COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2013AP469
2013AP470
2013AP471

Cir. Ct. Nos. 2008CF4503
1991CF910151
2007CF6172

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LLOYD T. SCHUENKE,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Lloyd T. Schuenke, *pro se*, appeals from an order denying his postconviction motions for relief in cases from 1991, 2007, and 2008. The circuit court explained that, with respect to the 1991 case, the motion was

barred both because of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and because Schuenke's 1991 sentence had expired. The motions in the 2007 and 2008 cases were denied because they were predicated on invalidation of the 1991 conviction. We affirm.

¶2 In 1991, Schuenke was charged with two counts of third-degree sexual assault, contrary to WIS. STAT. § 940.225(3) (1989-1990),[1] and convicted by a jury. He was sentenced to five years' imprisonment on each count, to be served consecutively. His sentence was completed on December 1, 2000. In 2007, Schuenke was charged with, and pled no contest to, one count of failure to comply with sex offender registration requirements. In 2008, Schuenke was charged with one count of battery, one count of substantial battery, and one count of felony intimidation of a witness, all with use of a dangerous weapon and all as a habitual criminal; the 2007 conviction was the predicate offense for the habituality modifier. Schuenke pled no contest to battery with a dangerous weapon and as a habitual criminal, and to substantial battery as a habitual criminal.

¶3 In January 2013, Schuenke filed postconviction motions in each case, claiming "actual and legal innocence."[2] The motion in the 1991 case claimed, among other things, that the State should have had to charge him with violations of WIS. STAT. § 940.225(4)(b) and that the State failed to prove, beyond

[1] "Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class D felony." WIS. STAT. § 940.225(3) (1989-1990).

[2] Each case had varying levels of postconviction and appellate activity between Schuenke's convictions and the January 2013 postconviction motions, but it is not necessary for us to recount each case's history.

a reasonable doubt, a lack of consent by the victim.[3] The motion in the 2007 case alleged that, because Schuenke was innocent of the 1991 charges, the State had no authority to charge him for a sex offender registration violation. The motion in the 2008 case asserted that the State had no authority to charge him as a habitual criminal because he was innocent of the 2007 charge.

¶4 The circuit court denied the motions. It deemed the argument in the 1991 case "barred not only by [***Escalona***] but also by the fact that the case is expired and the defendant is not entitled to pursue postconviction relief in an expired case." (Footnote omitted.) Further, the circuit court explained, because the motions in the 2007 and 2008 cases were "predicated on an argument that the conviction in [the 1991 case] must be set aside," they lacked merit once the challenge to the 1991 case was rejected.

¶5 Schuenke dedicates the first forty-nine pages of his fifty-page brief to attempting to undermine his 1991 conviction. However, nowhere does he address the circuit court's determination that the motion was barred because of the expired sentence.

[3] WISCONSIN STAT. § 940.225(4) (1989-1990) provides, in relevant part:

> "Consent", as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.… The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence…:
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

¶6 "After the time for appeal or post-conviction remedy provided in [WIS. STAT. §] 974.02 has expired, a prisoner in custody under sentence of a court … may move the court which imposed the sentence to vacate, set aside or correct the sentence." WIS. STAT. § 974.06(1) (2011-12). In his reply brief, Schuenke contends § 974.06 does not "clearly and specifically require that a defendant be under the specific sentence being attacked in order to obtain relief from it." But that is precisely what "in custody under sentence of a court" means. *See* ***State v. Theoharopoulos***, 72 Wis. 2d 327, 334, 240 N.W.2d 635 (1976) (noting that under the federal equivalent of § 974.06, a motion "does not lie unless the petitioner is in custody *under the sentence he desires to attack*" (emphasis in original)); ***State v. Bell***, 122 Wis. 2d 427, 429, 362 N.W.2d 443 (Ct. App. 1984) (***Theoharopoulos*** "clearly indicates that our supreme court meant the sentencing court which imposed *the sentence under attack*" (emphasis added)).

¶7 Accordingly, because Schuenke was and is no longer in custody for his 1991 convictions, the circuit court lacked jurisdiction to hear any challenge to those convictions. *See* ***Bell***, 122 Wis. 2d at 431. The circuit court then properly noted that, because they were predicated on invalidation of the 1991 convictions, the two remaining motions were meritless.[4]

[4] The procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), is irrelevant to the 1991 case in light of our determination that the circuit court had no jurisdiction to consider Schuenke's challenge thereto. Further, while we agree with the State that the motions in the 2007 and 2008 cases were also barred by ***Escalona***, we decline to develop that analysis further in the interests of judicial economy: the 2007 and 2008 motions' lack of merit is patently obvious once the challenge to the 1991 case is dismissed.

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).