COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP751 **Cir. Ct. No. 2006CF3895**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEAN D. WHITEHEAD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Sean Whitehead appeals, pro se, the circuit court's order denying his postconviction motion wherein Whitehead asked the court to

vacate the judgment of conviction or alternatively allow him to withdraw his guilty pleas based on lack of jurisdiction, ineffective assistance of trial and appellate counsel, and his contention that WIS. STAT. § 961.41(4) (2013-14)[1] is unconstitutional. As set forth below, we affirm the court's denial of Whitehead's motion, but on different grounds.

¶2 In 2006, Whitehead was arrested and charged with two counts of armed robbery. Pursuant to a plea agreement, he pled guilty to amended charges of two counts of attempting to sell noncontrolled substances as controlled substances, in violation of WIS. STAT. § 961.41(4) (2003-04), a class I felony. In affirming his intent to plead guilty to the amended charges, Whitehead acknowledged that he had read and understood the plea questionnaire/waiver of rights form, and specifically admitted to the conduct noted in the complaint that he had attempted to sell "fake cocaine" (in the form of baking soda) to the victims. The court sentenced Whitehead to consecutive terms of maximum imprisonment on each count, then stayed the sentence and ordered a total of four years of probation.

¶3 Whitehead's counsel filed a no-merit report to which Whitehead did not respond. We affirmed the no-merit report, concluding that after review, we identified no issues of arguable merit and specifically noting that the no-merit report "addresse[d] the potential issue of whether Whitehead's plea was freely, voluntarily and knowingly entered and a factual basis for the plea established."

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 Whitehead's probation was revoked and he served the confinement portion of his sentence. His extended supervision was later revoked. While Whitehead was confined, the department of corrections sent an inquiry to the circuit court for clarification of the charges as listed on the judgment of conviction. After review of the record, including the plea hearing transcript, the court[2] amended the judgment of conviction to remove a reference to WIS. STAT. § 939.32 (attempt). Whitehead completed the entirety of his sentence for the above two crimes in January 2015.

¶5 In February 2015, Whitehead, through counsel, moved "to correct the sentence imposed" to reflect that the offenses to which he pled guilty were "attempts," and therefore class A misdemeanors, with a lesser maximum sentence than the felonies on which he served his sentence. The court denied this motion by a decision and order dated March 2, 2015. Whitehead then filed a pro se motion for postconviction relief on March 30, 2015. In denying the motion, the court stated by a decision and order dated April 8, 2015:

> On March 30, 2015, the defendant filed a second motion for postconviction relief. The defendant has now filed for plea withdrawal under [WIS. STAT. §] 974.06…. He also claims that [WIS. STAT. §] 961.41(4) … is vague and ambiguous….
>
> A no merit appeal was filed in this case, and the defendant elected not to respond. Under the circumstances, his current claims are barred. *See* ***State v. Tillman***, [2005 WI App 71,] 281 Wis. 2d 157[, 696 N.W.2d 574]…. To the extent that he again argues that the amended judgment of conviction was erroneous, he can appeal the court's March 2, 2015 decision and order.

[2] The Honorable Charles F. Kahn, Jr., presided over Whitehead's plea and sentencing hearings. The Honorable William Brash presided over the 2015 postconviction proceedings.

In his notice of appeal, Whitehead states he is appealing the court's April 8, 2015 decision and order.

¶6 Whitehead seeks relief under WIS. STAT. § 974.06.[3] Section 974.06(1) allows a defendant who believes his or her sentence is unlawful to seek relief after the time for appeal or postconviction relief has expired; however, the motion requires the movant to be "a prisoner in custody under sentence of a court." A defendant who completes the sentence he or she wishes to challenge is not "in custody" for § 974.06 purposes. *See* ***Thiesen v. State***, 86 Wis. 2d 562, 570, 273 N.W.2d 314 (1979).

¶7 At the time he filed his postconviction motion, Whitehead was no longer in custody under the sentence for the WIS. STAT. § 961.41 convictions he challenges. As such, the circuit court was without competency to proceed on his

[3] In his postconviction motion, Whitehead also cited WIS. STAT. § 972.02 and requested "a writ of error of *coram nobis*." To the extent he is attempting to argue that he has not waived his right to a jury trial should we allow him to withdraw his guilty pleas, he is correct. *See, e.g.*, ***State v. Nelson***, 2005 WI App 113, ¶¶23-25, 282 Wis. 2d 502, 701 N.W.2d 32. On appeal, Whitehead has not renewed his request for a writ of coram nobis. Accordingly, we deem him to have abandoned that claim for relief. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (issue raised before the circuit court but not raised on appeal is deemed abandoned).

claims raised under WIS. STAT. § 974.06. *See* ***Thiesen***, 86 Wis. 2d at 570.[4] In its order denying Whitehead's claims, the circuit court analyzed their merits under § 974.06 and ***Tillman***. However, because the court was without competency to consider Whitehead's claims brought under § 974.06, we affirm the court's denial of Whitehead's motion, but on this alternative ground. *See* ***State v. Trecroci***, 2001 WI App 126, ¶45, 246 Wis. 2d 261, 630 N.W.2d 555 (we may affirm a circuit court's ruling on different grounds).

By the Court.—Order affirmed.

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

[4] In ***Thiesen v. State***, 86 Wis. 2d 562, 571, 273 N.W.2d 314 (1979), the supreme court used the term "jurisdiction." In ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶¶1-2, 8-10, 273 Wis. 2d 76, 681 N.W.2d 190, the court made a key distinction between a circuit court having subject matter jurisdiction over a matter versus competency to decide a case. As the ***Mikrut*** court explained, while subject matter jurisdiction is conferred upon a circuit court by the constitution and cannot be revoked by statute, a court's competency to adjudicate a particular case may be lost based upon a party's "failure to comply with a statutory mandate pertaining to the exercise of [the circuit court's] subject matter jurisdiction." ***Id.***, ¶¶8-9. Based upon that distinction, the issue before us here is one of competency not jurisdiction. *See* ***Xcel Energy Servs., Inc. v. LIRC***, 2013 WI 64, ¶27 n.8, 349 Wis. 2d 234, 833 N.W.2d 665:

> In some older cases, the concept of circuit court competency was often discussed as coextensive with the court's subject matter jurisdiction, but recent cases make clear that the two concepts are distinct and that it is competency, not subject matter jurisdiction, that may be lacking where statutory prerequisites are not followed.

Id. (citing ***Mikrut***, 273 Wis. 2d 76, ¶¶8-9).