COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP640-CR **Cir. Ct. No. 2002CF1411**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EZRA O. SANDERS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Ezra O. Sanders, *pro se*, appeals an order denying his motion to modify his sentence. He challenges the DNA surcharge imposed by the circuit court, arguing that the court failed to adequately explain why it was imposed. *See* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 208, 752

N.W.2d 393, 395 (when the circuit court exercises discretionary power to impose a DNA surcharge, it must explain its reasons for doing so). We affirm.

¶2 As we have explained in other cases, when moving to vacate a DNA surcharge, a defendant is moving to modify his or her sentence. A motion to modify a sentence must be brought within ninety days of sentencing under WIS. STAT. § 973.19(1)(a), or within appellate time limits set forth in WIS. STAT. RULE 809.30. *See* ***State v. Norwood***, 161 Wis. 2d 676, 680–681, 468 N.W.2d 741, 743 (Ct. App. 1991). Sanders was sentenced on May 9, 2002, for multiple felonies and ordered to provide a DNA sample and pay the applicable surcharge. Sanders did not move to modify his sentence until nearly seven years after this sentence was imposed, so his motion is untimely. Moreover, if we were to construe the motion as brought pursuant to WIS. STAT. § 974.06, which allows postconviction challenges in a broader set of circumstances, Sander's claim would fail because that statute may not be used to challenge the circuit court's exercise of sentencing discretion "when a sentence is within the statutory maximum or otherwise within the statutory power of the court." *See* ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20, 25 (1978).

¶3 Sanders contends that he should be allowed to obtain relief because his motion for sentence modification is based on a "new factor," the recently decided ***Cherry*** case. *See* ***Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208, 752 N.W.2d at 395. A motion for sentence modification based on a "new factor" can be made at any time. ***State v. Noll***, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 580, 653 N.W.2d 895, 898. "The term 'new factor' refers to 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 … it was unknowingly overlooked by all of the parties." ***State v. Kluck***, 210 Wis. 2d 1,

7, 563 N.W.2d 468, 470 (1997). Our recent decision in ***Cherry*** does not qualify as a new factor. We have previously held that a post-sentencing change in the law is not a new factor for purposes of sentence modification because it is not "highly relevant" to the imposition of the original sentence. *See* ***State v. Trujillo***, 2005 WI 45, ¶30, 279 Wis. 2d 712, 732, 694 N.W.2d 933, 943; ***State v. Tucker***, 2005 WI 46, ¶13, 279 Wis. 2d 697, 704–705, 694 N.W.2d 926, 930.

By the Court.—Order affirmed.

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