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

