

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 9, 2003

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. 03-0415

Cir. Ct. No. 98-CF-116

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK ALAN SZARKOWITZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Mark Szarkowitz appeals an order dismissing his postconviction motion. The circuit court concluded that Szarkowitz had waived his right to pursue postconviction relief because his motion should have been raised with earlier motions for probation modification. Szarkowitz argues his

prior motions do not prohibit him from later filing a motion on constitutional grounds. We agree with Szarkowitz and reverse that portion of the order.

¶2 In his postconviction motion, Szarkowitz also challenged the validity of a repeater enhancement to his sentence. He did not address this issue in his appellate brief and did not reply to the State's argument on the issue. Consequently, we affirm that portion of the order.

BACKGROUND

¶3 In November 1997, Szarkowitz was charged as a repeat offender in Lincoln County with theft of two trailers belonging to two different owners. In April 1998, he was charged as a repeat offender in Outagamie County with theft of a car as party to a crime. In October 1998, he was charged in Lincoln County with being a felon in possession of a firearm and felony bailjumping, again as a repeat offender. These cases were consolidated in January 1999 in Outagamie County.

¶4 A plea hearing was conducted on February 5, 1999. Pursuant to a plea agreement, Szarkowitz pled no contest, as a repeat offender, to a reduced charge of operating a motor vehicle without owner's consent in the Outagamie County theft. He also pled no contest without a repeater enhancement to one of the two Lincoln County thefts. The remaining counts were dismissed. Sentencing began, but was adjourned.

¶5 The sentencing hearing reconvened on February 23. The court withheld sentence and placed Szarkowitz on probation for ten years, to run concurrently with an existing prison sentence. As a condition of probation, Szarkowitz was ordered to spend six months in county jail, which would be served after he completed his prison sentence.

¶6 On March 23, while still in prison, Szarkowitz filed a pro se motion labeled “Motion to Modify Sentence.” He requested that the jail term be modified to run concurrently with his prison sentence. The court summarily denied the motion.

¶7 On April 29, Szarkowitz filed another pro se motion, labeled “Motion to Correct Illegal Sentence.” The trial court construed this motion as one for good time on his jail term and scheduled a hearing. In the meantime, Szarkowitz was paroled and began serving his jail term. The motion hearing was held on June 18 and the court denied the motion.

¶8 In March 2002, Szarkowitz’s probation was revoked on the consolidated case as well as another pre-existing case, and the court sentenced him to two concurrent terms of seven years in prison.

¶9 On December 3, Szarkowitz filed a postconviction motion under WIS. STAT. § 974.06,¹ requesting that he be allowed to withdraw his no contest plea in the consolidated case due to constitutional violations in his plea and sentencing. He also argued for vacation of the repeater-enhanced portion of the sentence. A hearing took place on January 9, 2003. The State requested dismissal of the motion arguing that Szarkowitz had waived his right to raise the issue. The State argued that Szarkowitz’s motion was a successive motion for postconviction relief under WIS. STAT. § 974.06(4) and should have been raised on one of Szarkowitz’s prior motions. The court took the State’s motion under advisement and rescheduled the hearing.

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

¶10 At the reconvened hearing, the court granted the State's motion to dismiss Szarkowitz's motion stating that Szarkowitz had waived his right make a WIS. STAT. § 974.06 motion, and had not presented just cause for failing to timely file the motion. Szarkowitz appeals.

DISCUSSION

¶11 Whether Szarkowitz may raise a constitutional issue under WIS. STAT. § 974.06 involves statutory interpretation, which is a question of law we decide independently. *See State v. Isaac J.R.*, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998).

¶12 WISCONSIN STAT. § 974.06(4) states:

All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

The State maintains that Szarkowitz should have raised his constitutional issues when he made his prior motions for modification of his probation. Because he did not do so and cannot give a sufficient reason why he did not, the State argues Szarkowitz waived the right to raise his constitutional issues now. However, Szarkowitz argues he was not able to raise constitutional arguments with his prior motions and therefore cannot be prohibited from doing so now.

¶13 Each of Szarkowitz's earlier pro se motions was for modification of a condition of probation. They were not postconviction motions as defined by

WIS. STAT. § 974.06. One motion was for good time and the other to allow his jail term to be served concurrently to his prison term. Motions to modify a condition of probation are statutorily restricted. WIS. STAT. § 973.09(3)(a) provides:

Prior to the expiration of any probation period, the court, for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof.

This statute is limited in its scope and provides discrete relief for a defendant who wishes to have his or her probation modified. The statute is not designed for constitutional challenges unrelated to the terms and conditions of probation.

¶14 The State argues that even if Szarkowitz could not raise constitutional issues in his motions to modify probation, he had all the facts necessary to raise those issues under WIS. STAT. § 974.06 at the same time he made his prior motions. Because he did not do so, the State maintains he should be prevented from raising those issues now. However, what Szarkowitz knew at the time of his prior motions is not relevant. If Szarkowitz had raised a § 974.06 motion previously and omitted issues that should have been raised at that time, the statute would prevent him from raising them now. That was not the case, however. This is Szarkowitz's first § 974.06 motion and nothing prohibits him from raising his constitutional arguments at this time.

¶15 Additionally, the trial court stated that the time had passed for filing a WIS. STAT. § 974.06 motion. However, the statute allows for filing at any time and can be used to review sentences and convictions regardless of time. *State ex rel. Warren v. County Court*, 54 Wis. 2d 613, 616-17, 197 N.W.2d 1 (1972). We therefore remand the case to the trial court so it can address Szarkowitz's claims under § 974.06.

¶16 Szarkowitz also argued in his WIS. STAT. § 974.06 motion that the repeater enhancement to his sentence was invalid. Even if the repeater enhancement were invalid, however, the result would simply be to vacate the enhanced portion of the sentence, or two years of the seven-year sentence. This term was to be served concurrently to a seven-year sentence on another charge that was not repeater enhanced. Consequently, his sentence would not be affected even if the enhancement were invalid. At any rate, Szarkowitz does not raise this issue in his brief, nor does he reply to the State's argument that the repeater enhancement was valid. "A proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted." *Madison Teachers v. Madison Sch. Dist.*, 197 Wis. 2d 731, 751, 541 N.W.2d 786 (Ct. App. 1995). We therefore affirm that portion of the trial court's order.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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