STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP001987

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JEFFREY EDWARD OLSON,

Defendant-Appellant.

ON APPEAL FROM A DECISION AND ORDER DENYING REQUEST FOR PLEA WITHDRAWAL ENTERED BY THE HONORABLE MICHAEL J. HANRAHAN ON SEPTEMBER 17, 2018

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

Did the post-conviction court properly deny Olson's motion for withdrawal of guilty plea in a case where the sentence had expired approximately twenty-one years before the motion was filed?

Trial Court answered: The trial court found that Olson's claim was without merit, and also that the trial court lacked jurisdiction over the motion, because the sentence had expired.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This case can be resolved by applying well-established legal principles to the facts of the case and, as a misdemeanor matter decided by a single judge, will not meet the criteria for publication. See Wis. Stats. (Rule) 809.22(2) and 809.23(1)(b).

STATEMENT OF THE CASE

On November 12, 1994, Jeffrey Olson was charged with misdemeanor battery, contrary to Wis. Stat. § 940.19(1), in Milwaukee County Circuit court case 94CM410611. (R1) Olson pled guilty to that charge on December 5, 1994 (R2:2; R5; R6), at which time the Honorable Elsa Lamelas found him guilty, entered judgment of conviction, and sentenced him to serve 9 months in the House of Correction, which she stayed in favor of 2 years of probation, subject to certain conditions. (R2:2; R7)

On October 22, 1996, State Probation/Parole Agent Marcie Adams sent a request to the court, asking that the court extend Olson's probation for 6 months, to allow Olson time to pay $142 in outstanding court costs and surcharges. (R10:3-4) A stipulation to the extension, signed by Olson on September 17, 1996, accompanied Adams's request. (R10:1) On November 7, 1996, the Honorable Ronald S. Goldberger extended Olson's probation for 6 months. (*Id*.) Olson was discharged from supervision on May 14, 1997, having satisfied the probation term. (R13:1-2; App. 101-102)

On November 4, 2016, Olson filed a motion for evidentiary hearing. He alleged that in October of 2016, he was notified by the Division of Corrections that he owed additional supervision fees for a period of supervision from May of 1996 through January of 1998. (R14; App. 103-104) He asserted, in essence, that he had not been on probation for that period, or that—if he was on probation for that period—his probation had been extended without his knowledge and without lawful process. (*Id*.) He requested an evidentiary hearing and certain other relief. (*Id*.)

The trial court denied the motion by written order on November 9, finding that Olson's sentence long before had expired and that the court had no jurisdiction over the Department's attempts to collect supervision fees. (R15; App. 105)

After additional correspondence with the circuit court in 2016 (R16:1), 2017 (R18:2), and 2018 (R19), Olson filed a motion to reinstate his appellate rights, which this court denied on August 29, 2018. (R21)

On September 10, 2018, Olson filed a one page motion to withdraw his plea. (R22; App. 106) Read broadly, Olson again claimed that his probation either had not been extended or had been extended illegally, without notice, which constituted a breach of the plea agreement justifying plea withdrawal. (*Id*.)

Judge Michael Hanrahan denied that motion on September 17, finding that the record established that Olson's probation had been properly extended for six months pursuant to a court order dated November 8, 1996; that the court had no jurisdiction over postconviction claims in a case where the sentence had expired; and that the core matter at issue—DOC's attempt to collect supervision fees—was not a matter over which the court had jurisdiction. (R23; App. 107)

Olson filed a notice of appeal on September 26, 2018. (R28). This appeal follows.

STANDARD OF REVIEW

The standards applicable to a trial court's decision to deny a postconviction motion without a hearing are set forth in *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433, and *State v. Love*, 2005 WI 116, ¶ 26, 284 Wis. 2d 111, 700 N.W.2d 62. In *Love*, the Court stated:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review *de novo*. If the motion raises such facts, the circuit court must hold an

> evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard.

Love, 284 Wis. 2d 111, ¶ 26, 700 N.W.2d 62. (internal citations omitted).

Whether a defendant's claims are procedurally barred in any particular case presents a question of law that this court reviews *de novo*. *See State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

Issues of the competence and jurisdiction of the court also are questions of law this court reviews *de novo. City of Eau Claire v. Booth*, 2016 WI 65, ¶ 6, 370 Wis. 2d 595, 601, 882 N.W.2d 738, 741.

ARGUMENT

THE POSTCONVICTION COURT PROPERLY DENIED OLSON'S MOTION WITHOUT A HEARING

A. Introduction

As an introductory matter, the State notes that Olson's brief on appeal does not conform with the requirements of Wis. Stats. § 809.19. It does not contain a description of the nature of the case, the procedural history leading up to the appeal, or properly identify the order being appealed from;[1] it contains only one reference to the record (Brief of Defendant-Appellant, p. 3). See, Wis. Stat. § 809.19(1)(d) and (e). The appendix does

