

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2007

A. John Voelker
Acting 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. 2005AP3112
2005AP3113**

**Cir. Ct. Nos. 1996CF4496
1996CF4555**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES LONDON WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
MICHAEL B. BRENNAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Charles L. Williams appeals from orders¹ of the circuit court denying his postconviction motions seeking sentence modification. Because the motions were untimely filed, we affirm.

¶2 In 1997, Williams was convicted of one count of armed burglary as a habitual criminal and one count of burglary. The circuit court imposed a twenty-five-year sentence for the armed burglary and a ten-year sentence for the burglary, to run consecutively. On November 16, 2005, Williams filed identical postconviction motions “pursuant to WIS. STAT. § 974.06” requesting sentence modification. Williams asserted that the circuit court, when imposing sentence, “was not fully apprized [sic] of the underlying facts” concerning the relationship between Williams and one of the victims—facts which if known and “properly considered ... would have cried out for a concurrent sentence” rather than the consecutive sentences imposed by the circuit court. Alternatively, Williams asserted that the circuit court did not adequately explain why consecutive sentences were appropriate. The circuit court denied the motions and these consolidated appeals follow.

¶3 Williams’s motions challenge the circuit court’s exercise of sentencing discretion. A motion for sentence modification alleging an erroneous exercise of sentencing discretion by the circuit court must be brought within ninety days of sentencing under WIS. STAT. § 973.19(1)(a) (2005-06),² or within

¹ Williams filed identical postconviction motions for sentence modification and the circuit court entered identical orders disposing of the motions in each case. This court, on its own motion, ordered these appeals consolidated for disposition.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

appellate time limits set forth in WIS. STAT. RULE 809.30. *State v. Norwood*, 161 Wis. 2d 676, 681, 468 N.W.2d 741 (Ct. App. 1991). Williams’s motions, filed over eight years after sentencing, are not timely filed under § 973.19(1)(a). Further, the appellate time limits of WIS. STAT. § 974.02(1) and RULE 809.30 have long since expired, and therefore, Williams’s motions are also untimely under those statutes.³

¶4 As noted above, Williams referred to WIS. STAT. § 974.06 in his motions. 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)). A § 974.06 motion “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). Thus, Williams cannot argue that the circuit court erroneously exercised sentencing discretion in a § 974.06 motion.⁴

³ A motion for sentence modification based upon a “new factor” can be made at any time. See *State v. Noll*, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895. In his circuit court motions, Williams did not argue that a “new factor” existed. On appeal, Williams does raise an argument in “new factor” terminology and contends that a change in parole policy relating to mandatory release practices constitutes a new factor. Because that argument was not argued before the circuit court, it is not properly before this court on appeal. See *State v. Rogers*, 196 Wis. 2d 817, 828-29, 539 N.W.2d 897 (Ct. App. 1995).

⁴ We also note that Williams filed a postconviction motion under WIS. STAT. § 974.06 in 2002. The motion was denied by the circuit court and this court summarily affirmed. *State v. Williams*, No. 2002AP1580, unpublished slip op. (WI App Dec. 26, 2002). To the extent that Williams relies on § 974.06, the motions are also procedurally barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994) (A defendant is barred from raising in a postconviction motion claims that could have been raised in prior postconviction and appellate proceedings, unless the defendant articulates a sufficient reason for that failure.).

¶5 Because the time for Williams’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 Williams cannot use WIS. STAT. § 974.06 to challenge his sentence under a claim that the circuit court erroneously exercised its sentencing discretion, we affirm the order denying Williams’s motions for sentence modification.

By the Court.—Orders affirmed.

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

