

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0854-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRADLEY K. PERKINS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Bradley Perkins appeals from an order denying his motion to modify his sentence. The dispositive issue is whether the trial court erroneously exercised its discretion when it denied modification. We conclude that the trial court properly handled the matter and therefore affirm.

Perkins escaped while serving a prison term on a Wisconsin conviction. He was eventually recaptured and returned to prison. He was then convicted and sentenced to twenty-seven months in federal prison, consecutive to his Wisconsin sentence, for an offense committed while he was an escapee. In this proceeding, he was prosecuted and convicted for the escape, and the trial court imposed a thirty-six-month sentence consecutive to the federal sentence.

In his motion, filed under § 973.19, STATS., Perkins asked the court to impose the escape sentence consecutive to the underlying Wisconsin sentence, so that he could complete both state terms before commencing the federal term. He primarily argued that his proposal would save transportation costs for the state and federal governments. The trial court denied relief, concluding that any savings were minimal.

Perkins first contends that the trial court erred because it believed that it could not modify the sentence unless Perkins showed a new factor. Perkins notes, correctly, that a new factor is not required to modify a sentence on a motion brought under § 973.19, STATS. However, nothing in the record supports his contention that the trial court believed otherwise.

Perkins next contends that the trial court erroneously believed that it was required to impose the escape sentence consecutive to the federal sentence. Again, Perkins misconstrues the record. The trial court made no such finding. The decision to impose the escape sentence consecutive to the federal sentence was an exercise of discretion.

Perkins next contends that the sentence violated § 946.42(4), STATS. That section requires that an escape sentence shall be imposed "consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when he or she escaped." He also contends that the sentence violated § 302.11(3), STATS., which provides that all consecutive sentences shall be computed as one continuous sentence. We conclude that the sentence did not violate § 946.42(4) because the purpose of that section is to bar concurrent sentences on an escape conviction. It does not require that the escape sentence commence immediately after completion of the underlying sentence. Additionally, the sentence does not violate § 302.11(3) because that section applies only when the trial court has imposed consecutive

sentences during the same proceeding. Here, the court imposed one sentence during the proceeding, and chose to make it consecutive to the federal sentence, not the state sentence.

In his fourth attack on the trial court's decision, Perkins asserts that the trial court erroneously believed that modifying the sentence would modify the federal sentence. Although the trial court asked the parties to address whether a modification might, in effect, modify the federal sentence, it does not follow that by asking the question the court demonstrated an erroneous belief. Ultimately, the effect on the federal sentence was not a factor in the trial court's decision to deny modification.

Finally, Perkins contends that the trial court erroneously found that his adjustment to prison in his previous term had not been satisfactory. Perkins bases his contention on facts that are not of record. We therefore decline to consider it. *Jenkins v. Sabourin*, 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981). In any event, the trial court's decision on the motion does not indicate that Perkins' record in prison was a factor in the decision.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.