[1] The caption asserts that the appeal is taken from Milwaukee County Circuit Court case 1994CM410611, Judge Elsa Lamelas, Trial Court, and Judge Michael P. Maxwell, Post-conviction Court. On information and belief, Judge Maxwell serves on the Waukesha County bench. (https://www.waukeshacounty.gov/CircuitCourts/CourtOfficials/michael-p.-maxwell/)

not contain the material required by Wis. Stat § 809.19(2), but rather a number of other items which do not appear in the appellate record. Most significantly, Olson makes extensive reference to facts which are not part of the appellate record. (Brief of Defendant-Appellant, pp. 5-7) The appellate court's review is confined to those parts of the record made available to it; *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26, 496 N.W.2d 226, 232 (Ct. App. 1993); *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992); and it is the appellant's responsibility to insure that the record is complete. *Fiumefreddo v. McLean*, 174 Wis. 2d at 26, 496 N.W.2d at 232. Factual assertions which are not contained in the appellate record cannot be considered. *See Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600, 603 (1981) The extraneous factual assertions in Olson's brief should therefore be disregarded.

While the lapses in the pleading may make this case appropriate for summary affirmance, the State will also address the merits of Judge Hanrahan's decision.

B. The Postconviction Court Lacked Jurisdiction Over The Motion Because Olson Was No Longer Under Sentence In The Case.

A defendant's right to seek post-conviction relief is not unrestricted: it is subject to limitations established by statute and case law. In Wisconsin, appeals and post-conviction relief in criminal cases are governed by Wis. Stat. § 974.02. *State v. Swiams*, 2004 WI App 217, ¶ 13, 277 Wis. 2d 400, 411, 690 N.W.2d 452. That statute reads in relevant portion,

> 974.02 Appeals and postconviction relief in criminal cases.
>
> (1) A motion for postconviction relief other than under s. 974.06 or 974.07 (2) by the defendant in a criminal case shall be made in the time and manner provided in s. 809.30. An appeal by the defendant in a criminal case from a judgment of conviction or from an order denying a postconviction motion or from both shall be taken in the time and manner provided in ss. 808.04 (3) and 809.30.

Wis. Stat. § 974.06(1) provides,

> After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody

> under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Finally, Wis. Stat. § 974.07(2) provides that a convicted defendant may move the court for an order for post-conviction DNA testing at any time after being convicted of a crime, adjudicated delinquent, or found not guilty by reason of mental disease or defect, if certain conditions precedent are met.

In essence, § 974.02 establishes the parameters for direct challenges to a conviction, during the time for direct appeal; § 974.06 establishes the parameters for a collateral attack on a conviction, after the time for direct appeal has expired; and § 974.07 establishes a procedure for post-conviction DNA testing. While Wis. Stat. § 974.07 establishes no time limit by which a defendant must bring that claim, both § 974.02 and § 974.06 do. A motion for direct relief must be filed within the time prescribed by § 809.30; a collateral attack under § 974.06 may be brought after the time for direct appeal has expired, but must be brought while the defendant is under the sentence of the case which is challenged.

Wisconsin courts have repeatedly held that the provision of § 974.06 that a defendant be under the sentence of the court is jurisdictional. In *State v. Theoharopoulos*, 72 Wis.2d 327, 240 N.W.2d 635 (1976), the defendant was convicted of a felony drug offense in Milwaukee County circuit court in 1969. He was placed on probation for two years, then discharged from supervision when that term was completed. Two years after he discharged from probation, he was taken into custody and confined in the Waukesha County Jail under a federal detainer for possible deportation. he detention and potential deportation were the result of his 1969 state conviction. *Id.* Once he was detained, Theoharopoulos brought a § 974.06 motion alleging various constitutional errors. The Supreme Court held that because Theoharopoulos had discharged from the state sentence

he wished to attack, the circuit court had no jurisdiction over his § 974.06 motion:

> The facts are undisputed that, at the time of the filing of the motion for postconviction relief, the defendant was no longer under sentence, nor in custody under the sentence of the state court. On the face of it, therefore, it appears indisputable that the circuit court had no jurisdiction to entertain the petition for relief.

Theoharopoulos, 72 Wis. 2d at 330, 240 N.W.2d at 636.

The rule that a court lacks jurisdiction to hear a § 974.06 motion if the defendant is not "under sentence" was reaffirmed in *Thiesen v. State*, 86 Wis. 2d 562, 570, 571, 273 N.W.2d 314, 318-319; (1979); and *State v. Schill*, 93 Wis. 2d 361, 372-373, 286 N.W.2d 836, 841-842 (1980). It was reiterated in *Jessen v. State*, 95 Wis. 2d 207, 211, 290 N.W. 2d 685, 687 (1980), where the Court wrote,

> We now state once again, and wish to make it clear, that the remedy provided in sec. 974.06 is available solely to those persons in custody under sentence of a court.

