

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 19, 2006

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 Nos. 2006AP448-CR
2006AP449-CR**

**Cir. Ct. Nos. 2000CF1393
2000CF1760**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL J. BROWN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 KESSLER, J. Paul J. Brown appeals from a January 25, 2006 order dismissing his motion to modify sentence. Because we determine that Brown's

motion is untimely under WIS. STAT. §§ 973.19 and 974.02 (2003-04),¹ and WIS. STAT. RULE 809.30, we affirm.

BACKGROUND

¶2 This is a combined appeal of Brown's motions for sentence modification in Milwaukee County Circuit Court case nos. 00CF1393 and 00CF1760. In 00CF1393, Brown pled guilty on May 24, 2000, to three counts of armed robbery, with the threat of force. Also on May 24, 2000, in 00CF1760, Brown pled guilty to one count of robbery, with the threat of force, and one count of attempted robbery, with the threat of force. On July 10, 2000, Brown was sentenced in both cases: in 00CF1393, Brown was sentenced to consecutive sentences for each of the three counts, for a total of sixteen years of confinement and ten years of extended supervision; and in 00CF1760, he was sentenced to consecutive sentences (between the counts and consecutive to his sentences in 00CF1393), for a total of seven years' confinement and six years' extended supervision.

¶3 Brown has filed a number of motions with the trial court in the intervening years.² On October 9, 2001, Brown filed a motion for production of transcripts, which was denied by the trial court on the same day (with a notation that a copy of the transcript of the sentencing hearing, which was already available

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² Brown has filed the same motions in both cases and the records in both cases have copies of the trial court orders relating to each of the motions. The motions themselves are primarily, though not entirely, part of the record of case no. 00CF1393.

in the file, would be forwarded to Brown). On January 7, 2002, Brown filed a “motion for jail time credit” requesting ninety-eight days of sentence credit. On January 9, 2002, the trial court granted the motion in part, ordering that fifty-seven days of sentence credit be applied to the sentence on count one of each of the cases. The January 9, 2002 decision and order also amended the judgments of conviction to reflect the trial court’s order at the sentencing hearing that “the counts in each of these cases [are] to run consecutive to each other and concurrent with the revocation term.”

¶4 On March 1, 2002, Brown filed a new motion requesting modification of his sentence, which the trial court denied by order dated March 4, 2002. On May 27, 2003, Brown filed a motion to modify his sentence based upon a new factor—a change in the law reassigning armed robbery from a Class C felony to a Class E felony, with a requisite reduction in maximum penalties available. On May 27, 2003, the trial court denied the motion, citing the supreme court’s holding in *State v. Hegwood*, 113 Wis. 2d 544, 548, 335 N.W.2d 399 (1983), that a change in the law was not a new factor under which a sentence could be modified.

¶5 On February 17, 2004, Brown petitioned the trial court for eligibility for the Challenge Incarceration Program (CIP). A public defender was assigned to the case and at a hearing held on June 24, 2004, the trial court granted the petition. On October 22, 2004, Brown filed a motion for modification of sentence, asserting that his eligibility for the CIP was a new factor which required a modification of his sentence in order for him to be eligible under its guidelines. On October 25, 2004, the trial court issued an order denying the motion. One year later, on October 19, 2005, Brown filed a motion for reconsideration of the October 2004

order and on October 26, 2005, the trial court denied Brown's motion for reconsideration.

¶6 On January 24, 2006, Brown filed a motion for sentence modification asserting, for the first time, that the trial court had abused its discretion in sentencing Brown because the trial court "failed to provide [an] explanation for imposing consecutive sentences for each count, versus imposing concurrent sentence[s and] ... failed to make findings regarding sentence factors." In his motion, Brown seeks a sentence modification which allows him to serve concurrently all five of the sentences he received in case nos. 00CF1393 and 00CF1760, for a total of seven years confinement and three years extended supervision. On January 27, 2006, the trial court³ denied Brown's motion for sentence modification as untimely. On February 21, 2006, Brown appealed this order and filed a motion for reconsideration with the trial court. By order dated February 23, 2006, the trial court denied Brown's motion for reconsideration.

