**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

January 11, 1996

**NOTICE**



**No. 94-3094**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**BOBBY JOE SMITH,**

**Defendant-Appellant.**

APPEAL from an order of the circuit court for Rock County: J. RICHARD LONG, Judge. *Affirmed*.

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Bobby Joe Smith appeals from an order denying his motion for postconviction relief brought pursuant to § 974.06, STATS. The issues are: (1) whether the trial court had subject matter jurisdiction over Smith when it convicted him of armed robbery; (2) whether the trial court properly refused to consider Smith's claim that he was denied effective assistance of trial counsel; (3) whether the trial court properly refused to consider Smith's claim that he was denied effective assistance of appellate counsel; (4) whether Smith is entitled to a "retroactive hearing" at which the charge of armed robbery should be reduced to the lesser-included offense of theft; (5) whether Smith's sentence

should be reduced or modified; and (6) whether the trial court properly refused to hold a hearing on the postconviction motion. We affirm.

On October 10, 1991, Smith pled guilty to armed robbery as a repeater. The trial court sentenced him to twenty years' imprisonment. By appellate counsel, Smith filed a motion for postconviction relief. The trial court denied the motion on June 1, 1993. This court affirmed the judgment of conviction on March 22, 1994, and the supreme court denied Smith's petition for review on July 19, 1994. Several months after the supreme court's decision, Smith filed a *pro se* motion for postconviction relief under § 974.06, STATS. The trial court denied the motion without a hearing.

Smith first contends that the trial court lacked subject matter jurisdiction over him when it convicted him of armed robbery because he was not charged with an offense known to law. Smith argues that the armed robbery charge was not an offense known to law because he did not possess a gun.

Wisconsin trial courts "have original [subject matter] jurisdiction of all matters civil and criminal not excepted in the constitution or not prohibited by law." ***Dumer v. State***, 64 Wis.2d 590, 595, 219 N.W.2d 592, 596 (1974). Even "[i]f the criminal complaint is defective, or if the defendant is convicted under an invalid law," which was not the case here, the circuit court still retains subject matter jurisdiction because it "has the power to inquire into the sufficiency of the charges before the court." ***Mack v State,*** 93 Wis.2d 287, 295, 286 N.W.2d 563, 567 (1980). The State correctly points out that the circuit court does not lack subject matter jurisdiction simply because a defendant disputes the facts alleged in the charging document. The trial court had subject matter jurisdiction over Smith.

Smith next argues that the trial court erred when it refused to consider his claim that his trial counsel failed to provide him with effective assistance. In Smith's previous appeal, this court concluded that there was no ineffective assistance by trial counsel. Because this issue had already been decided, the trial court properly refused to consider it.

Smith next contends that he received ineffective assistance of appellate counsel. A claim for ineffective assistance of appellate counsel should be brought by petition for writ of *habeas corpus* in the court which heard the appeal. ***State v. Knight***, 168 Wis.2d 509, 520, 484 N.W.2d 540, 544 (1992). A criminal defendant who asserts that his or her appellate counsel provided ineffective assistance may not raise that claim by § 974.06, STATS. ***State v. Flores***, 170 Wis.2d 272, 278, 488 N.W.2d 116, 119 (Ct. App. 1992). The trial court properly refused to consider this issue because it was not originally raised in this court by petition for writ of *habeas corpus*.

Smith next argues that he is entitled to a "retroactive hearing" at which the charge of armed robbery should be reduced to the lesser-included offense of theft. Smith contends that he should have been charged with theft, not armed robbery, because he did not have a gun when he committed the crime. A person is guilty of armed robbery if he or she commits robbery "by use or *threat of use* of a dangerous weapon ...." Section 943.32(2), STATS. (emphasis added). Whether a victim is "threatened" with a weapon depends on whether the victim reasonably believes that the defendant is armed. ***State v. Witkowski***, 143 Wis.2d 216, 221-22, 420 N.W.2d 420, 422-23 (Ct. App. 1988). The victim reasonably believed Smith was armed because the victim observed Smith's hand tucked into his shirt as if he was holding something. Smith is not entitled to relief based on this claim.[1]

Smith next contends that his sentence should be either reduced or modified because he was not armed when he committed the robbery. The trial court was aware that Smith claimed he was not armed when it sentenced him. This is not a new factor entitling Smith to resentencing. *See* ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975) (a new factor is something which was "not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.").

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[1] Smith's arguments are, at times, difficult to follow. Throughout his brief, he implicitly asserts that he did not knowingly enter his plea because he did not threaten use of force, an element of the crime to which he pled. Smith never moved to withdraw his plea before the trial court so we will not now consider this claim.

Finally, Smith argues that the trial court should have held a hearing on his postconviction motion. The trial court is not required to hold a hearing on a motion brought under § 974.06, STATS., if "the motion and the files and records of the action conclusively show that the person is entitled to no relief ...." Section 974.06(3). The trial court properly denied Smith's motion without a hearing because, as explained in this decision, Smith is not entitled to relief. Accordingly, we affirm.

*By the Court.*—Order affirmed.

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