

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2007

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. 2006AP1263-CR

Cir. Ct. No. 1997CF973589

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS WILLIAM ROSS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JOSEPH R. WALL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Curtis Ross appeals from the decision and order denying his motion for postconviction relief. He argues that the circuit court erred when it concluded that his claim was barred by *State v. Escalona-Naranjo*, 185

Wis. 2d 168, 517 N.W.2d 157 (1994). Because we conclude that the circuit court did not err when it denied his motion, we affirm.

¶2 In 1998, Ross was convicted after a jury trial of possession of cocaine with intent to deliver as an habitual offender, and the court sentenced him to seventeen years in prison. In 1999, Ross filed a motion for postconviction relief under WIS. STAT. RULE 809.30 (1997-98), which the circuit court denied. This court affirmed the circuit court and the supreme court denied his petition for review. In 2001, Ross filed a WIS. STAT. § 974.06 (1999-2000) motion. The circuit court denied that motion because it raised issues beyond the scope of the statute and because it was barred by *Escalona*. Ross appealed to this court but that appeal was dismissed for failure to prosecute. In 2003, Ross filed another motion for postconviction relief. Once again, the circuit court denied it, this court affirmed, and the supreme court denied his petition for review.

¶3 In 2006, Ross filed another postconviction motion that is the subject of this appeal. In that motion, he challenged his sentence for the first time. The circuit court denied the motion, finding that he had not raised a new factor that entitled him to relief, and that his other claims were barred by *Escalona*.

¶4 Ross argues that the circuit court erred when it denied his last motion because a motion to modify sentence cannot be barred by *Escalona*. Ross, however, misstates the circuit court's ruling. Ross argued to the circuit court that there had been a change in the parole policy and this constituted a new factor. The circuit court did consider whether Ross had stated a "new factor" that frustrated the original purpose of the sentence. See *State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). The circuit court, citing to *State v. Franklin*, 148 Wis. 2d 1, 14, 434 N.W.2d 609, 613 (1989), found that a change in

parole policy cannot constitute a new factor unless the parole policy was considered by the sentencing court. The circuit court reviewed the sentencing transcript and found that the sentencing court had not considered the parole policy when it sentenced Ross. Consequently, the circuit court considered whether Ross had raised a new factor, and found that he had not.

¶5 Sentence modification involves a two-step process. *Franklin*, 148 Wis. 2d at 8, 434 N.W.2d at 611 (1989). The defendant must first show that there is a new factor that justifies the motion. *Id.*

Whether a fact or set of facts constitutes a new factor is a question of law which may be decided without deference to the lower court's determinations. If a defendant has demonstrated the existence of a new factor, then the circuit court must undertake the second step in the modification process and determine whether the new factor justifies modification of the sentence. This determination is committed to the circuit court's discretion and will be reviewed under an abuse of discretion standard.

Id. (citations omitted).

¶6 We agree with the circuit court's finding that the sentencing court did not consider parole policy when it sentenced Ross. Consequently, a change in the parole policy cannot constitute a new factor.

¶7 Ross also argued to the circuit court that the sentencing court erroneously exercised its discretion when it sentenced him. The circuit court concluded that Ross had many opportunities to raise this argument and had not done so. We agree with the circuit court's conclusion that this issue is barred by *Escalona*, 185 Wis. 2d at 185-186, 517 N.W.2d at 163-164.

¶8 Ross also argues that his right to equal protection has been violated by the different sentencing treatment of defendants under truth-in-sentencing.

Specifically, he argues that under the new law, WIS. STAT. § 973.195(1r)(b)1 (2003-04), defendants may petition for sentence modification based on rehabilitation, education, and treatment while in prison. Under the old law, however, the defendant's progress and rehabilitation in prison are not new factors warranting sentence modification. *See State v. Kaster*, 148 Wis. 2d 789, 804, 436 N.W.2d 891, 897 (Ct. App. 1989). He was sentenced under the old law.

¶19 We agree with the State that Ross has not stated a violation of his right to equal protection. There is a rational relationship to a legitimate state interest for the difference in the sentencing schemes. Under the old sentencing law, a person's progress in prison was a factor to be considered by the parole board when making a parole determination. *See State v. Kluck*, 210 Wis. 2d 1, 8, 563 N.W.2d 468, 471 (1997). Because this was a consideration for the parole board, the court did not need to recognize it as a new factor. Under the new law, parole no longer exists. Consequently, the legislature created a new mechanism by which defendants could benefit from rehabilitative and other programs while in prison. Because there is a rational reason for the difference in the two schemes, the State has not violated Ross's equal protection rights. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

