

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 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 No. 2005AP447

Cir. Ct. No. 2003CF665

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT A. ZIMMERLEE,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Robert Zimmerlee appeals from the circuit court's order denying his postconviction motion under WIS. STAT. § 974.06(1)

(2003-04),¹ and an order denying his motion for reconsideration. Because Zimmerlee's postconviction motions were properly denied, we affirm.

¶2 Zimmerlee entered guilty pleas in 2003 to one count of homicide by intoxicated use of a motor vehicle and one count of causing injury or great bodily harm by intoxicated use of a motor vehicle. The circuit court imposed a fifteen-year sentence on the homicide count, consisting of ten years of initial confinement and five years of extended supervision. The circuit court imposed a concurrent three-year sentence on the injury count, consisting of one year of initial confinement and two years of extended supervision.

¶3 Zimmerlee did not file a direct appeal. Instead, on November 13, 2003, Zimmerlee filed a motion to modify his sentence, requesting a change in the restitution order² imposed by the circuit court and a reduction of his prison terms. Following a hearing on the motion, the trial court entered an order on March 12, 2004, denying the motion. Zimmerlee did not appeal from the order.

¶4 Subsequently, Zimmerlee filed a WIS. STAT. § 974.06(1) motion, the motion underlying this appeal. The motion asserted that: (1) the circuit court erroneously exercised discretion at sentencing; (2) the State breached its plea agreement with Zimmerlee at the hearing on his motion for sentence modification; (3) the circuit court failed to award him certain sentence credit to which he was entitled; and (4) Zimmerlee was denied effective assistance of trial counsel.

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

² The circuit court ordered restitution in the amount of \$12,577.00.

¶5 In response to the motion, the circuit court entered an order granting Zimmerlee “a total of 19 days of credit on counts one and two rather than three (3) days of credit.” The order denied the balance of Zimmerlee’s motion, concluding it was barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Zimmerlee moved for reconsideration, claiming that *Escalona-Naranjo* did not bar his claims in light of *State v. Grindemann*, 2002 WI App 106, 225 Wis. 2d 632, 648 N.W.2d 507. The circuit court rejected the motion for reconsideration and Zimmerlee appeals.

¶6 To the extent the postconviction motion underlying this appeal attempted to challenge the trial court’s exercise of sentencing discretion, it is untimely. A motion for sentence modification based on an allegedly unduly harsh sentence must be raised on direct appeal, *see State v. Krueger*, 119 Wis. 2d 327, 332, 351 N.W.2d 738 (Ct. App. 1984), or by a motion filed under WIS. STAT. § 973.19(1)(a), within ninety days of sentencing. By the time Zimmerlee filed the instant WIS. STAT. § 974.06(1) motion, the time for filing a WIS. STAT. § 973.19(1)(a) motion or a direct appeal had passed.

¶7 A WIS. STAT. § 974.06(1) motion is limited to jurisdictional or constitutional issues or other errors going directly to guilt. *Cresci v. State*, 89 Wis. 2d 495, 505, 278 N.W.2d 850 (1979). Claims of erroneous exercise of discretion at sentencing, and disputes over sentence credit do not present constitutional or jurisdictional issues. Therefore, those parts of Zimmerlee’s motion seeking resentencing and sentence credit were not properly raised in his § 974.06(1) motion and the court properly rejected them.

¶8 The two remaining claims raised in Zimmerlee’s WIS. STAT. § 974.06(1) motion, whether the State breached its plea agreement with

Zimmerlee at the hearing on his motion for sentence modification and whether he was denied effective assistance of trial counsel could not have been brought in his 2003 motion for sentence modification. They are, therefore, properly presented by a § 974.06(1) motion and are not technically barred by *Escalona-Naranjo*, which held that a defendant present all available grounds for relief from a judgment of conviction in his or her WIS. STAT. § 974.02(1) motion or by direct appeal unless there are justifiable reasons for failing to do so. *Escalona-Naranjo*, 185 Wis. 2d at 181-82.

¶9 We first dispose of Zimmerlee's claim that the State breached its plea agreement with him at the hearing on his motion for sentence modification. Zimmerlee's assertion was neither explained nor developed in his motion. In *State v. Bentley*, 201 Wis. 2d 303, 309-310, 548 N.W.2d 50 (1996), the supreme court held that conclusory allegations presented without adequate factual basis and legal argument in support of the allegation do not entitle a defendant to relief. In light of the conclusory allegations presented by Zimmerlee in support of his claim that the State breached its plea agreement with him, we will not disturb the circuit court's rejection of it.

¶10 Zimmerlee's second constitutional claim, the claim of ineffective assistance of counsel, is based on counsel's alleged failure to hire certain experts to testify about accident reconstruction, human physiology and seatbelts. The facts allegedly underlying this claim were known to Zimmerlee when judgment was entered on his guilty pleas and when he filed his first postconviction motion, a motion confined to sentence modification.

¶11 The holding in *Escalona-Naranjo* was intended to prevent piecemeal adjudication of a defendant's claims and to promote finality in

litigation. *See id.*, 185 Wis. 2d at 185-86. Allowing a defendant to file a motion challenging a sentence, and if the motion is unsuccessful, to later file a motion challenging the underlying conviction promotes the piecemeal litigation that WIS. STAT. § 974.06(4) and *Escalona-Naranjo* are intended to prevent. Accordingly, under the specific facts of this case, we conclude that the general holding of *Escalona-Naranjo* should be applied to bar this claim.

¶12 Finally, we turn to the circuit court’s denial of Zimmerlee’s motion for reconsideration. This court pointed out in *Grindemann* that a motion requesting sentence modification alleging a new factor is not subject to the “successive motion” bar under WIS. STAT. § 974.06(4) and *Escalona-Naranjo*. *Grindemann*, 225 Wis. 2d 632, ¶19 n.4. Because the motion underlying this appeal is not one for sentence modification alleging a new factor, *Grindemann* is not relevant to the disposition of the case. It follows that the circuit court did not err in denying Zimmerlee’s motion for reconsideration.

By the Court.—Orders affirmed.

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

