COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2744

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RONALD R. KOTAS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Ronald Kotas appeals from the trial court's order denying his petition for writ of error *coram nobis*. The issue is whether Kotas is entitled to withdraw his no contest plea based on new information he has obtained

about the circumstances of his theft conviction. We conclude that he is not entitled to relief and we affirm.

¶2 Kotas pled no contest to two counts of theft in 1987 for taking electronic equipment from his employer. The trial court imposed a three-year prison sentence, stayed it and placed Kotas on probation for five years. Kotas was discharged from probation in the fall of 1989.

¶3 Nine years after being discharged from probation, Kotas filed a motion to set aside the conviction based on new information that he claims would have materially affected the outcome of his case. Kotas stated that Jerry Parado, a supervisor at his former employer Midwestern Relay Company, told him in 1992 that Parado had heard the company's chief engineer, John Patterson, state that he "has a system to get rid of any employee, 'union or no union.'" Kotas further explained that he believed that he had been "set up" by his employer. Kotas attached to the motion a statement signed by the original trial judge in the case stating that, in his opinion, the outcome of the case would have been different if he had known of this information.

¶4 Kotas then filed an amended motion to set aside the conviction alleging that he would not have pled no contest if he had known this information. After a hearing, the trial court denied the motions as untimely. Kotas moved for reconsideration and to substitute the trial judge. The trial court denied Kotas's request for substitution. Kotas appealed. On April 7, 1999, we summarily affirmed, ruling that the trial court had correctly concluded that the motions to set aside the verdict were not timely because the time for appeal had long since passed. We further noted that we could not construe the motions as brought under

WIS. STAT. § 974.06 (1997-98)[1] because Kotas had been discharged from probation. We pointed out in a footnote that the State had suggested that Kotas may be able to obtain relief by writ of error *coram nobis*.

¶5 Kotas then filed a petition for writ of error *coram nobis* in the trial court. The trial court denied the writ, concluding that *coram nobis* relief was not available because Kotas was not attempting to correct a factual error.

¶6 The writ of error *coram nobis* is available to a person who seeks relief from a conviction the sentence for which has already been served. *See* ***State v. Heimermann***, 205 Wis. 2d 376, 381-84, 556 N.W.2d 756 (Ct. App. 1996). A person seeking this writ must show "the existence of an error of fact which was unknown at the time of trial and is of such a nature that knowledge of its existence at the time of the trial would have prevented the entry of judgment." ***Id***. at 383.

¶7 Like the trial court, we conclude that Kotas may not obtain relief by writ of error *coram nobis*. Kotas is not attempting to correct a factual error. Instead, he has obtained new information about a potential defense. Even if the new information would have produced a different outcome, as he asserts, he may not obtain relief via the writ because "[a]n alleged error of fact which justifies granting the writ must be such as would have prevented conviction, not merely new evidence which might have caused a different result." ***State v. Dingman***, 239 Wis. 188, 196, 300 N.W. 244 (1941). Because Kotas has not discovered a factual

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

error that would have prevented his conviction, the trial court properly denied the writ.[2]

By the Court.—Order affirmed.

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

[2] Kotas also argues that he might be entitled to relief under a number of other statutes. He contends that he may be entitled to relief under WIS. STAT. § 752.35, which allows discretionary reversal in the interest of justice. However, this statute does not allow discretionary reversal of a judgment which is the subject of collateral attack, only the judgment from which the appeal is taken. *See* ***State v. Allen***, 159 Wis. 2d 53, 464 N.W.2d 426 (Ct. App. 1990). Kotas suggests that he may be entitled to relief under WIS. STAT. § 805.15(3), which allows a new trial when there is newly discovered evidence. This statute, however, pertains only to situations in which there has been a trial. Here, there was no trial. Kotas pled no contest. Finally, Kotas suggests that WIS. STAT. § 806.07(1) may provide him relief. This statute, however, pertains only to civil orders and judgments.