

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 27, 2005

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. 2005AP254

Cir. Ct. No. 1999CF2189

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANDREW M. OBRIECHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT A. DeCHAMBEAU, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Andrew Obrieht appeals the circuit court's order denying his motion for postconviction relief and the judgment of conviction and sentence for battery in violation of WIS. STAT. § 940.19(1), as a repeat

¹ This appeal is decided by one judgment pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

offender. We affirm the court's order, the judgment of conviction and the sentence.

¶2 On April 10, 2000, Obriecht entered a plea of no contest to a charge of violating WIS. STAT. § 940.19(1), battery by prisoners as enhanced for habitual criminality under WIS. STAT. § 939.62(1)(a). Sentence was withheld and the court ordered him placed on probation for a period of three years, concurrent with any sentence he was then serving. After Obriecht's probation was revoked, he appeared before the circuit court for sentencing on August 17, 2001. The court sentenced him to one year in prison consecutive to a sentence imposed in another case.

¶3 For reasons not directly relevant to this appeal, Obriecht did not file a motion for postconviction relief until December 1, 2004. The motion asserted that his trial counsel was ineffective for matters related to the arraignment and that he wished to withdraw his plea because the circuit court failed to ascertain his knowledge and understanding of the charge and trial counsel failed to explain the nature of the charge to him and failed to disclose the results of certain investigations related to the charge. The motion also asked to have his sentence vacated because he was denied effective assistance of postconviction counsel. Postconviction counsel was ineffective, Obriecht asserted, because that attorney told him that the only permissible issues that may be raised in postconviction proceedings relate to those at or after the sentencing on revocation and that attorney therefore refused to assist him in withdrawing his plea and in investigating various avenues for defense of the charges.

¶4 The circuit court denied Obriecht's motion, concluding that there was no basis to the claims of ineffective assistance of trial counsel and

postconviction counsel, and, moreover, Obrieht had not secured their presence at a hearing, which is required for an ineffective assistance of counsel claim. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶5 On appeal Obrieht argues the merits of his motion and also asks for a hearing in the circuit court at which trial counsel and postconviction counsel are present, if we conclude that is necessary. We do not address these arguments because we affirm the circuit court on another ground. When a sentence is withheld and the defendant is placed on probation, any challenges relating to that conviction, including to the plea, must be made at that time. *See State v. Tobey*, 200 Wis. 2d 781, 784, 584 N.W.2d 95 (Ct. App. 1996); *State v. Drake*, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). A postconviction motion for relief after sentence has been imposed following probation revocation may raise only issues related to that sentence, and these are the only issues properly before us on appeal. *See Tobey*, 200 Wis. 2d at 784. This is apparently what Obrieht's postconviction counsel advised him, and that is correct. However, Obrieht presents no argument that the circuit court erred in imposing the sentence that it did after revocation. Accordingly, we affirm the court's order denying his motion for postconviction relief, as well as the judgment of conviction and sentence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

