STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT 3

Appeal No. 2013AP000650

In the matter of the refusal of Maurice J. Corbine:

SAWYER COUNTY,

Plaintiff-Respondent,

v.

MAURICE J. CORBINE,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING MOTION FOR RECONSIDERATION, ENTERED IN SAWYER COUNTY, THE HONORABLE JOHN P. ANDERSON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Does the Court of Appeals lack jurisdiction to review the circuit court's denial of the Corbine's motion for reconsideration.

2. Did the circuit court err by determining there were no facts outside the record that would have prevented entry of judgment.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin, plaintiff-respondent, requests neither oral argument nor publication because the brief should adequately set forth the facts and applicable precedent and because resolution of this appeal requires only the application of well established precedent and the facts of the case.

STATEMENT OF THE CASE:
FACTS AND PROCEDURAL HISTORY

Defendant-Appellant, Maurice J. Corbine, pro se, appeals from an order denying his motion for writ of coram nobis and an order denying his motion for reconsideration. (R: 9). On September 26, 2004, Corbine was issued a refusal citation. (R: 1). Corbine failed to request a refusal hearing and a default judgment was entered on October 20, 2004. (R: 2).

On November 21, 2012, Corbine filed a petition for writ of coram nobis and supporting affidavit. (R: 3, 4). Corbine stated the purpose for the petition for writ of coram nobis was that he attended the hearing in 04TR 1904. (R: 4) Further, Corbine stated there were facts outside the record that would have prevented the court from entering judgment. (R: 4).

Specifically, Corbine claims that the refusal citation issued by Officer Dailey did not contain an arrest report for consideration of further charges. (R. 4, pp 4-5). Corbine claims that this report was not known to the circuit court at the time of the judgment in 04TR1904.

The report by Officer Dailey indicated that Corbine was not asked to perform any field sobriety tests because he was being argumentative. (R: 4, p 14). The report further states Corbine began kicking the squad door. (R: 4, p. 14). Officer Dailey transported Corbine to the hospital for a legal blood draw. During this time Corbine was being aggressive. (R: 4, p.15). Officer Dailey read to Corbine the Informing the Accused form and asked if he would give a sample of his blood. (R: 4, p 15). Officer Dailey's report states "Corbine didn't say no. Corbine was yelling extremely loud, 'I want my lawyer' and would not answer the question, but continued yelling, 'I want my lawyer' for approximately ten minutes." (R: 4, p.15). Corbine also argues that Officer Dailey lacked probable cause to detain Corbine for questioning and that the same evidence used in 04CT178, which was amended to

Inattentive Driving, should have been made available to the circuit court in 04TR1904. (R: 4, p.5).

On December 5, 2012, the Honorable John Anderson denied Corbine's Motion for Writ of Coram Nobis. (R: 7). On December 12, 2012, Corbine filed a Motion for Reconsideration of the Denial of the Petition for Writ of Coram Nobis pursuant to Wis. Stat. §805.17. (R: 8). Corbine then filed a Notice of Appeal on March 15, 2013. (R: 9). Judge Anderson subsequently denied the Motion for Reconsideration on May 3, 2013. (R: 13).

Corbine is appealing from the order denying his motion for writ of coram nobis and the order denying his motion for reconsideration.

On July 11, 2013, the Wisconsin Court of Appeals District 3 issued an order stating the Court lacks jurisdiction to review the denial of the December 6, 2012, order because the 90-day appeal period pursuant to Wis. Stat. §804.04(1) applied. Although Corbine moved for reconsideration, the motion did not effect the time for appealing because it was not filed after a trial to the court or other evidentiary hearing. *See* ***Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.***, 175 Wis. 2d 527, 533-35, 499 N.W.2d 282 (Ct. App. 1993). Because the Notice of Appeal was filed more than 90 days after the entry of the December 6, 2012 order, the Court held that it lacked jurisdiction to review the order.

The Court of Appeals directed the parties to address whether the court has jurisdiction to review the reconsideration order.