DISCUSSION

¶7 Under WIS. STAT. § 974.02(1), "[a] motion for postconviction relief other than under s. 974.06 or 974.07 (2) by the defendant in a criminal case shall be made in the time and manner provided in s. 809.30." WISCONSIN STAT. RULE 809.30(2)(h) states, in pertinent part:

³ Due to the span of time over which these proceedings occurred, these cases have been assigned to multiple judges: From the inception of the case through July 2000, and then again from October 2005 through the decision and order dated February 23, 2006, the Honorable Jeffrey A. Wagner presided; from August 2000 through March 2002, the Honorable Daniel L. Konkol presided; and from May 2003 through October 2004, the Honorable Elsa C. Lamelas presided.

(h) *Notice of appeal, postconviction or postdisposition motion.* The person shall file in circuit court and serve on the prosecutor and any other party a notice of appeal or motion seeking postconviction or postdisposition relief within 60 days after the later of the service of the transcript or circuit court case record.

¶8 A defendant can also seek sentence modification pursuant to WIS. STAT. § 973.19.⁴ Under § 973.19(1), a defendant must bring a motion to modify sentence when he or she has not ordered transcripts within ninety days of sentencing, § 973.19(1)(a), or when transcripts have been ordered, within the deadlines established by WIS. STAT. RULE 809.30(2)(h).

⁴ WISCONSIN. STAT. § 973.19 states:

Motion to modify sentence. (1) (a) A person sentenced to imprisonment or the intensive sanctions program or ordered to pay a fine who has not requested the preparation of transcripts under s. 809.30 (2) may, within 90 days after the sentence or order is entered, move the court to modify the sentence or the amount of the fine.

(b) A person who has requested transcripts under s. 809.30 (2) may move for modification of a sentence or fine under s. 809.30 (2) (h).

(2) Within 90 days after a motion under sub. (1) (a) is filed, the court shall enter an order either determining the motion or extending the time for doing so by not more than 90 days for cause.

(3) If an order determining a motion under sub. (1) (a) is not entered timely under sub. (2), the motion shall be considered denied and the clerk of the court shall immediately enter an order denying the motion.

(4) An appeal from an order determining a motion under sub. (1) (a) is governed by the procedure for civil appeals.

(5) By filing a motion under sub. (1) (a) the defendant waives his or her right to file an appeal or postconviction motion under s. 809.30 (2).

¶9 Additionally, after a defendant's time for appeal or to seek other postconviction relief under WIS. STAT. § 974.02 has expired, he or she may bring a motion for postconviction relief under WIS. STAT. § 974.06; however, "[p]ostconviction review under sec. 974.06, Stats., is limited to jurisdictional or constitutional matters or to errors that go directly to guilt." *State v. Flores*, 158 Wis. 2d 636, 646, 462 N.W.2d 899 (Ct. App. 1990), *overruled on other grounds* by *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992) (citing *Cresci v. State*, 89 Wis. 2d 495, 505, 278 N.W.2d 850 (1979)). Specifically, § 974.06 proceedings "cannot be used to challenge a sentence because of an alleged [mis]use of discretion." *Smith v. State*, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978).

¶10 Brown was convicted and sentenced in 2000. In October 2001, Brown requested that the trial court order that all of the transcripts of his hearings in case nos. 00CF1393 and 00CF1760 be provided to him free of charge. On October 9, 2001, the trial court denied Brown's request, except that it ordered Brown be provided with a copy of the only transcribed hearing, the sentencing hearing. It is clear from the record that Brown had a copy of the transcript of the sentencing hearing by October 2004, when he attached pages of it as an exhibit to his October 22, 2004 motion. Brown, for the first time in his motion for sentence modification filed on January 24, 2006, asserted that the trial court erroneously exercised its discretion when it sentenced Brown to consecutive sentences on the five counts contained in case nos. 00CF1393 and 00CF1760. Because the time for Brown's appeal rights had long expired under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30, as had his right to request sentencing modification under WIS. STAT. § 973.19, and because Brown cannot use WIS. STAT. § 974.06 to challenge his sentence under a claim that the trial court erroneously exercised its discretion in its

sentencing of Brown, we affirm the trial court's January 27, 2006 and February 13, 2006 orders denying Brown's motion and motion for reconsideration requesting a modification of his sentence based on an erroneous exercise of discretion by the sentencing court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

