

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 20, 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. 2003AP3127

Cir. Ct. No. 2000CF3925

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

XAVIER N. LOVE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MARY M. KUHNMUENCH, Judge. *Affirmed.*

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

¶1 PER CURIAM. Xavier N. Love appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)¹ postconviction motion. In his motion, Love argued that his trial counsel was ineffective for not filing a sentence modification motion under WIS. STAT. § 973.19. The circuit court denied Love's motion without a hearing. Because the circuit court correctly concluded that trial counsel's representation of Love was completed upon the filing of a notice of intent to pursue postconviction relief, we affirm.

BACKGROUND

¶2 Love pled guilty to first-degree reckless homicide. As part of a plea agreement, the State agreed to dismiss a habitual criminal allegation and not to issue additional charges in connection with the incident. On January 3, 2001, the court sentenced Love to forty-five years of imprisonment, comprised of thirty years of initial confinement and fifteen years of extended supervision.

¶3 On January 18, 2001, Love's trial counsel, Cynthia M. Wynn, filed a notice of intent to pursue postconviction relief with the circuit court. *See* WIS. STAT. RULE 809.30(2)(b).² In the notice of intent to pursue postconviction relief, Love requested the appointment of appellate counsel. *See* RULE 809.30(2)(b)5. The State Public Defender appointed Attorney Diana M. Felsmann to represent Love. Attorney Felsmann did not file a postconviction motion or notice of appeal on Love's behalf. Attorney Felsmann closed her file in June 2001, after

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

² The substance of WIS. STAT. RULE 809.30(2)(b) has not been changed throughout the course of this matter.

determining that there would be no arguable merit to an appeal and after Love agreed that she should close her file.³

¶4 On May 19, 2003, Love filed a *pro se* motion for sentence modification in which he argued that the circuit court erroneously exercised sentencing discretion. In its order, the circuit court stated that a challenge to sentencing discretion must be raised either in a direct appeal under WIS. STAT. RULE 809.30 or in a sentence modification motion under WIS. STAT. § 973.19. The court noted that Love's direct appeal rights under RULE 809.30 had expired and that his motion was filed more than ninety days after sentencing, and therefore, it was not timely under § 973.19(2). The court also noted that a challenge to sentencing discretion could not be raised in a WIS. STAT. § 974.06 postconviction motion. Accordingly, the court denied the motion. Love did not appeal.

¶5 On August 18, 2003, Love filed the WIS. STAT. § 974.06 postconviction motion underlying this appeal. That motion borrowed substantially from the prior sentence modification motion. However, in apparent recognition of the limitations of a § 974.06 motion, Love did not directly contend that the circuit court erroneously exercised sentencing discretion. Rather, he alleged that his trial counsel was ineffective for not filing a motion challenging the exercise of sentencing discretion. The circuit court denied the motion without a hearing.

³ Attorney Felsmann's decision to close her file is recounted in the circuit court's order. The source of the court's information regarding Attorney Felsmann's conduct and Love's agreement is not apparent from the record.

DISCUSSION

¶6 We first note that several issues addressed by Love in his *pro se* brief are not properly before this court. In his brief, Love complains about Attorney Felsmann's decision to close the file. He contends that he did not knowingly, voluntarily or intelligently waive his right to a direct appeal and that if Attorney Felsmann believed there were no arguably meritorious issues, she should have filed a no-merit report under WIS. STAT. RULE 809.32.

¶7 The proper vehicle for a defendant to attack appointed counsel's failure to commence an appeal governed by WIS. STAT. RULE 809.30 or WIS. STAT. RULE 809.32, is a petition for habeas corpus, pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), which should be filed in this court. *State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 798-99, 565 N.W.2d 805 (Ct. App. 1997); *see also State v. Evans*, 2004 WI 84, ¶34 n.12, ¶39 n.14, 273 Wis. 2d 192, 682 N.W.2d 784. Love cannot obtain review of Attorney Felsmann's conduct as appointed counsel in the context of a WIS. STAT. § 974.06 postconviction motion.

