

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 6, 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. 2003AP3026

Cir. Ct. No. 1999CF3941

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MELVIN D. TORAN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JOHN SIEFERT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Melvin D. Toran, *pro se*, appeals from an order denying his postconviction motion and an order denying reconsideration. In his

motions, filed under WIS. STAT. § 974.06 (2003-04),¹ Toran argued that the court erroneously exercised sentencing discretion. The circuit court denied Toran's motions without a hearing. Because a challenge to sentencing discretion cannot be raised in a § 974.06 motion, we affirm.

¶2 On October 11, 1999, Toran pled guilty to one count of delivery of heroin, less than three grams, while armed with a dangerous weapon, party to a crime; and one count of delivery of heroin, between ten and fifty grams, while armed with a dangerous weapon, party to a crime. The court sentenced Toran to four years in prison for the lesser amount and to ten years in prison for the greater amount, to be served consecutively.

¶3 Toran did not pursue an appeal under WIS. STAT. § 974.02 or WIS. STAT. RULE 809.30. On September 25, 2003, Toran filed a *pro se* motion for sentence modification under WIS. STAT. § 974.06. He alleged that the circuit court erroneously exercised sentencing discretion when it imposed consecutive sentences and when it did not consider a “de facto” policy of the Parole Commission to deny parole to drug offenders.² The circuit court denied Toran's motion, and a reconsideration motion, without a hearing.

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

² We note that a change in parole policy does not constitute a “new factor” for sentence modification purposes unless parole policy was “highly relevant to the imposition of sentence.” *State v. Franklin*, 148 Wis. 2d 1, 13, 434 N.W.2d 609 (1989) (citation omitted). We have reviewed the sentencing transcript in this case and there is no indication that the sentence was premised upon any assumptions regarding when Toran might be granted parole. As in *Franklin*, “parole policy simply was not relevant to the original sentence imposed in this case.” *Id.* Therefore, no new factor exists.

¶4 Postconviction review under WIS. STAT. § 974.06 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); *Cresci v. State*, 89 Wis. 2d 495, 505, 278 N.W.2d 850 (1979). Section 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). “[P]ostconviction review under sec. 974.06 is applicable only to jurisdictional or constitutional matters or to errors that go directly to the issue of the defendant’s guilt.” *Id.* Misuse of discretion in sentencing cannot be raised under § 974.06 “when a sentence is within the statutory maximum or otherwise within the statutory power of the court.” *Id.* Toran’s sentence was within the statutory maximum. Therefore, he could not invoke § 974.06 in order to challenge the court’s exercise of sentencing discretion.³

By the Court.—Orders affirmed.

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

³ Because he did not file a timely notice of intent to pursue postconviction relief, Toran’s motion could not be construed as having been filed under WIS. STAT. RULE 809.30 (direct appeal from conviction). Similarly, it could not be construed as having been filed under WIS. STAT. § 973.19(1) because a motion for sentence modification under that section must be filed within ninety days of sentencing.

