

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2008

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. 2007AP1028-CR

Cir. Ct. No. 2002CF1436

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TYRONE L. TILLERY,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Wedemeyer¹ and Fine, JJ.

¶1 PER CURIAM. Tyrone L. Tillery appeals from the order denying his motion to modify his sentence. He argues that this court's decision in *State v.*

¹ This opinion was circulated and approved before Judge Wedemeyer's death.

Mason, 2004 WI App 176, 276 Wis. 2d 434, 687 N.W.2d 526, constitutes a new factor that warrants modification of his sentence. Because we conclude that Tillery is not entitled to sentence modification, we affirm.

¶2 In 2003, Tillery was convicted of one count of felony murder-attempted armed robbery, and one count of first-degree recklessly endangering safety, both as a party to a crime. As the circuit court explained in a previous order denying a similar motion, it believed when it sentenced Tillery on the felony murder charge, that the maximum potential amount of initial confinement for that crime was forty years, and it so stated at the sentencing hearing. The court actually sentenced Tillery to twenty years of initial confinement and ten years of extended supervision on that count.

¶3 Tillery appealed from the conviction and his counsel filed a no-merit report. This court affirmed the conviction. While the appeal was pending, this court decided *Mason*, which concluded that the maximum term of initial confinement for this offense was thirty-seven and one-half years. *See id.*, ¶1.

¶4 In October 2006, Tillery filed a postconviction motion alleging that the court erred under *Mason* when it sentenced him. The circuit court denied the motion. The court first noted that the *Mason* case was decided before Tillery filed his response to his counsel's no-merit report. The court concluded, however, that the sentencing court's error in stating the maximum potential sentence was harmless under *State v. Kourtidias*, 206 Wis. 2d 574, 557 N.W.2d 858 (Ct. App. 1996). Tillery then moved for reconsideration, and the circuit court denied that motion. Tillery did not appeal from these orders.

¶5 In 2007, Tillery filed the motion that is the subject of this appeal. In that motion, he reframed the same issue arguing that the sentencing court's error

was a new factor that warranted sentence modification. The circuit court once again denied the motion. The court found that it had previously denied Tillery's motions brought on the same basis. The court stated that although it was unaware of *Mason* at the time it sentenced Tillery, it was not "an event or development" that frustrated the purpose of the imposed sentence, and consequently, was not a new factor.

¶6 Without deciding whether Tillery has presented a new factor or whether he is entitled to raise the same issue that he previously litigated, we conclude that he is not entitled to sentence modification on the merits of his claim. We agree with the circuit court's initial determination that the sentencing court's misstatement of the potential length of confinement was harmless error under *Kourtidas*. In *Kourtidas*, the appellant argued that his sentence was improperly based on a penalty enhancer. *Id.*, 206 Wis. 2d at 590. We held that because the sentence was within the term prescribed by the statute for the substantive crime, the penalty enhancer had not been invoked, and thus any error was harmless. *Id.*; see also *Mason*, 276 Wis. 2d 434, ¶24 n.4. Similarly in this case, the circuit court sentenced Tillery to a term (twenty years) that was within the actual potential maximum (thirty-seven and one-half years). Consequently, we agree with the circuit court's determination that any error was harmless.

By the Court.—Order affirmed.

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

