**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

February 19, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-1950-CR & 97-1951-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LARRY J. COPUS,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

EICH, C.J.[1] Larry Copus appeals from an order dismissing his motion for postconviction relief on jurisdictional grounds. We agree with the trial court that, at the time he filed his motion, Copus was not "in custody" under a

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(f), STATS.

sentence of a Wisconsin court within the meaning of § 974.06, STATS., and we therefore affirm the order.

In February 1994, Copus was charged with misdemeanor battery and disorderly conduct in the Rock County Circuit Court. He and his attorney negotiated a plea to the charges—and to an additional driving while intoxicated charge which was also pending in Rock County. Pursuant to the plea agreement, the battery charge was reduced to disorderly conduct, and Copus pleaded guilty to all three charges. After a colloquy, the trial court accepted Copus's plea and found him guilty. The court followed the parties' joint recommendation and placed him on probation for a period of eighteen months, with various conditions.

A month later, in March 1994, Copus was arrested on federal firearms and explosives charges. His probation on the state charges was subsequently revoked, and on May 24, 1994, the trial court sentenced him to ninety days in jail—with ninety days' credit for time served—on one charge, and to ninety days (consecutive) on the other.[2]

On June 16, 1994, Copus was arraigned on the federal charges and subsequently convicted. According to information he provided, Copus was sentenced to ninety-seven months' imprisonment and the length of the sentence was based in part on his convictions in the state cases which are the subject of this appeal.

Two years later, on July 2, 1996, Copus filed a document in Rock County Circuit Court entitled "Petition for Post Conviction Relief or Habeas

[2] The driving-while-intoxicated charge is not before us on this appeal.

Corpus," asking that his disorderly conduct convictions be set aside on grounds that he was "never informed … of all potential punishments if convicted" of the offenses.[3] The trial court ordered briefing on the threshold issue of whether Copus was serving a Wisconsin sentence within the meaning of § 974.06, STATS.[4] Citing ***State v. Theoharopoulos,*** 72 Wis.2d 327, 240 N.W.2d 635 (1976), the trial court concluded that because Copus was not "in custody under the sentence he desires to attack," the court lacked jurisdiction to hear his § 974.06 motion.

Copus fully served the first ninety-day sentence imposed by the trial court, and the State asserts that he has served "at least 22 days" of the second (consecutive) ninety-day sentence. Nothing in the record, however, indicates that the State of Wisconsin has lodged a detainer with federal corrections officials in whose custody Copus presently lies,[5] and it thus appears that the sole reason for his present incarceration is his federal sentence. Copus disagrees, asserting that once he completes his federal sentence and "returns home[,] there is nothing

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[3] While the trial court's memorandum decision states, without discussion or explanation, that "[t]he sentence record was adequate," the State indicates that no briefing or argument occurred on the merits of Copus's motion. Like the trial court, we rest our decision on jurisdictional grounds alone.

[4] Section 974.06(1), STATS., states:

> After the time for appeal or postconviction remedy … has expired, *a prisoner in custody under sentence of a court* ... 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.

(Emphasis added.)

[5] The trial court found that "[n]o detainer is outstanding for defendant's arrest …. [and] [t]he Rock County District Attorney has indicated that none will be forthcoming."

stopping one of the enthusiastically defendant [sic] police officers that Appella[n]t is now su[]ing for civil rights violations in federal court from slam-dun[]king Appella[n]t back into the jail to comple[]te the remainder of the sentence." Should that happen, of course, he would be incarcerated under Wisconsin process and serve a Wisconsin sentence. At this time, however, we agree with the trial court that Copus simply has not shown that he is in custody within the meaning of § 974.06, STATS., and ***Theoharopoulos***.[6]

*By the Court*.–Order affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4, STATS.

[6] Copus argues that because the federal court considered his Wisconsin convictions in imposing the federal sentence, that sentence somehow relates to Wisconsin. We rejected a similar argument in ***State v. Bell***, 122 Wis.2d 427, 428-9, 362 N.W.2d 443, 444 (Ct. App. 1984), where the defendant maintained that because an Illinois court relied on his Wisconsin conviction in imposing a maximum sentence for a violation of Illinois law, he had standing to pursue a § 974.06, STATS., motion even though he had been discharged from his Wisconsin sentence at the time.