

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 6, 2004

Cornelia G. Clark
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. 03-2837-CR

Cir. Ct. No. 94CF000320

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND F. GOSE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County:
PETER L. GRIMM, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Raymond F. Gose appeals pro se from an order denying his postconviction motion under WIS. STAT. § 974.06 (2001-02),¹ for a

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

new trial based on the victim's recantation and for sentence modification. He also appeals from an order denying his pro se motion for modification of the terms and conditions of probation. We conclude that having already litigated his entitlement to a new trial based on the victim's recantation, Gose cannot renew that claim. Also no new factor supports modification of the sentence or the termination of probation. We affirm the orders denying postconviction relief.

¶2 In 1995 Gose was sentenced to various terms of probation upon convictions for two counts of first-degree sexual assault of a child, two counts of incest to a child, and one count of exposing a sex organ. The victim of his crimes was his minor granddaughter. Gose's postconviction motion under WIS. STAT. RULE 809.30 sought a new trial on the ground of newly discovered evidence—the victim's recantation of her trial testimony. The motion was denied with the trial court concluding that the recantation was not credible because it resulted from pressure applied by the victim's father and grandmother. *State v. Gose*, 96-0723-CR, unpublished slip op. at 3 (Wis. Ct. App. July 16, 1997). The trial court's decision was affirmed on appeal. *Id.* at 6.

¶3 In April 2002, the victim filed an affidavit recanting her trial testimony. Gose filed a pro se motion for a new trial on July 18, 2002. A motion for sentence modification was filed later by new counsel. An evidentiary hearing was held. The victim testified that it was not Gose but another man, her mother's boyfriend, who had sexually assaulted her. The victim's brother also testified that the mother's former boyfriend had assaulted him on more than twenty occasions. The trial court denied Gose's motions. Gose then filed a pro se motion for modification of the terms and conditions of probation. That motion was also denied.

¶4 Regarding Gose's motion for a new trial based on the victim's recantation, the trial court concluded that the claim had been adjudicated once before. Gose does not address this aspect of the trial court's ruling. We conclude that as a result of his earlier motion for a new trial and appeal, Gose could not relitigate the claim that the victim's recantation supported a new trial. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶5 Likewise, under WIS. STAT. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), a claim that could have been raised on direct appeal is barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason for why the claim was not raised on direct appeal. *State v. Lo*, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. Gose does not argue on appeal that a sufficient reason exists. That the victim's new recantation comes after reaching adult age and getting out from under the influence and intimidation of her mother's boyfriend is not significant because of the finding that both recantations were influenced by her father and grandmother.

¶6 Despite the procedural bar to Gose's motion for a new trial, the trial court addressed the motion on the merits. The trial court concluded that there was no reasonable probability that a different result would be reached at a new trial because the victim's adult recantation was not credible. *See State v. Terrance J.W.*, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996) (a motion for new trial on the ground of newly discovered evidence may be granted when: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the

evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached in a new trial). Examining the affidavit and the victim's explanation of how her grandmother helped draft the affidavit, the court determined that the recantation was again the product of family pressure. It found the victim to be "a scared little girl, easily influenced, emotionally weak, and desperately trying to do whatever she can to help out her grandfather." Gose attacks this ruling as not giving due consideration to the victim's testimony and evidence from her brother. The trial court's findings are based on a credibility determination which we will not disturb unless clearly erroneous. *State v. Lukensmeyer*, 140 Wis. 2d 92, 105, 409 N.W.2d 395 (Ct. App. 1987). The trial court's findings are not clearly erroneous. Thus, Gose was not entitled to a new trial.

¶7 Gose claims that in denying his motion to modify the terms and conditions of probation, the trial court erroneously believed that it lacked authority to modify probation absent the demonstration of a new factor frustrating the intent of the original sentence.² He argues that because probation is not a sentence, the new factor requirement has no application. See *State v. Edwards*, 2003 WI App 221, ¶14, 267 Wis. 2d 491, 671 N.W.2d 371, *review denied*, 2004 WI 20, 269 Wis. 2d 201, 675 N.W.2d 807 (Wis. Feb. 24, 2004) (No. 03-0790-CR) (under WIS. STAT. § 973.09(3)(a),³ the trial court has discretion to extend probation or

² In his pro se motion to modify the terms and conditions of probation, Gose indicated that the previous motion for sentence modification had been mislabeled and that his attorney had wrongly argued the motion as based on new factors. Gose does not argue on appeal that grounds for sentence modification exist.

³ WISCONSIN STAT. § 973.09(3)(a) provides: "Prior to the expiration of any probation period, the court, for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof."

modify its terms and conditions for “cause,” and there is no limitation on what the trial court may consider as cause when making that determination); *cf. State v. Grindemann*, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507 (the trial court may modify a sentence only on the basis of new factors, or when it concludes its original sentence was unduly harsh or unconscionable).

¶8 We reject Gose’s characterization that his requested modification sought only to modify the “terms and conditions” of probation. In light of time served in prison after his probation was improperly revoked, Gose sought to have probation terminated in favor of time already served. He sought a restructuring of the sentence and a change in the amount of time he was required to serve on probation. He was not seeking a mere change in the conditions of probation.

¶9 Gose’s reliance on *Disciplinary Proceedings Against Martin*, 112 Wis. 2d 661, 334 N.W.2d 107 (1983), is misplaced. *Martin* involved the suspension of an attorney’s license after the attorney was convicted of a crime for which he received probation as a sentence. *Id.* at 662. In structuring the suspension, the supreme court observed: “Because that term of probation is subject to change by order of the trial court, we believe that a definite period of suspension is appropriate in this case.” *Id.* at 666. The court did not, as Gose claims, terminate Attorney Martin’s probation. It merely recognized that sentence modification was a possibility and could affect the license suspension if a definite period was not set.

¶10 Equally unavailing is Gose’s citation to *Edwards*, 267 Wis. 2d 491, and *State v. Hays*, 173 Wis. 2d 439, 444-45, 496 N.W.2d 645 (Ct. App. 1992). Those cases recognize the trial court’s authority to modify the terms and conditions of probation. However, they illustrate that “terms and conditions,” as

used in WIS. STAT. § 973.09(3)(a), does not reference the length of time of the probationary period. Indeed, § 973.09(3)(a) specifically authorizes the trial court to “extend probation for a stated period,” but includes no specific authorization to terminate probation. Moreover, because that statute uses “period” as reference to the amount of time, the authorization to modify the “terms and conditions” of probation does equate “term” to the amount of time to be served on probation. To hold otherwise would allow the trial court to effect a prohibited judicial revocation of probation under the guise of modifying the “terms and conditions” of probation. *See State v. Horn*, 226 Wis. 2d 637, 651, 594 N.W.2d 772 (1999) (recognizing that although the trial court has statutory authority to extend probation or modify the terms of a defendant’s probation up until the time probation expires, only the executive branch may determine whether revocation is warranted). The trial court’s power to terminate probation, absent grounds for sentence modification, appears limited to circumstances where the defendant refuses to accept probation. *See State v. Pote*, 2003 WI App 31, ¶22, 260 Wis. 2d 426, 659 N.W.2d 82 (when a defendant refuses to accept probation and requests instead that a sentence be imposed, a court must honor the request); *State v. McCready*, 2000 WI App 68, ¶1, 234 Wis. 2d 110, 608 N.W.2d 762 (honoring a probationer’s request to end probation is not a judicial revocation). Gose did not refuse to accept probation, he simply wanted probation terminated in favor of time served. That was a request for sentence modification. The trial court’s finding that no factors supported sentence modification is not challenged on appeal.

By the Court.—Orders affirmed.

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