¶8 We also note that, in his appellate brief, Love raises several complaints about the effectiveness of trial counsel that were not raised in his postconviction motion.⁴ In the motion, Love argued only that trial counsel was ineffective when she did not file a motion for sentence modification under WIS. STAT. § 973.19. Because this court will not consider issues on appeal that were not raised in the circuit court, *see State v. Rogers*, 196 Wis. 2d 817, 826, 539

⁴ Similarly, Love did not challenge the effectiveness of Attorney Felsmann's representation in his postconviction motion.

N.W.2d 897 (Ct. App. 1995), we do not address Love’s other challenges to the effectiveness of trial counsel.⁵

¶9 We now turn to the single issue that is properly before us—whether Love’s trial counsel was ineffective for not filing a sentence modification motion within the ninety-day time limit of WIS. STAT. § 973.19. We agree with the circuit court’s conclusion that trial counsel’s representation of Love was completed upon the filing of the notice of intent to pursue postconviction relief.

¶10 Under WIS. STAT. RULE 809.30(2)(a) and (b), if a person desires postconviction relief in a criminal case, “[c]ounsel representing the person at sentencing ... shall file in [the] circuit court and serve on the prosecutor and any other party a notice of intent to pursue postconviction ... relief.” The notice of intent to pursue postconviction relief shall be filed within twenty days after the date of sentencing. RULE 809.30(2)(b). The filing of the notice of intent is the first step in the direct appeal process, and trial counsel is responsible for filing the notice. *See* WIS. STAT. § 973.18(5) (“If the defendant desires to pursue postconviction relief, the defendant’s trial counsel shall file the notice required by s. 809.30(2)(b).”).

¶11 The notice of intent should indicate whether the person requests the appointment of counsel for purposes of postconviction relief. WIS. STAT. RULE 809.30(2)(b)5. If appointed counsel is requested, the person’s indigency is redetermined if necessary, counsel is appointed and transcripts are ordered. RULE 809.30(2)(d) and (e). After transcripts are prepared, appointed counsel files

⁵ Love argues that trial counsel did not order an “up-to-date” psychological test to determine his competency and misled him about the court’s probable sentence.

any necessary postconviction motions or the notice of appeal. RULE 809.30(2)(h) through (2)(j). Thus, under the process established in RULE 809.30(2), trial counsel has no further obligation to a defendant after the filing of a notice of intent to pursue postconviction relief.

¶12 In this case, the notice of intent to pursue postconviction relief filed on Love's behalf requested the appointment of counsel. The record shows that Attorney Felsmann was appointed to represent Love. Therefore, Attorney Wynn's obligation to Love ceased upon the filing of the notice of intent to pursue postconviction relief.

¶13 The Judicial Council Note to WIS. STAT. § 973.19 supports our conclusion. That Note states, in pertinent part:

Motions under this section should usually be filed by trial counsel without the need for transcripts or for the appointment of an appellate public defender. A defendant must elect between the remedies provided by this section and s. 809.30(2). Filing a motion under this section waives relief under s. 809.30(2). However, a defendant who has filed a notice of intent to pursue postconviction relief under s. 809.30(2)(b) may invoke this remedy at any time before transcripts are ordered under s. 809.30(2).

¶14 While the Note states that a motion for sentence modification under WIS. STAT. § 973.19 may be filed by trial counsel, it also suggests that once transcripts are ordered, any sentence modification motion would be part of the WIS. STAT. RULE 809.30(2) appeal process. The record in this case shows that Love's appeal was proceeding according to RULE 809.30(2) procedure. Therefore, the sentence modification procedure of § 973.19 was not applicable. See *State v. Meyer*, 150 Wis. 2d 603, 608, 442 N.W.2d 483 (Ct. App. 1989) (A motion to modify sentence under § 973.19 "is an alternative to, and waiver of," RULE 809.30 procedures.).

¶15 Because trial counsel was not ineffective for not filing a sentence modification motion under WIS. STAT. § 973.19, the circuit court's order denying Love's WIS. STAT. § 974.06 postconviction motion must be affirmed.

By the Court.—Order affirmed.

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