ARGUMENT

I. THE WISCONSIN COURT OF APPEALS LACKS JURISDICTION TO REVIEW THE ORDER DENYING CORBINE'S MOTION FOR RECONSIDERATION.

The first issue on appeal is whether the Court has jurisdiction to review the May 3, 2013, reconsideration order. The motion for reconsideration was denied at a March 6, 2013, hearing. The Order was entered after Corbine filed his Notice of Appeal.

An appeal cannot be taken from an order denying a motion for reconsideration which presents the same issues as those determined in the order sought to be reconsidered. *See* ***Silverton Enters., Inc. v. General Cas. Co.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154) (Ct. App. 1988). The concern is that a motion for reconsideration not be used to extend the time to appeal from a judgment or order when that time is expired. ***Id.***, *see also* ***Ver Hagen v. Gibbons***, 55 Wis. 2d 21, 197 N.W.2d 752 (1972). The most important factor is that an order denying reconsideration is not appealable since it does not prevent an appeal from the original order or judgment.

After the circuit court's denial of Corbine's motion for writ of coram nobis, Corbine had 90 days to appeal. ***See*** Wis. Stat. § 808.04(1). Corbine chose not to file the appeal until March 15, 2013, more than 90 days after the order was filed. Instead of a timely appeal, Corbine filed a motion for reconsideration on December 12, 2012.

Under the appellate procedure statutes, Corbine could have proceeded down either or both avenues. In ***Ver Hagen***, the court stated there were a number of reasons for holding that an order granting or denying a motion for review of a prior order or judgment is not appealable. Either the order is not final in that it does not

prevent a judgment from which an appeal can be taken, or it does not affect a substantial right inasmuch as the right is affected by the prior appealable order or judgment. If an appeal were allowed in such a case, the statute limiting the time for appeal would be wholly nullified. ***Id.*** at 26.

The Court held that a party may move the trial court to reconsider its orders or judgments but must present issues other than those determined by the order or judgment for which review is requested in order to appeal from the order entered on the motion for reconsideration. ***Id.***

In ***Ver Hagen***, since the appellant's motion presented the same issues which the trial court decided when granting summary judgment, the court concluded that the appellants were not entitled to appeal from the order denying their motion for re-hearing. ***Id.***

Applying ***Ver Hagen*** to the present facts, the Court of Appeals must reach the same conclusion. Corbine's original motion for writ of coram nobis indicates that at the time of his conviction in 04TR1904, the circuit court did not possess Officer Dailey's arrest report. (R: 4, pp.4-5). Corbine claims that based upon Officer Dailey's report he did not refuse any test which would determine he was intoxicated and that there was nothing mentioned which would lead to the contention that Corbine refused the test, yet he was convicted of this offense. (R: 4, p.5).

Corbine also argues that there was no video depicting the arrest and that the dismissal of criminal charges in 04CT178 should have resulted in a dismissal of his conviction in 04TR1904. Corbine alleges that if the Court had known of the existence of the police report and the lack of a video of the arrest, the circuit court would not have entered judgment. Judge Anderson denied the motion based upon a review of the record and the certified driving record which indicated that Corbine was found guilty in 04TR1904 as a result of the default judgment.

On December 12, 2012, Corbine filed a motion for reconsideration. (R: 8). His motion states the procedural history of the case and argues the Court simply relied on the existing record which showed that a default judgment was entered in 04TR1904. (R: 8, p.2). Corbine also states that the Court refused to hear his arguments regarding the specifics in the petition.

When reviewing both motions, it is clear that Corbine is simply arguing that he did agree with Judge Anderson denial of the motion for writ of coram nobis. Corbine is not raising any new substantive argument in his motion for reconsideration. Corbine's motion for reconsideration presented the same issues which Judge Anderson denied when denying the original motion for writ of coram nobis. Therefore, under ***Ver Hagen***, the Court of Appeals lacks jurisdiction to hear Corbine's appeal from the order denying the motion for reconsideration. Therefore, the appeal must be dismissed.

