

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 16, 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. 95-0822-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS H. RICHMOND,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County:
LEE E. WELLS, Judge. *Affirmed.*

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

PER CURIAM. Thomas H. Richmond appeals from an order denying his postconviction motion for a sentence modification. Richmond claims that his due- process rights were violated as a result of being sentenced on the basis of a presentence investigation report that contained information about an uncharged assault. Richmond also claims that the trial court erroneously exercised its discretion by determining that information written by

the victim to the parole board two years after sentencing did not frustrate the purpose of his sentence and, therefore, was not a new factor justifying resentencing.

Richmond was convicted of first-degree sexual assault of a child. He was sentenced to ten years in prison. On direct appeal, Richmond's counsel filed a no-merit report, which we accepted. *See Anders v. California*, 386 U.S. 738 (1967). We affirmed the trial court's judgment, and rejected as being without merit the claim that Richmond was entitled to sentence modification because the presentence report discussed a sexual assault charge that had been dismissed pursuant to a plea bargain. This court also rejected as being without arguable merit a "new factor" claim for sentence modification based on a letter written by his victim to the parole board seeking leniency for Richmond. Subsequently, Richmond brought a motion before the trial court seeking to modify his sentence. He again alleged new factors. The new factors included a reiteration of Richmond's previous claim that the presentence report improperly discussed a sexual-assault charge, and also alleged that the victim wanted to speak at the sentencing, but was prevented from doing so by her mother. Richmond claimed that the victim would have said that she wanted Richmond's sentence to emphasize treatment, not imprisonment. The trial court denied Richmond's postconviction motion, and Richmond appeals.

Richmond again argues that his due-process rights were violated because the presentence investigation report discussed the uncharged assault. The trial court noted that this issue had been raised and rejected on direct appeal in this court's no-merit opinion. Claims resolved against a defendant on direct appeal cannot be reasserted on successive postconviction motions. *State v. Brown*, 96 Wis.2d 238, 241, 291 N.W.2d 528, 531 (1980), *cert. denied*, 449 U.S. 1015 (1980). We affirm the trial court on this issue.

Richmond next argues that a letter written by the victim to the parole board two years after sentencing constitutes a "new factor" that justifies resentencing. A "new factor" is:

[A] fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in

existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

State v. Harris, 174 Wis.2d 367, 379, 497 N.W.2d 742, 747 (Ct. App. 1993) (citation omitted). The new factor must be an event or development that “frustrates the purpose of the original sentencing.” *Id.* (citation omitted). Whether a motion to modify a sentence presents a new factor is a question of law that appellate courts review *de novo*. *State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989).

The trial court imposed a ten-year sentence in this case because of the seriousness of the offense; the need to protect small children; Richmond's drinking problem and his failure to do anything about it in his past; the existence of aggravating factors, such as the particular vulnerability of the victim and the fact that Richmond was a blood relative of the victim; and, the impact Richmond's actions had on the victim. The victim's decision to seek leniency for Richmond two years after the crime was committed is not a development that frustrates the purpose of the original sentence and is not a new factor that would warrant a modification of sentence.

By the Court. – Order affirmed.

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