

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 2010

David R. Schanker
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. 2009AP2894

Cir. Ct. No. 2005CF6674

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY EDWARD OLSON,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JEFFREY A. CONEN, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Jeffrey Edward Olson, *pro se*, appeals from orders denying his motions for postconviction relief. We affirm the circuit court's orders on procedural grounds.

BACKGROUND

¶2 The background facts in this case were summarized in our decision affirming Olson's convictions in his direct appeal:

On November 28, 2005, Olson was charged with one count of repeated sexual assault of a child under the age of sixteen, contrary to WIS. STAT. § 948.025(1)(b) (2005-06), a class C felony.... After the alleged victim, a family member, testified at the preliminary hearing, the charge was amended to third-degree sexual assault, contrary to WIS. STAT. § 940.225(3) (2005-06), and Olson was bound over for trial. Ultimately, the parties reached a plea agreement, whereby the State amended the charge to two counts of fourth-degree sexual assault and recommended probation, without jail time as a condition of probation. In exchange, Olson entered *Alford*² pleas to the two misdemeanors.

On August 23, 2006, the trial court accepted Olson's pleas and found him guilty. On count one, Olson was sentenced to nine months in jail. On count two, the court imposed and stayed a nine-month consecutive sentence and placed Olson on probation for two years, with jail time as a condition of probation. Olson did not file a notice of appeal.

On April 4, 2007, Olson filed a *pro se* motion to modify his sentence on grounds that his sentence was being computed incorrectly. The trial court denied the motion in a written order dated April 6, 2007. Olson subsequently filed a *pro se* motion for postconviction relief, which was

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² See *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970) (allowing a defendant to agree to accept conviction while simultaneously maintaining his or her innocence).

denied on grounds that his appellate rights had expired. Ultimately, the Court of Appeals reinstated Olson's appeal rights and the public defender appointed counsel to represent Olson in postconviction proceedings.

Postconviction counsel proceeded to evaluate Olson's case. Subsequently, counsel moved to withdraw at Olson's request so that he could proceed with his appeal *pro se*. After corresponding with Olson to advise him of the potential risks of proceeding *pro se*, the trial court granted counsel's motion to withdraw and Olson was permitted to proceed *pro se*.

Now representing himself, Olson filed a four-page motion for postconviction relief....

The trial court denied Olson's motion in a written decision.

See State v. Olson, No. 2008AP2542-CR, unpublished slip op., ¶¶2-7 (Wis. Ct. App. March 3, 2009) (footnote omitted). Olson represented himself in his direct appeal. We affirmed, concluding that Olson was not denied the effective assistance of trial counsel and declining to consider Olson's assertion that the State suppressed evidence because the issue was raised for the first time on appeal. *See id.*, ¶8. Subsequently, we denied Olson's motion for reconsideration and the Wisconsin Supreme Court denied his petition for review and his two motions for reconsideration of that decision.

¶3 On September 25, 2009, Olson filed a motion for postconviction relief in the circuit court. The motion stated that it was brought pursuant to WIS. STAT. §§ 805.03 and 805.15.³ Olson argued that he was entitled to relief pursuant

³ WISCONSIN STAT. § 805.03, part of WIS. STAT. ch. 805, entitled "Civil Procedure—Trials," provides:

(continued)

to *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (discussing ineffective assistance of counsel claims) and *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (discussing the type of hearing used to address an ineffective assistance of counsel claim.).

¶4 The circuit court denied Olson’s motion without a hearing, interpreting the motion for a new trial as one brought under WIS. STAT. § 974.06, because WIS. STAT. § 805.15 does not apply to criminal cases. It concluded that Olson’s claims were precluded by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because they were disposed of in his prior appeal. The circuit court also denied Olson’s motion for reconsideration. This appeal follows.

Failure to prosecute or comply with procedure statutes. For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12 (2) (a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

WISCONSIN STAT. § 805.15, also part of ch. 805, provides in relevant part:

New trials. (1) MOTION. A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice. Motions under this subsection may be heard as prescribed in s. 807.13. Orders granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.

DISCUSSION

¶5 The State argues Olson’s motion was procedurally barred. We agree and, on that basis, we affirm the circuit court’s orders. See *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (“[W]e may affirm on grounds different than those relied on by the [circuit] court.”).

¶6 Olson sought postconviction relief pursuant to WIS. STAT. §§ 805.03 and 805.15. However, those civil statutes do not govern postconviction attacks on a criminal conviction. Once the time for a direct appeal of a criminal conviction has passed, “a defendant in a criminal case may collaterally attack his conviction pursuant to a WIS. STAT. § 974.06 motion, or via a petition for writ of habeas corpus.”⁴ *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶16, 290 Wis. 2d 352, 714 N.W.2d 900 (citations omitted). Here, Olson filed his motion in the circuit court, so his motion was properly construed as one filed under § 974.06.

¶7 However, Olson is barred from collaterally attacking his criminal conviction under WIS. STAT. § 974.06 because he is no longer “in custody under sentence of a court.” See *State v. Theoharopoulos*, 72 Wis. 2d 327, 329, 240 N.W.2d 635 (1976) (quoting § 974.06 and recognizing that circuit court lacks jurisdiction to consider a motion for postconviction relief brought under § 974.06 if the defendant has completed his sentence). Here, it is undisputed that at the time Olson filed his motion on September 25, 2009, his sentences had been

⁴ When a defendant alleges ineffective assistance of *appellate* counsel, he or she “must petition the appellate court that heard the appeal for a writ of habeas corpus.” *State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). Olson represented himself in his direct appeal and has alleged only the ineffective assistance of trial counsel.

completed.⁵ Therefore, the circuit court lacked competency⁶ to consider Olson's motion under WIS. STAT. § 974.06.

¶8 In his reply brief, Olson again confirms that he has finished serving his sentences. He argues for the first time that the circuit court should have construed his motion as a petition for a writ of *coram nobis*. This type of writ, mentioned in the State's brief, is another mechanism by which a person may seek relief from a judgment of conviction after the sentence has already been served. See *State v. Heimermann*, 205 Wis. 2d 376, 381-84, 556 N.W.2d 756 (Ct. App. 1996). However, it is limited to correcting "an error of fact not appearing on the record," and it is not available to reach errors of fact or law which could be addressed by way of appeal. See *Jessen v. State*, 95 Wis. 2d 207, 213-14, 290 N.W.2d 685 (1980). Therefore, it would not appear to apply here. In any event, we decline to discuss Olson's belated attempt to characterize his motion as a petition for writ of *coram nobis* because he raised that issue for the first time on appeal, and he has not explained how such a writ might provide him with relief. See *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first time on appeal are generally deemed waived); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (stating that this court will not address issues on appeal that are inadequately briefed).

⁵ Olson is currently serving a different prison sentence for other crimes. That, however, does not qualify him to seek relief from his convictions under WIS. STAT. § 974.06 in the instant case. See *State v. Bell*, 122 Wis. 2d 427, 430-31, 362 N.W.2d 443 (Ct. App. 1984) (under § 974.06, a court has competency to proceed only when the claimant is still "in custody under the sentence he desires to attack").

⁶ As the State notes, many similar cases involving the application of WIS. STAT. § 974.06 speak in terms of a loss of jurisdiction. However, it is more accurate to say that a circuit court loses competency to proceed. See *Green County Dep't of Human Servs. v. H.N.*, 162 Wis. 2d 635, 655-56, 469 N.W.2d 845 (1991).

¶9 For the foregoing reasons, we affirm the circuit court orders denying Olson’s motion, albeit on a different ground than that relied on by the circuit court. Specifically, we conclude that the circuit court lacked competency to consider Olson’s motion because he is no longer serving his sentences for the convictions he wants to collaterally attack. *See Theoharopoulos*, 72 Wis. 2d at 329.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