II. THE CIRCUIT COURT DID NOT ERRONEOUSLY EXERCISE DISCRETION WHEN DENYING CORBINE'S MOTION FOR RECONSIDERATION FOR WRIT OF CORAM NOBIS BECAUSE THERE ARE NO FACTS OUTSIDE THE RECORD THAT IF KNOWN TO THE COURT WOULD PREVENT ENTRY OF JUDGMENT.

If the Court of Appeals determines it has jurisdiction to hear Corbine's appeal, it must still dismiss the appeal because Corbine does not raise any issue or any allegation which if know at the time of the default judgment would have prevented the entry of default judgment.

When reviewing decisions regarding Petitions for Writs of Coram Nobis, appellate courts apply an erroneous exercise of discretion standard. ***Jessen v. State***, 95 Wis.2d 207, 213, 290 N.W.2d 65 (1980). The Writ of Coram Nobis is of very limited scope. ***State v. Kanieski***,

30 Wis. 2d 573, 576, 141 N.W.2d 196 (1966). A Writ of Coram Nobis concerns only errors of fact which are outside the record and unknown to the trial court and which, if known, would have prevented entry of the judgment. ***Id.*** This writ does not exist to correct errors of law and of fact appearing on the record since such errors are traditionally corrected by appeals and writs of error. ***Id.*** A claim that one may have had a defense to a charge cannot be brought in a Petition for Writ of Coram Nobis. Coram Nobis does not exist to challenge the merits of the original controversy. *See* ***Jessen***, 95 Wis. 2d at 214.

In the present appeal, the hearing from December 5, 2012, in which Judge Anderson denied Corbine's motion for writ of coram nobis, is not on appeal. What is on appeal is the order denying Corbine's motion for Reconsideration. A transcript of that hearing has not been made part of the record.

Here, Corbine does not argue that Judge Anderson improperly exercised discretion. Corbine only reiterates his argument that the judgment should be vacated and if the circuit court knew facts outside the record, it would not have found him in default.

Corbine's appeal is somewhat complicated considering that Corbine has another appeal in a separate case. However, looking at this appeal in its most basic form, Corbine was arrested for suspected OWI. He was read the Informing the Accused and apparently failed to voluntarily submit to a chemical test of his blood. He was issued a refusal citation. Most importantly, he failed to request a hearing within ten days after service of the notice of intent to revoke his operating privileges. *See* Wis. Stat. § 343.305(10)(a).

The success of Corbine's appeal hinges on the requirements of the statute. Corbine had a legal right to request the refusal hearing and could have raised the arguments found in his motion for coram nobis. The record is void of any request for refusal hearing. The only

record that does exist is that default judgment was entered on the refusal ticket on October 20, 2004.

All other arguments made by Corbine as to 04CT178 are not germane to the appeal. Under Wisconsin's Implied Consent law, drivers are deemed to have consented to a chemical test of their blood. As the Court of Appeals is well aware, a refusal citation and a subsequent prosecution for OWI are completely unrelated.

Had Corbine properly requested a refusal hearing, he could have challenged the issuance of the citation. In the alternative, he could have submitted to the chemical test of his blood. Hence, there would have been no refusal citation and the criminal charges would have been eventually dropped. Corbine's refusal constitutes a separate offense.

There is no legal argument which Corbine can succeed in vacating the default judgment in 04TR1904. The judgment was a default and the record is void of any request for a refusal hearing with the Circuit Court. The only way that Corbine could have successfully attacked the refusal citation was to have filed within ten days a request for a hearing. *See* Wis. Stat. § 343.305(10)(a). The plain language of Wis. Stat. § 343.305(10)(a) indicates that the Circuit Court does not have the discretion to enlarge the ten-day time period.

Since Corbine has not produced or shown in any way that he formally made the request for a refusal hearing, the attack of the refusal citation is without merit.

CONCLUSION

For the foregoing reasons, this Court should affirm the order dismissing Corbine's motion for reconsideration.

Dated this 20th day of November 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,628 words.

Dated this 20th day of November, 2013.

_____
John M. Yackel
Assistant District Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of November, 2013.

_____
John M. Yackel
Assistant District Attorney