

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 2011

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 No. 2010AP2558-CR

Cir. Ct. No. 2006CF5897

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOMAS FLORES,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
PATRICIA D. McMAHON and KEVIN E. MARTENS, Judges. *Affirmed.*

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

¶1 PER CURIAM. Tomas Flores appeals *pro se* from circuit court orders denying his motion for a partial bail refund and his motion for

reconsideration.¹ He contends that he should not be held jointly and severally liable with his co-defendant for the restitution imposed at sentencing. Because Flores does not demonstrate a basis for pursuing his claim, we affirm.

BACKGROUND

¶2 Flores and a co-actor beat another man to death. The State charged Flores with felony murder. Flores's family posted \$5000 cash bail on his behalf and secured his release from pretrial incarceration. Thereafter, Flores pled guilty as charged. At the December 2007 sentencing hearing, the circuit court ordered that Flores was jointly and severally liable with his co-actor for \$6320 in restitution owed to the victim's family. The circuit court added that "the cash bail that is posted ... shall be applied to this restitution pursuant to statute."

¶3 Flores did not present a claim for postconviction relief until July 29, 2010, when he filed the first of the two *pro se* motions that underlie this appeal. He argued that he should be required to pay only half the restitution owed to the victim's family, and he asked for a refund of some of the bail money he forfeited to pay the restitution.² The circuit court denied the motion and his subsequent request for reconsideration. Flores appeals.

¹ The Honorable Patricia D. McMahon addressed Flores's postconviction motion. Judge McMahon thereafter retired from the bench, and the Honorable Kevin E. Martens, as successor to Judge McMahon's calendar, denied Flores's motion for reconsideration.

² Flores conceded that he owed half the restitution ordered and \$363 in other court costs. He therefore sought a refund of \$1477.

DISCUSSION

¶4 Flores complains that the circuit court improperly ordered him to pay restitution of \$6320 jointly and severally with his co-defendant. In his view, his restitution obligation should not exceed one-half of the total amount of restitution owed.³ He does not, however, identify the authority allowing his postconviction litigation. Therefore, we begin by considering whether anything in his submissions demonstrates a procedural basis for his claim.

¶5 “[A] convicted criminal defendant may seek postconviction relief with a postconviction motion and direct appeal under [WIS. STAT.] § 974.02 [2009-10]⁴ and [WIS. STAT.] § (RULE) 809.30, and may collaterally attack his conviction under [WIS. STAT.] § 974.06 or via a petition for a writ of *habeas corpus*.” *State v. Henley*, 2010 WI 97, ¶44, 328 Wis. 2d 544, 787 N.W.2d 350 (brackets, italics, and footnote added). Flores did not file a postconviction motion or an appeal from his conviction within the statutory time limits established in RULE 809.30. Therefore, his appellate rights under those provisions lapsed. *See State v. Lagundoye*, 2004 WI 4, ¶20 n.13, 268 Wis. 2d 77, 674 N.W.2d 526. Neither of Flores’s postconviction submissions in 2010 was sufficient to constitute a petition for a writ of *habeas corpus* because the submissions were not verified

³ Although Flores acknowledges that the circuit court imposed joint and several liability for the restitution ordered, he includes a definition of “several liability” in his appellate brief. We therefore note that when liability is joint and several, each wrongdoer is individually responsible for the entire amount of damage caused. *See Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.*, 96 Wis. 2d 314, 330, 291 N.W.2d 825 (1980).

⁴ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

and did not include the allegations required for such a petition pursuant to WIS. STAT. § 782.04. Thus, Flores evidently filed his claim pursuant to § 974.06.

¶6 Relief under WIS. STAT. § 974.06 is limited to constitutional and jurisdictional challenges. *State v. Nickel*, 2010 WI App 161, ¶7, 330 Wis. 2d 750, 794 N.W.2d 765. Therefore, the statute “cannot be used to challenge a sentence based on an erroneous exercise of discretion ‘when a sentence is within the statutory maximum or otherwise within the statutory power of the court.’” *Id.* (citation omitted).

¶7 Here, the circuit court ordered restitution as a component of the sentencing proceeding, as contemplated by WIS. STAT. § 973.20(1r). Such orders “are within the discretion of the circuit court.” *See State v. Fernandez*, 2009 WI 29, ¶50, 316 Wis. 2d 598, 764 N.W.2d 509; *see also State v. Pope*, 107 Wis. 2d 726, 731-32, 321 N.W.2d 359 (Ct. App. 1982) (appellate court reviewing restitution order determines whether it can be sustained as a proper exercise of sentencing discretion). When exercising sentencing discretion, the circuit court has the statutory authority to specify that multiple defendants are jointly and severally liable for the restitution ordered. *See* § 973.20(7). Thus, Flores seeks to challenge a discretionary sentencing decision that lies well within the statutory power of the circuit court. Such a challenge may not be pursued under WIS. STAT. § 974.06.⁵ *See Nickel*, 330 Wis. 2d 750, ¶7.

⁵ We observe, as did the circuit court, that if Flores has paid more than he believes is his fair share of the restitution, he may seek contribution from the co-actor. *See McGee v. Bates*, 2005 WI App 19, ¶6, 278 Wis. 2d 588, 691 N.W.2d 920.

¶8 We acknowledge Flores's suggestions in his appellate brief that his trial counsel was ineffective by failing to contest the restitution order. His statements in this regard arguably allege a violation of his constitutional right to counsel. See *State v. Ludwig*, 124 Wis. 2d 600, 606, 369 N.W.2d 722 (1985) (constitutional right to counsel is right to effective assistance of counsel). Such a claim is cognizable under WIS. STAT. § 974.06. Flores, however, did not raise any claim of ineffective assistance of counsel in the motions that he filed in circuit court. Therefore, we will not consider the issue. See *Shadley v. Lloyds of London*, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 (appellate court will generally not review an issue raised for the first time on appeal).

By the Court.—Orders affirmed.

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

