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**DISTRICT I**

February 9, 2021

To:

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Circuit Court Judge  
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You are hereby notified that the Court has entered the following opinion and order:

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2020AP242

State of Wisconsin v. Jimi K. Wellman (L.C. # 2012CF1941)

Before Brash, P.J., Dugan and Donald, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Jimi K. Wellman, *pro se*, appeals an order denying his postconviction motion challenging his sentence for second-degree sexual assault of a child and incest with a child. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for

summary disposition. *See* WIS. STAT. RULE 809.21(1) (2017-18).<sup>1</sup> We summarily affirm the order.

In 2013, a jury convicted Wellman of second-degree sexual assault of a child and incest with a child for having sex with his fourteen-year-old cousin while she was sleeping. Wellman filed a postconviction motion on the basis of ineffective assistance of counsel, which was denied by the postconviction court. This court reversed the postconviction court and remanded the matter for a hearing. Following a hearing, the postconviction court again denied Wellman's motion. Wellman appealed, and this court affirmed the postconviction court.

On December 6, 2019, Wellman, *pro se*, filed a motion for sentence modification which was denied by the postconviction court on December 9, 2019. Wellman, *pro se*, then filed another postconviction motion pursuant to WIS. STAT. § 974.06 on December 30, 2019. The motion alleged that his trial counsel was ineffective for failing to “challenge the [t]rial court’s abuse of discretion during sentencing.” On January 3, 2020, the postconviction court denied the motion on the grounds that it was procedurally barred. This appeal follows.

On appeal, Wellman contends that the postconviction court erred in denying his postconviction motion and his motion for sentence modification.

We note at the outset that Wellman’s motion for sentence modification is not appropriately before this court. Wellman’s motion for sentence modification was filed on December 6, 2019, and denied on December 9, 2019. Wellman’s notice of appeal, however,

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

only lists the January 3, 2020 order denying his WIS. STAT. § 974.06 motion as the order he is now appealing. The notice specifically states that Wellman’s appeal stems from a “decision and order denying [a] Section 974.06 Motion.” WISCONSIN STAT. RULE 809.10(1)(b)2. requires an appellant to identify the order appealed from and the date it was entered in a notice of appeal. *See id.* If a trial court has issued multiple, distinct final orders, a party’s failure to identify one of those orders in the notice of appeal deprives this court of jurisdiction over that order. *State v. Baldwin*, 2010 WI App 162, ¶61, 330 Wis. 2d 500, 794 N.W.2d 769. The failure of the notice of appeal to correctly identify the final appealable document is not necessarily fatal to appellate jurisdiction, *see Carrington v. St. Paul Fire & Marine Ins. Co.*, 169 Wis. 2d 211, 217 n.2, 485 N.W.2d 267 (1992), however, the notice of appeal must sufficiently identify an order such that there can be no doubt what is being appealed. *See State v. Avery*, 80 Wis. 2d 305, 309, 259 N.W.2d 63 (1977), *abrogated on other grounds by State v. Montgomery*, 148 Wis. 2d 593, 436 N.W.2d 303 (1989). Wellman’s notice of appeal does not support any inference that he intended to appeal from the December 9, 2019 order. We therefore conclude that the order denying Wellman’s sentence modification motion is not properly before this court; thus, we will not address Wellman’s arguments stemming from the postconviction court’s denial of that motion.

As to the January 3, 2020 order which denied Wellman’s WIS. STAT. § 974.06 motion, we agree with the State that Wellman’s motion raised a challenge to the sentencing court’s sentencing discretion, which is not cognizable in a § 974.06 proceeding. *See Smith v. State*, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978).<sup>2</sup> When a sentence is within the statutory maximum,

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<sup>2</sup> Wellman does not contend that counsel was ineffective on appeal, as he did in his December 30, 2019 postconviction motion. Therefore, we deem that argument abandoned. *See State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993).

“postconviction review under [§] 974.06 is applicable only to jurisdictional or constitutional matters or to errors that go directly to the issue of the defendant’s guilt” and “cannot be used to challenge a sentence because of an alleged [mis]use of discretion.” *Smith*, 85 Wis. 2d at 661. Wellman’s sentence was within the statutory maximum. Therefore, he could not invoke § 974.06 in order to challenge the sentencing court’s exercise of discretion.

Because Wellman’s motion for sentence modification is not properly before this court, and because Wellman cannot invoke WIS. STAT. § 974.06 to challenge the sentencing court’s exercise of discretion, we do not address either the merits of his arguments, or whether his claims are procedurally barred.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*