In this context, "under sentence" means that the defendant was confined under the sentence imposed as a result of the conviction he wishes to attack. *State v. Bell*, 122 Wis. 2d 427, 362 N.W.2d 443 (Ct. App. 1984),

Thus, the statutes are plain. A defendant has two avenues to challenge his conviction on grounds other than DNA testing: a direct appeal within the time established in § 809.30; or a collateral attack after the time for direct appeal has expired but before he is discharged from his sentence.[2]

[2] A defendant also has potential relief under Wis. Stats. §782.01, which provides that a "person restrained of personal liberty" may seek equitable relief through a petition for writ of habeas corpus. However, habeas relief would not have been available to Olson: it is available only when the petitioner demonstrates: 1) restraint of his liberty, 2) the restraint was imposed contrary to constitutional protections or by a body lacking jurisdiction, and 3) he has no other adequate remedy available at law. *State v. Pozo*, 2002 WI App 279, 258 Wis. 2d 796, 654 N.W.2d 12. There is nothing to suggest those conditions are met here.

Common law provides that a person who has completed his sentence may petition for a writ of *coram nobis*. However, coram nobis is a remedy of very limited scope, addressed to the discretion of the trial court. It is available only when (1) a petitioner has no other remedy, and (2) there existed of an error of fact unknown at the time of trial and which is of such a nature that knowledge of its existence at the time of trial would have prevented the entry of judgment. *Jessen*, 95 Wis. 2d at 213-214, 290 N.W.2d at 688.

In this case, this court declined to extend Olson's deadlines for filing a direct appeal (R21), and no basis existed for *coram nobis* relief. Therefore, Olson's failure to bring the postconviction motion while he was under sentence deprived the circuit court of jurisdiction over the matter. Accordingly, Judge Hanrahan properly denied the motion.

C. Olson's motion was procedurally barred

Even if the postconviction court were to have had jurisdiction over Olson's 2018 motion to withdraw his plea, the motion was properly denied, as it was procedurally barred by the 2016 motion.

A criminal defendant is required to consolidate all postconviction claims into his original, supplemental, or amended motion. If he fails to raise a constitutional issue that could have been raised on direct appeal or in a prior § 974.06 motion, the issue may not become the basis for a subsequent § 974.06 motion unless the court ascertains that a sufficient reason exists for the failure either to allege or to adequately raise the issue in the appeal or previous §974.06 motion. *State v. Lo*, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756. Moreover, a matter once litigated may not be relitigated in a subsequent postconviction proceeding. *State v. Crockett*, 2001 WI App 235, ¶ 15, 248 Wis. 2d 120, 131, 635 N.W.2d 673, 678; *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991).

Here, Olson first filed a motion challenging the Department of Correction's assertions that his probation had been extended, and that he owed additional fees as a result, in November of 2016. (R14; App. 103-104) The trial court denied

the motion (R15, App 105), and Olson did not an appeal. Although the relief Olson sought in 2018—withdrawal of the plea—was different, the substance of his claim was the same. (R22, App 106) In the 2018 motion, Olson offered neither any reason that he did not raise the issue of plea withdrawal in his previous filing, nor a theory by which the underlying complaint could be relitigated. Accordingly, although Judge Hanrahan did not address the motion in those terms, Olson's motion to withdraw his plea was properly denied as procedurally barred.

D. Olson's motion was insufficient to warrant a hearing

1. Legal Standard

As noted above, if a post-conviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief, the circuit court *must* hold an evidentiary hearing. *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972), and *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). However, a motion properly may be denied without a hearing if it does not raise such, or if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98.

2. Olson's Motion was deficient under the *Nelson/Bentley* standard

Leaving aside any jurisdictional or procedural defect, the postconviction court properly denied Olson's motion without a hearing. Although Judge Hanrahan did not address Olson's motions in terms of the *Nelson/Bentley* standard, the motion was insufficient to warrant a hearing. It presented only conclusory allegations, without any factual support, and the record conclusively showed that Olson was not entitled to the relief he sought.

In essence in the motion, Olson argued that the State breached the plea agreement by improperly extending his probation. (R22, App. 106) Leaving aside that he did not recite the original agreement—which, in and of itself would have

prevented the court from meaningfully assessing his claim—Olson's legal assertion was incorrect: the Department of Corrections was not a party to the plea agreement, and the prosecutor was not a party to the extension. (See, R10) Olson did not demonstrate that a "non-extension" clause was part of the original plea agreement; see, e.g., *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 579 N.W.2d 698 (1998); or that the parties to the plea agreement intended their agreement to extend beyond the original sentencing hearing, such that recommendation for an extension would have breached the plea agreement, even if the prosecutor had endorsed such an extension. See, *State v. Windom*, 169 Wis. 2d 341, 350, 485 N.W.2d 832, 835 (Ct. Appeals 1992).

A party seeking to vacate a plea agreement must establish by clear and convincing evidence that a "material and substantial" breach of the agreement has occurred. *State ex rel. Warren v. Schwarz*, 219 Wis. 2d at 643, 579 N.W.2d at 711 (internal citations omitted). This, Olson did not do. For that reason, too, the motion was properly denied.

CONCLUSION

For the foregoing reasons, this court should affirm the circuit court's decision and order denying the Olson's motion for postconviction relief.

Dated this _____ day of June, 2019

Respectfully submitted,

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_____
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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 word count of this brief is 4063.

_____ _____

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CERTIFICATE OF COMPLIANCE
WITH 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 s. 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.

_____ _____

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INDEX TO THE APPENDIX

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of June, 2019.

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