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110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
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**DISTRICT II**

May 11, 2022

To:

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

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2021AP119-CR                      State of Wisconsin v. John H. Shomo, Jr. (L.C. #2016CF284)

Before Gundrum, P.J., Grogan and Kornblum, 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).**

John H. Shomo appeals a judgment of conviction and an order denying his motion for postconviction relief. He argues the circuit court erroneously denied his postconviction motion seeking dismissal with prejudice under the Intrastate Detainer Act, WIS. STAT. § 971.11 (2019-20).<sup>1</sup> Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Shomo was charged in September 2015 with a series of burglaries that occurred in Shawano and Washington counties in 2013 and 2014.<sup>2</sup> In October 2015, Shomo, who was incarcerated at the time, requested prompt disposition of those cases under the Intrastate Detainer Act. The State failed to bring Shomo to trial within 120 days in either case, and the cases were dismissed without prejudice in August 2016.

The State issued new criminal complaints later that month. By a Second Amended Information, the Shawano County charges were incorporated into the Washington County case. Thereafter, Shomo agreed to plead no contest to two of the Washington County charges and one of the Shawano County charges. The remaining charges in both cases were dismissed and read in. After a colloquy, the circuit court accepted Shomo's pleas, adjudged him guilty, and imposed sentence.

Shomo filed a postconviction motion in December 2020, requesting that the circuit court vacate its earlier dismissal without prejudice and enter an order dismissing the consolidated Washington County case. Shomo challenged our supreme court's holding in *State v. Davis*, 2001 WI 136, 248 Wis. 2d 986, 637 N.W.2d 62, and argued that WIS. STAT. § 971.11(7) required dismissal with prejudice under the circumstances of his case. He also asserted that Count 1 should not have been read in because he was incarcerated at the time of the alleged offense. Postconviction counsel stated that it was Shomo's position that Count 1 was preventing him from being transferred to a medium-security prison and if it was dismissed outright, "that would obviate the need to litigate" the issue of whether § 971.11(7) required dismissal with prejudice.

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<sup>2</sup> According to the State, records from these cases no longer exist. We therefore accept the parties' representations regarding what occurred.

The State filed a response brief and agreed that Count 1 should be dismissed outright. The circuit court treated this as a stipulation and ordered the judgment of conviction amended to show that Count 1 of the Second Amended Complaint was dismissed outright. Given Shomo's assertion that such an order obviated the need to consider his WIS. STAT § 971.11(7) claim, the court denied all other relief. Shomo now appeals.

Shomo advances the same arguments regarding *Davis* and WIS. STAT. § 971.11(7) on appeal. The State responds that Shomo's appeal is untimely and this court lacks jurisdiction.<sup>3</sup> Questions regarding our appellate jurisdiction must be resolved before reaching the merits of a case. *Southern Wis. Cattle Credit Co. v. Lemkau*, 140 Wis. 2d 830, 835, 412 N.W.2d 159 (Ct. App. 1987). The State's argument rests on the notion that the earlier dismissal without prejudice was "arguably ... a '[f]inal adjudication' under WIS. STAT. § 809.30(1)(a)" and therefore Shomo should have taken an appeal from that dismissal. Be that as it may, Shomo's appeal was timely taken from the circuit court's postconviction order, and given the admittedly "arguable" nature of the State's position and absence of any case law authority cited in its brief, we conclude the State has not demonstrated we lack appellate jurisdiction over Shomo's claims.

Alternatively, the State contends Shomo has forfeited his appellate arguments by virtue of the guilty-plea-waiver rule. We agree. A voluntary and intelligent guilty plea waives all nonjurisdictional defects and defenses, even if the defendant attempts to preserve those issues in the circuit court. *State v. Asmus*, 2010 WI App 48, ¶3, 324 Wis. 2d 427, 782 N.W.2d 435.

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<sup>3</sup> Contrary to Shomo's claims, it was not necessary for the State to raise this argument or its guilty-plea-waiver argument in the circuit court. A respondent may raise any argument that would support affirming the circuit court's action, and this court may sustain a circuit court's decision on a theory or reasoning not presented to that court. *State v. Neal*, 2016 WI App 34, ¶19, 369 Wis. 2d 72, 879 N.W.2d 808. We decline Shomo's invitation to depart from this principle in this case.

*Asmus* controls here: “Failure to bring a prisoner to trial within 120 days under the Intrastate Detainer Act is not a jurisdictional defect.” *Id.*, ¶4. Accordingly, we deem Shomo’s present arguments forfeited and decline to reach them.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court are 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*