

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 99-1549-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TANYA M. LUCHINSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Appeal dismissed.*

¶1 ANDERSON, J.¹ Tanya M. Luchinski failed to bring a motion to modify her sentence before initiating this direct appeal. Therefore, we do not have jurisdiction and dismiss her appeal.

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

¶2 In the beginning Luchinski was charged with two counts of misdemeanor theft in violation of § 943.20(1)(a), STATS., for the theft of four checks from a family member. Luchinski and the State entered into a plea agreement. The State agreed to amend one theft count to domestic disorderly conduct to dispose of a case that came to light after the original charge was filed. In exchange, Luchinski would enter a plea of “no contest” and the parties would be free to argue for the appropriate disposition.

¶3 The State asked the trial court to withhold sentence and place Luchinski on probation for twelve months with conditions of probation to include restitution and domestic counseling. In response, Luchinski’s attorney proposed that the trial court impose six months of probation because Luchinski believed she could complete any counseling and make full restitution within that time frame. Luchinski’s only comment was a request that the start of her probation be delayed for thirty days to permit her to move to Fond du Lac. The trial court withheld sentence and placed Luchinski on probation for twelve months with specific conditions. Finally, the court denied Luchinski’s request to postpone the start of her probation for thirty days.

¶4 Luchinski brings this direct appeal under RULE 809.40, STATS., without first pursuing a motion to modify her sentence. She contends that the trial court “engaged in an erroneous exercise of discretion” in sentencing her. Specifically, she complains that the trial court proceeded to sentencing without any information upon which to act and, therefore, failed to consider the three primary factors that comprise sentencing.

¶5 Although the State does not argue that Luchinski’s failure to pursue a motion to modify her sentence before bringing this appeal precludes us from

hearing her appeal, our jurisdiction is a matter that we must consider sua sponte. *See Mack v. Joint Sch. Dist. No. 3*, 92 Wis.2d 476, 484, 285 N.W.2d 604, 608 (1979). Although one-judge appeals from misdemeanor convictions are brought under RULE 809.40, STATS., the procedure and time limits are governed by RULE 809.30 to 809.32, STATS. *See* RULE 809.40(1).

To obtain review of a sentence “as of right,” the defendant must move for sentence modification under RULE 809.30, Stats., or under sec. 973.19, Stats. The sentence modification rule is part of the larger rule “that for issues on appeal to be considered as a matter of right, postconviction motions must be made except in challenges to the sufficiency of the evidence under sec. 974.02(2)[Stats. (1979-80)].”

State v. Hayes, 167 Wis.2d 423, 425-26, 481 N.W.2d 699, 700 (Ct. App. 1992) (citations omitted; quoted source omitted; alteration in original).

¶6 This directive has a salutary purpose—the preservation of scarce judicial resources. Compelling a defendant to first give the trial court the opportunity to correct its own error obviates the need for appeal and the associated drain on the resources of the court of appeals. The rule not only avoids unnecessary appeals, but it allows trial judges to reflect upon their sentencing decisions in light of arguments that are often presented for the first time at the appellate level. Luchinski’s failure to bring a motion to modify her sentence deprives us of jurisdiction.

By the Court.—Appeal dismissed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

