COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 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. 95-1870

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FRANK COWAN,

Defendant-Appellant.

APPEAL from an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed*.

Before Dykman, P.J., Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

PER CURIAM. Frank Cowan appeals from an order denying his postconviction motion for sentence modification under § 974.06, STATS. Cowan argues that the trial court erroneously exercised its discretion by sentencing him to an excessive sentence and denying his motion for an evidentiary hearing on

sentence modification. Because we conclude that Cowan failed to allege facts required for relief under § 974.06, we affirm.

Cowan pled guilty to three counts of delivery of cocaine pursuant to a plea agreement in which the State agreed to recommend a sentence of no more than fifteen years. The maximum possible sentence was twenty-five years. The trial court sentenced Cowan to five years on each count to run consecutively. Cowan filed a § 974.06, STATS., motion for sentence modification. The trial court denied the motion, and Cowan appeals.

Cowan alleges that the trial court imposed a sentence which "shocks the public sentiment, is outrageous and excessive and is the product of an erroneous exercise of discretion." He seeks modification of his sentence under § 974.06, STATS., and argues that the denial of his motion for an evidentiary hearing on the matter was an erroneous exercise of discretion.

A sentence can be challenged under § 974.06, STATS., if it is imposed in violation of the United States or Wisconsin Constitutions or exceeds the maximum authorized sentence. Section 974.06(1). A § 974.06 motion does not reach procedural errors that themselves do not reach constitutional or jurisdictional status. ***State v. Nicholson***, 148 Wis.2d 353, 360, 435 N.W.2d 298, 301 (Ct. App. 1988). The grounds for a § 974.06 motion are narrow and preclude all claims not expressly enumerated. ***Mack v. State***, 93 Wis.2d 287, 292, 286 N.W.2d 563, 565 (1980).

Cowan does not raise issues cognizable under § 974.06, STATS. He does not allege facts which raise the constitutional or jurisdictional issues required for such a motion. First, erroneous exercise of discretion in the imposition of a lawful sentence is challenged by a motion for modification of the sentence, not a § 974.06 motion. ***Hall v. State***, 66 Wis.2d 630, 633-34, 225 N.W.2d 493, 495 (1975). An erroneous exercise of sentencing discretion within the statutorily authorized range does not amount to a violation of a constitutional right. ***Id***. Second, the possibility of new factors which might otherwise justify a modification of sentence is not a jurisdictional or constitutional error as required for § 974.06 relief. ***State v. Flores***, 158 Wis.2d 636, 646, 462 N.W.2d 899, 903 (Ct. App. 1990), *overruled on other grounds*, ***State v. Knight***, 168 Wis.2d 509, 519 n.6, 484 N.W.2d 540, 544 (1992).

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment. Though Cowan does not argue that his sentence violates the Eighth Amendment, he asserts that it shocks the public sentiment. We will assume that Cowan is asserting an Eight Amendment violation, a matter cognizable in a § 974.06, STATS., motion.

> The test for determining if a sentence is cruel and unusual is whether the sentence is so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.

State v. Hermann, 164 Wis.2d 269, 282, 474 N.W.2d 906, 911 (Ct. App. 1991).

In ***Hermann***, we determined that a three-year mandatory minimum sentence for knowingly engaging in an illegal drug sale in a statutorily protected zone was not cruel and usual punishment. ***Id.*** We noted that such a sentence was lenient compared with the sentences for drug possession found not to violate the Eighth Amendment in ***Hutto v. Davis***, 454 U.S. 370 (1982), and ***Harmelin v. Michigan***, 501 U.S. 957 (1991). ***Id.*** at 282-83, 474 N.W.2d at 911.

We conclude that Cowan's sentence would not violate the judgment of reasonable persons concerning what is right and proper because the sentence was lenient under the circumstances. Contrary to Cowan's assertion, the record shows that this is the second time he has been convicted of a drug offense. Cowan's individual five-year sentences do not shock public sentiment and do not violate the Eighth Amendment to the United States Constitution. It is within the trial court's discretion to determine whether the sentences are to be served concurrently or consecutively.

By the Court.—Order affirmed.

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