

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

July 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-2020**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**DAVID E.Z. SIMS,**

**Defendant-Appellant.**

APPEAL from an order of the circuit court for Dane County:  
ROBERT DE CHAMBEAU, Judge. *Affirmed.*

Before Dykman, Sundby and Vergeront, JJ.

PER CURIAM. David Sims appeals from an order denying his motion for postconviction relief. Sims pled no contest on two robbery counts and received two consecutive five-year sentences. He subsequently filed a motion for sentence modification, and for an order vacating his plea on one of the two counts, on the grounds that he was induced to plea by counsel's ineffective assistance. We conclude that the motion for sentence modification

was untimely and that counsel provided Sims with effective representation. We therefore affirm.

Sims did not file a timely motion under § 974.02, STATS., and RULE 809.30(2)(h), STATS. Consequently, he lost the right to obtain relief on his claim that the trial court improperly exercised its sentencing discretion. Only claims of constitutional dimension survive after the time for § 974.02 motions has lapsed. *See* § 974.06(1), STATS.

Sims failed to establish that counsel ineffectively represented him on one of the two robbery charges. He contends that counsel's failure to properly investigate and discover exculpatory evidence forced him to plead despite his innocence. However, counsel testified at the hearing on Sims's motion that he investigated all available information and interviewed Sims's alleged alibi witness, but was not able to develop a viable defense. Counsel further testified that, in contrast, the State had a strong case against Sims, including an eyewitness's identification. He advised Sims accordingly and Sims voluntarily accepted the plea bargain. The trial court found counsel's testimony credible and we must accept that determination. *See Turner v. State*, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977). The burden was on Sims to show that counsel's performance was deficient. *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Given the trial court's determination on the credibility of counsel's testimony, Sims has not met that burden.

*By the Court.* – Order affirmed.

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