COURT OF APPEALS
DECISION
DATED AND RELEASED

January 16, 1997

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. 96-1251

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TODD D. MOSKONAS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Portage County: FREDERIC W. FLEISHAUER, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. Todd D. Moskonas appeals from a judgment of conviction for sexual assault of a child and from an order summarily denying his postconviction motion.[1] The issues are: (1) whether the postconviction

[1] We use the phrase summarily denied to denote that the motion was denied without an evidentiary hearing.

court correctly concluded, as a matter of law, that the trial court was empowered to impose a probationary term to run concurrent to a prison sentence ("substantive motion"); and (2) whether the postconviction court erroneously exercised its discretion in summarily denying Moskonas's substantive motion and his request for the appointment of postconviction counsel. We conclude that ***State v. Aytch***, 154 Wis.2d 508, 453 N.W.2d 906 (Ct. App. 1990), allows the imposition of a probationary term concurrent to a prison sentence. Consequently, the postconviction court properly exercised its discretion in summarily denying the motion. Therefore, we affirm.

In 1991, Moskonas was charged with sexual contact of a child. That allegation resulted in revocation of his probation imposed for a 1987 conviction for third-degree sexual assault of a child. Following the 1992 conviction for the 1991 charge, Moskonas was sentenced for both crimes: to five years in prison and to a twelve-year probationary term to run concurrent with that sentence.

Moskonas filed a *pro se* postconviction motion to "vacate" and "correct" his 1992 sentence because he claimed that the trial court could not impose a term of probation concurrent to a prison sentence. He also moved for the appointment of postconviction counsel to represent him on the substantive motion. The postconviction court summarily denied his motions because the concurrent probation structure is authorized by ***Aytch***.

Moskonas raises seven issues which we have consolidated into two.[2] ***Aytch*** is dispositive of the substantive issue because we held that "a sentence with probation that is concurrent to a prison sentence on a different charge is permitted under sec. 973.09(1)(a), STATS." ***Aytch,*** 154 Wis.2d at 511-12, 453 N.W.2d at 908.[3] Consequently, the trial court's imposition of a probationary

[2] Moskonas's first issue is whether we review the construction of a statute without deference to the trial court's interpretation. Moskonas is correct. However, it does not change our decision. We consolidate four of the "substantive" issues because they challenge the propriety and applicability of ***Aytch.*** We consolidate the two remaining issues because they challenge the propriety of the postconviction court's order summarily denying relief.

[3] Section 973.09(1)(a), STATS., provides in relevant part:

term to run concurrent to a prison sentence is authorized by statute, as construed by ***Aytch.*** Despite Moskonas's arguments attempting to circumvent ***Aytch,*** it is precedent that is binding on the trial court and on this court. *See* ***State v. Solles,*** 169 Wis.2d 566, 570, 485 N.W.2d 457, 459 (Ct. App. 1992).

The trial court has the discretion to summarily deny a postconviction motion if the defendant has alleged facts which, even if proven true, would not entitle him to relief. *See, e.g.*, ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972) ("[I]f the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.").

The substantive issue is controlled by ***Aytch***. There is no reason to conduct an evidentiary hearing because there is no evidence that could render ***Aytch*** inapplicable. Consequently, Moskonas has not alleged anything that would entitle him to postconviction relief, and the trial court properly exercised its discretion in summarily denying his motion. *See* ***Nelson,*** 54 Wis.2d at 497-98, 195 N.W.2d at 633; *see also* ***State v. Bentley,*** 201 Wis.2d 303, 310-11, 548 N.W.2d 50, 53 (1996). Likewise, it would be an exercise in futility to appoint counsel to pursue this issue because it is controlled by ***Aytch.*** Counsel cannot change that.

By the Court.—Judgment and order affirmed.

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

(..continued)

> [I]f a person is convicted of a crime, the court, by order, may withhold sentence or impose sentence under s. 973.15 and stay its execution, and in either case place the person on probation to the department for a stated period, stating in the order the reasons therefor. The court may impose any conditions which appear to be reasonable and appropriate. The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously....