COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1042 **Cir. Ct. No. 2001CF3325**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID D. AUSTIN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN A. DIMOTTO, Judge. *Affirmed*.

¶1 CURLEY, P.J.[1] David D. Austin, *pro se*, appeals the order denying his postconviction motion seeking to vacate his conviction for operating while

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10).

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

intoxicated (OWI), fourth offense. Austin argues that the trial court erroneously exercised its discretion by claiming that it had no jurisdiction over his case and by denying his motion for reconsideration. He also argues that his attorney was ineffective for permitting him to plead no contest to OWI, fourth offense. He further claims he has only been convicted of OWI once in the past ten years—not three times, as the State claimed, and thus, his conviction should be vacated. This court disagrees and affirms.

I. BACKGROUND.

¶2 On January 18, 2002, Austin entered a no contest plea to operating a motor vehicle while intoxicated, fourth or subsequent offense, pursuant to WIS. STAT. § 346.63(1)(a). Originally Austin had been charged with fifth offense OWI, which is a felony. After being charged, Austin filed a motion seeking to dismiss the case. He claimed that the State could not use two prior convictions for OWI because of their age, and he claimed that a 1992 Illinois offense for OWI was improperly entered because, at the time of the conviction, he was overseas in the armed forces. The State agreed to amend the charge to misdemeanor OWI, fourth offense, because the State could not substantiate the Illinois conviction. Austin was found guilty. The facts set forth in the complaint were used as a factual basis for the judgment. The trial court sentenced Austin to ten months in the House of Correction, consecutive to any other sentence he was then serving. He was also fined $600 plus costs and other penalty assessments and surcharges were assessed.

¶3 On May 10, 2010, over eight years after his conviction, Austin filed a postconviction motion claiming a due process violation and ineffective assistance of counsel in the earlier case. Austin asserted in his motion that:

> i. From my own research of law, I know that I cannot be convicted of a 4th offense when the law only provides for the counting of two (2) convictions in a ten (10) year period. If there are more offenses within the ten (10) year period, than [sic] and only than [sic], may the State look back further to add to the count of DUI's and increase the penalty.
>
> ii. ….If trial counsel had researched the law, he would have known that it was in fact a 2nd offense and not a 4th offense. The fact that trial counsel allowed defendant to be sentenced for a crime he was not guilty of, leads one to believe that counsel was deficient in his handling of defendant's case and must be found to be ineffective. The A.D.A. having the duty as a representative of "The People" has a duty to make sure that the "facts" fit the crime being charged. Therefore, the A.D.A. willfully went for a charge that was of a harsher penalty than was permissible by law. Which violates the constitutional right[]s of the defendant and denies him due process of law.

Austin relied upon WIS. STAT. § 346.65(2)(b) for his contention that he could not be lawfully charged with OWI-fourth offense.[2] On May 12, 2010, the trial court denied the motion in a written decision without holding a hearing, stating that it was unclear whether Austin "waived his current argument at the time he entered his no contest plea because a transcript of the sentencing hearing has not been

[2] WISCONSIN STAT. § 346.65(2)(b) provides:

> **(2)** Any person violating s. 346.63(1):
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> ….
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> (b) Except as provided in par. (f), shall be fined not less than $350 nor more than $1,100 and imprisoned for not less than 5 days nor more than 6 months if the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and other convictions counted under s. 343.307(1) within a 10-year period, equals 2, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

produced," and that it was Austin's responsibility to provide the documentation to support his contentions.

¶4 Austin then attempted to obtain copies of the transcripts by petitioning the trial court for the transcripts and advising the trial court that he was indigent and currently incarcerated. As a result, Austin sought a waiver of the transcripts and record costs and fees.

¶5 On June 2, 2010, the trial court denied his motion in a written order, observing that Austin had indicated, following his no contest plea, that he did not plan on seeking postconviction relief. As a consequence, no transcripts of the proceedings were produced. The trial court went on to note that where the time for an appeal has expired, "an arguably meritorious claim for relief" must be presented before the trial court will order production of the transcripts at public expense. The trial court went on to reject Austin's claim that an "arguably meritorious claim" existed.

¶6 Following the trial court's order Austin filed another motion, this time seeking to use his inmate release account funds to pay for the court records and transcripts. The trial court granted this motion, provided sufficient funds were available in the release account to cover the costs. It would appear sufficient funds were available as the record and transcripts are in the appellate file.

¶7 The record reflects that the next activity in the case was Austin's motion filed in December 2010 requesting that the court "vacate/set aside

conviction and sentence or grant a ***Machner*** [h]earing."[3] As support for his motion, Austin submitted that:

> i. From my own research of law, I know that I cannot be convicted of a 4th offense when the law only provides for the counting of two (2) convictions in a ten (10) year period.
>
> Wis. Stat. 346.65 (2001-2002)[.]
>
> (2) Any person violating s. 346.63(1): (b) Except as provided in par. (f), shall not be fined not less than $350 nor more than $1,100 and imprisoned for not less than 5 days nor more than 6 months if the number of convictions under ss. 940.09(1) and 940.25 in the person[']s lifetime, plus the total number of suspensions, revocations and other convictions counted under s. 343.307(1) **within a 10-year period, equals 2**, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one. (Emphasis added[.])

Consequently, Austin contended that:

> The law as it is written clearly indicates that the State is to start its counting of offenses "within" 10 years, if there are more convictions than 2, the penalty for the offense is increased by each level of the law that is applicable to the number of prior convictions plus the current one.
>
> In this case, there was not more than one (1) other conviction in the 10[-]year period that Wis. Stat. § 346.65[(2)](b) allowed for the counting of.

¶8 In addition, Austin explained that his attorney had filed a motion to dismiss the case based upon a miscounting of convictions, but abandoned it, advising Austin that there had been a change in the law. As Austin's research did not reveal any change in the law, he argued that his trial attorney was ineffective

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

for not arguing the motion and for allowing him to plead no contest to OWI fourth offense, when there was only one prior offense according to Austin's analysis of the then-prevailing law.

¶9 In January 2011, Austin's motion was denied.[4] The trial court determined that it had no jurisdiction to review Austin's claim because his motion was brought pursuant to WIS. STAT. § 974.06, which is applicable only to persons in custody under sentence of the court, and Austin's sentence for this conviction had expired. Austin then brought a motion for reconsideration, which was also denied. In his motion for reconsideration, he explained that his sentence for his conviction of OWI, fourth offense, was used to enhance the sentence he is currently serving, and he cited a federal case that permitted challenging an earlier sentence when it was used to enhance a new sentence. The trial court denied the motion for reconsideration without a hearing. This appeal follows.

II. ANALYSIS.

¶10 Austin argues that the trial court erroneously exercised its discretion by claiming that it had no jurisdiction over his case and by denying his motion for reconsideration.

¶11 This court first observes that the issue of whether the trial court had jurisdiction is a legal question which this court reviews under a *de novo* standard of law. ***Socha v. Socha***, 183 Wis. 2d 390, 393, 515 N.W.2d 337 (Ct. App. 1994)

[4] The order denying Austin's motion was signed by the Honorable Jean A. DiMotto as the successor judge for the Honorable Daniel Konkol who had sentenced Austin and heard the earlier motions.

(Whether a court has jurisdiction is a question of law that we review *de novo*). Thus, this court examines the issue without deference to the trial court.

¶12 Austin submits that the wording of WIS. STAT. § 974.06 permits the bringing of an action regardless of whether he is serving a sentence for that case. He points to language found in the statute which states: "a prisoner in custody under sentence of a court" is eligible for petitioning under the statute as evidence that he can bring his action as he is currently serving a sentence handed down by "a court." Austin is mistaken.

¶13 The case law does not support his interpretation of the statute. As early as 1976, our supreme court held that a party must be serving the sentence of the specific case for which relief is sought under WIS. STAT. § 974.06 in order for the trial court to have jurisdiction. *See* ***State v. Theoharopoulos***, 72 Wis. 2d 327, 329, 240 N.W.2d 635 (1976) (quoting § 974.06 and recognizing that the circuit court lacks jurisdiction to consider a motion for postconviction relief brought under § 974.06 if the defendant has completed his sentence). In that case, the petitioner was in custody under federal detention and threatened with deportation as a result of the state charge. ***Theoharopoulos***, 72 Wis. 2d at 330. Theoharopoulos wished to attack his state conviction via § 974.06. ***Id.*** Because he had already served his sentence, the supreme court found that the trial court had no jurisdiction. ***Id.*** The same result applies here. Consequently, the trial court did not have jurisdiction to hear Austin's motion.

¶14 Further, Austin's citation to ***Clay v. McBride***, 946 F. Supp 639 (N.D. Ind. 1996), a federal case, does not save him. First, ***Clay*** was an appeal of a writ of habeas corpus, not a motion predicated on WIS. STAT. § 974.06. *See* ***Clay***, 946 F. Supp. at 641. Second, federal law does permit a writ of habeas corpus to

address a case where the sentence has been served but only if that earlier sentence was used to enhance his current sentence. *See* ***id.*** at 643. However, based upon the transcript provided by Austin, the sentencing court for the sentence Austin is currently serving did not enhance his sentence based on his OWI fourth conviction. The trial court merely mentioned his fourth offense OWI and an escape charge as reasons why work release would not be appropriate. The sentencing judge also listed other negative factors that would militate against work release.

¶15 Moreover, even if this court entertained his motion, Austin's claim of ineffective assistance of counsel is without validity. Austin claims his attorney was ineffective for permitting him to plead no contest to a crime he could not have committed. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶16 First, this court observes that it appears Austin may have waived the right to challenge his conviction. At sentencing, the trial court had a colloquy with Austin's attorney in Austin's presence about the motion to dismiss that was filed.

> THE COURT: In the motion he had referred to the Illinois matter. It also had referred to a couple of convictions that were outside of the 10 year time period. The 10 year time period only applies to Subsection d which would be a second offense. It's a life time period that applies for third, fourth, fifth, etc. So under Section d, the two 1979 cases then would still be applicable.

> ATTORNEY BONNESON: Yes.
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> ATTORNEY MAGOWAN: That's right. And we discussed – Mr. Bonneson and I discussed that also.
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> ATTORNEY BONNESON: Yeah, the statute changed, so it's [now[5]] life time.
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> ATTORNEY MAGOWAN: Correct.
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> THE COURT: All right. So that's why the motion isn't being pursued. Is that correct?
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> ATTORNEY BONNESON: Correct.

This exchange would suggest that Austin knew the reasons behind the abandonment of the motion and he freely gave up the right to challenge the number of prior convictions in order to accept the prosecutor's agreement to reduce the charge to a misdemeanor and to recommend a minimum fine and a ten-month imprisonment.

¶17 Finally, with regard to the trial court's analysis of the penalties, this court is in agreement with the sentencing court's interpretation of the statutes. Austin contends that the penalty section that applies to him was WIS. STAT. § 346.65(2)(b), which reads:

> **(2)** Any person violating s. 346.63(1):
>
> ….
>
> (b) Except as provided in par. (f), shall be fined not less than $350 nor more than $1,100 and imprisoned for not less than 5 days nor more than 6 months if the number of

[5] In the above-referenced transcript, Attorney Bonneson states that the applicable statute is "*not*" life time instead of saying that it is "now" life time. (Emphasis added.) Given the context of the entire conversation, however, and the statutory language at issue, this court concludes that the insertion of the word "not" must have been a typographical error. In any event, whether Attorney Bonneson used "not" or "now" does not change the court's analysis of the issues Austin raises on appeal.

> convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and other convictions counted under s. 343.307(1) within a 10-year period, equals 2, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

Austin reasons that the lifetime provision provided for in subsections (b), (c) and (d) only apply to convictions for homicide by intoxicated use of a vehicle or firearm, *see* WIS. STAT. § 940.09(1), and injury by intoxicated use of a vehicle, *see* WIS. STAT. § 940.25. Austin is wrong.

¶18 Although this court will concede that the statute is confusing, its application to the facts here prove that Austin fell within WIS. STAT. § 346.65(2)(c), which reads:

> Except as provided in pars. (f) and (g), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 30 days nor more than one year in the county jail if the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and other convictions counted under s. 343.307(1), equals 3, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

This is so because Austin, in his lifetime, had three prior convictions for OWI. Consequently, Austin's attorney was not ineffective and Austin was sentenced under the proper subsection.

¶19 For the reasons stated, the trial court's order is affirmed.

By the Court.—Order affirmed.

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