COURT OF APPEALS
DECISION
DATED AND RELEASED

July 29, 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. 96-2034

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRUCE MARTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Bruce Martin, *pro se*, appeals from a judgment convicting him of two counts of armed robbery, party to a crime, and one count of possession of a firearm by a felon, party to a crime. *See* §§ 943.32(1)(b), 943.32(2), 939.05, and 941.29(2), STATS. He also appeals from an order denying his postconviction motion. Martin claims that he did not affirmatively enter any

guilty pleas and therefore his conviction should be vacated. He also claims in the alternative that the trial court erroneously exercised its sentencing discretion. We affirm.

Martin pled guilty to two counts of armed robbery, party to a crime, and one count of possession of a firearm by a felon, party to a crime, in exchange for the dismissal of another armed robbery charge in a different case. Martin completed and signed a guilty plea questionnaire and waiver of rights form that indicated he was pleading guilty to the two counts of armed robbery, party to a crime, and one count of possession of a firearm by a felon, party to a crime. Martin then appeared before the trial court and the following exchange occurred:

> THE COURT: Mr. Martin, you understand that you're pleading guilty to two count[s] … of armed robbery and one count of felon in possession of a firearm. Is that what you're doing?
>
> THE DEFENDANT: Yes, I am.

The trial court then informed Martin what the maximum penalties were for the charged crimes and had the following exchange:

> THE COURT: Knowing all of that, do you wish to continue with your pleas of guilty to these two counts of armed robbery and one count of felon in possession of a firearm?
>
> THE DEFENDANT: Yes.

Thereafter, Martin was sentenced to 22 years in prison on all counts. Martin filed a postconviction motion, alleging that his conviction was void because he never directly entered a guilty plea and that the sentences imposed were an erroneous exercise of discretion. The trial court rejected Martin's arguments and denied his motion without a hearing.

Martin first claims that he never affirmatively pled guilty because the trial court never directly questioned him on whether he wanted to plead guilty. Section 972.13(1), STATS., allows a judgment of conviction to "be entered upon … a plea of guilty…." Section 972.13(1), however, does not indicate how a defendant is to make such a plea nor does it mandate an exact line of questioning by the trial court or what type of terminology should be used by a defendant wishing to plead guilty. Here, as noted, the trial court engaged Martin in an exchange regarding his desire to plead guilty by first asking him whether he understood that he was pleading guilty. Martin responded, "Yes." The trial court then asked Martin whether he wished to continue with his guilty pleas after learning of the possible penalties involved. Martin again answered, "Yes." This colloquy was sufficient to indicate Martin's desire to plead guilty and that he did, in fact, enter guilty pleas.

Martin also claims that the trial court erroneously exercised its sentencing discretion by sentencing him to the same term as that given to a co-defendant. We cannot reach the merits of Martin's claim. In his postconviction motion to the trial court, Martin relied on both §§ 974.06 and 973.19, STATS., in support of his sentence modification argument. Pursuant to § 973.19(1), a defendant who has not filed a notice of intent to pursue postconviction relief and ordered transcripts pursuant to § 809.30(2), STATS., may seek a sentence modification. Such action, however, must be brought within ninety days from the date the sentence is ordered. Martin was sentenced on September 30, 1991. His postconviction motion was filed on March 25, 1996. Martin, therefore, was approximately five years too late to avail himself of § 973.19.

Martin also relied on § 974.06, STATS., for bringing his postconviction motion. "The question of [an erroneous exercise] of discretion in

sentencing cannot be raised under § 974.06, STATS., when a sentence is within the statutory maximum or otherwise within the statutory power of the court." ***State v. Smith***, 85 Wis.2d 650, 661, 271 N.W.2d 20, 25 (1978). Martin was sentenced to prison terms of ten years each on the two counts of armed robbery, which are each punishable by up to twenty years in prison. Martin received a two-year prison term on the conviction of possession of a firearm by a felon, the maximum term available. Martin's sentence was within the statutory maximum and, therefore, his claim of sentencing error is not reviewable under § 974.06.[1]

By the Court.—Judgment and order affirmed.

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

[1] The trial court erroneously addressed the merits of his arguments because neither § 974.06, STATS., nor § 973.19, STATS., permits review of Martin's sentence.