

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 22, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1889

Cir. Ct. No. 2002CF126

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY A. POWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Timothy Powell, pro se, appeals a judgment of conviction and an order denying postconviction relief. Powell claims his sentence should be “restructured.” Powell also claims ineffective assistance of counsel. We reject Powell’s arguments and affirm.

¶2 A two-count criminal complaint was filed on March 1, 2002. The first count charged Powell with sexual contact with a person who had not attained the age of thirteen years, contrary to WIS. STAT. § 948.02(1).¹ The second count charged that Powell committed three or more acts of sexual contact to the same child, contrary to WIS. STAT. § 948.025. The victim was a nine-year-old girl.

¶3 On March 21, 2002, Powell agreed to plead no contest to Count 1 in exchange for the dismissal of Count 2. The circuit court accepted Powell's plea at the arraignment the following day, and ordered Count 2 dismissed and read in for purposes of sentencing.

¶4 Sentencing was held on May 1, 2002. Powell was asked whether there was anything by way of correction he wanted to bring to the court's attention concerning the presentence report. Powell's attorney answered: "No, your honor." Powell said nothing. The court imposed a sentence of twenty-three years' initial confinement and twenty-five years' extended supervision.

¶5 On February 6, 2003, Powell's counsel filed a postconviction motion seeking a reduction of the extended supervision portion of Powell's sentence from twenty-five years to twenty years. The circuit court granted the motion and amended Powell's sentence on February 27, 2003. Powell filed no other timely postconviction motion and no direct appeal.

¶6 On September 16, 2004, Powell filed a pro se "Defendant's Notice of Intent to Pursue Postconviction Relief." On May 13, 2005, Powell filed a pro se "Motion for Sentence Adjustment." The theory of this motion was that the

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

PSI was in error because the evidence did not support a charge against him under WIS. STAT. § 948.025(1), which is a Class B felony; but instead supported a charge under § 948.025(2), a Class C felony. The difference between the statutory subsections is the number of sexual assaults against the same child under the age of thirteen: three or more violations constitute a Class B felony and fewer than three constitute a Class C felony. Powell also argued that his counsel was ineffective for failing to make this argument.

¶7 The court entered an order denying the motion on May 18, 2005.

The court stated:

Mr. Powell seems to be under the impression that he was sentenced on Count 2 of the Information, which is a charge of repeated sexual assault of the same child under Section 948.025, Stats. This charge was dismissed. He was found guilty and sentenced on Count 1 of the Information, First Degree Sexual Assault of a Child, under Section 948.02(1). Accordingly, his discussion about the number of sexual assault charges with the same child is irrelevant.

¶8 Powell moved for reconsideration. His motion was denied on June 20, 2005. This appeal followed.

¶9 We affirm the circuit court's denial of Powell's motion to "restructure" his sentence. A notice of intent to pursue postconviction or postdisposition relief must be made within twenty days after the date of sentencing or final adjudication. WIS. STAT. § 809.30(2)(b). Powell's sentence was amended by order of February 27, 2003, pursuant to the postconviction motion Powell's counsel filed. Powell's pro se notice of postconviction motion was filed on September 16, 2004. Therefore, the pro se postconviction motion was untimely. In addition, Powell was present at the sentencing hearing and did not object to any perceived error in the PSI, which he now claims was in error. Accordingly,

Powell waived any objection to the PSI. *See State v. Johnson*, 158 Wis. 2d 458, 470, 463 N.W.2d 352 (Ct. App. 1990).

¶10 Moreover, a defendant may not seek collateral review under WIS. STAT. § 974.06 of any issue that was or could have been raised on direct appeal or in an earlier postconviction motion. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Powell has offered no legitimate reason why the grounds presented in his appeal were not raised in the previous motion for postconviction relief filed by his attorney on February 6, 2003. Powell does not make a jurisdictional claim, nor has he cited any authority that might bring his claims under any constitutional rubric. It is not the duty of this court to fashion a constitutional theory for him. *See State v. Scherreiks*, 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989). Powell can thus claim no relief under § 974.06.

¶11 Finally, there is no substantive merit to Powell's argument at any rate. As the circuit court correctly observed, Powell seems to be under the impression that he was sentenced under Count 2 of the information, but Count 2 was dismissed. It is axiomatic that no error can arise from dismissed charges. Powell also contends in an undeveloped fashion that he was confused as to which statutory provision he was pleading to. This argument was not raised in the circuit court and is also thus waived. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). Nevertheless, there is nothing in the record that could even arguably support a contention that Powell was confused about which statutory provision he was pleading to. Powell's contention is disingenuous.

¶12 To prevail on a claim of ineffective assistance of counsel, Powell has the burden of proving both that the attorney's performance was deficient, and that

this deficiency prejudiced the defense such that the conviction is unreliable. *See State v. Sanchez*, 201 Wis. 2d 219, 232, 548 N.W.2d 69 (1996). Because there is no merit to Powell's arguments, the circuit court correctly found that counsel was not ineffective for not raising his arguments in the court below.

By the Court.—Judgment and order affirmed.

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

