COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 01-1488
01-1489

Cir. Ct. Nos. 86CF006556
86CF006865

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANKIE WARDELL SIMMONS,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge.[1] *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

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[1] Judge Crawford issued the order from which this appeal is taken; Judge Ralph Gorenstein presided over the underlying plea and sentencing hearings.

¶1 PER CURIAM. In these consolidated cases, Frankie Wardell Simmons, *pro se*, appeals from the circuit court order denying his petition for a writ of error c*oram nobis.* He argues that the court erred in denying his petition. We affirm.

I. BACKGROUND

¶2 According to the judgment rolls and plea questionnaire in the appellate record, on February 9, 1987, Simmons pled guilty to robbery and theft, each as a party to the crime.[2] On March 25, 1987, the circuit court sentenced Simmons to three years in prison for the robbery; it also sentenced him to five years in prison for the theft, consecutive to the sentence for the robbery. The court stayed the theft sentence and ordered seven years of probation. Simmons did not directly appeal and, for many years, he did not pursue postconviction relief.

¶3 On April 16, 2001, long after he had completed his state sentences, Simmons filed a petition for a writ of error c*oram nobis*, challenging the robbery conviction. According to his petition, on or about March 24, 1999, a United States district court had used Simmons' robbery conviction as a basis for enhancement of a sentence in a federal case. Simmons contended: (1) that counsel in the state case was ineffective "by allowing him to enter into a plea of guilty on a robbery charge, when he was only guilty of petty theft by till tap[p]ing"; and (2) that his guilty plea to robbery was defective because "the facts of the case were never read into the record nor clearly stated," "[t]here was no plea c[o]lloquy conducted in this case

[2] The appellate record does not include a transcript of the plea hearing. According to the circuit court order denying the writ of error *coram nobis*, the court reporter at the 1987 plea hearing had retired and "her notes from 1987 were destroyed." We note, however, that the same court reporter covered both the plea hearing and the sentencing hearing, and that the appellate record contains the transcript of the sentencing hearing.

period," and "[i]f a factual basis had been established the court could not have accepted a plea of guilty to a robbery offense because the evidence would have shown the offense was till tap[p]ing i.e. a petty offense of larceny."

¶4 The circuit court denied Simmons' petition, concluding that the alleged errors Simmons presented were ones that could have been raised on direct appeal, or in a postconviction motion seeking relief under WIS. STAT. § 974.06. Therefore, the court concluded, "Neither his claim of ineffective assistance of counsel nor his challenge to the factual basis of his guilty pleas are [sic] grist for a writ of error coram nobis."

¶5 On appeal, Simmons renews the contentions he made in his petition for a writ of error *coram nobis*.

II. DISCUSSION

¶6 Because a writ of error *coram nobis* is a discretionary writ addressed to the circuit court, ***Jessen v. State***, 95 Wis. 2d 207, 213, 290 N.W.2d 685 (1980), we review a circuit court decision granting or denying a petition for such a writ for an erroneous exercise of discretion, ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). This court, however, "has the power to affirm a trial court's ultimate ruling even though its reasoning was incorrect." ***State v. Heimermann***, 205 Wis. 2d 376, 386, 556 N.W.2d 756 (Ct. App. 1996).

¶7 The State concedes that the circuit court's reasoning was wrong—that, under ***State v. Hahn***, 2001 WI 6, ¶2, 241 Wis. 2d 85, 621 N.W.2d 902, an offender, under certain circumstances, may petition for a writ of error c*oram nobis* in order to collaterally challenge a state conviction even after completing the state

sentence. The State argues, however, that for two reasons, the circuit court reached the right result. The State is correct.

¶8 First, under ***In re Ernst***, 179 Wis. 646, 649, 192 N.W. 65 (1923), "[w]hen a proper remedy is afforded by appeal or ordinary writ of error, the writ of error *coram nobis* will not lie." Here, because Simmons could have raised his claims in a direct appeal, or in a postconviction motion under WIS. STAT. § 974.06, he forfeited any right to *coram nobis* relief.

¶9 Second, under the doctrine of laches, Simmons' claims are barred. Laches is an equitable defense, ***Sawyer v. Midelfort***, 217 Wis. 2d 795, 806, 579 N.W.2d 268 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 124, 595 N.W.2d 423 (1999), that may be invoked in response to a petition for a writ of error *coram nobis*, *see* ***United States v. Darnell***, 716 F.2d 479, 480 (7th Cir. 1983). Laches requires: "(1) unreasonable delay; (2) lack of knowledge on the part of the party asserting the defense that the other party would assert the right on which he bases his suit; and (3) prejudice to the party asserting the defense in the event the action is maintained." ***State v. Prihoda***, 2000 WI 123, ¶37, 239 Wis. 2d 244, 618 N.W.2d 857. Here, the doctrine of laches applies.

¶10 As in ***Darnell***, Simmons' case presents "a textbook example of the problems arising from an inordinate delay in seeking relief." ***Darnell***, 716 F.2d at 481. Also in the instant case, as in ***Darnell***, "the court reporter's notes have been

lost or destroyed, thus eliminating any exact record of what transpired." ***Id.***[3] As the State explains:

> Simmons waited more than fourteen years after his original sentencing before he raised these claims. Because of that delay, the likelihood that the State can reassemble the necessary investigators, victims, and other witnesses approaches zero. The likelihood that other evidence still exists after all these years also approaches zero; for example, the State does not have any reason to believe it could at this point still find the bank videotape that captured Simmons in the act of committing his crime.
>
> In short, the delay by Simmons has unequivocally prejudiced the State in ways that would not have arisen had Simmons pursued a timely appeal or postconviction motion. "[*C*]*oram nobis* clearly is not a substitute for appeal." [***Darnell***, 716 F.2d] at 481 n.5.

(Record reference omitted.)

¶11 We agree. Accordingly, we conclude that although the circuit court utilized an incorrect legal basis for its denial of Simmons' petition, denial was appropriate.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

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[3] In his reply, Simmons argues, in part, that laches does not bar his claim because he "submitted the sentencing transcript" along with the petition, thus showing that the circuit court characterized the two charged offenses as "more till tap thefts rather than strong armed robbery type" offenses. He explains that this characterization by the circuit court "is preserved in the court reporter's sentencing transcript and has not been lost or destroyed." He does not dispute, however, the absence of any record of the guilty plea proceeding, which, evidently, could hold the keys to his underlying claims. Instead, focusing on his assertion that "the trial judge, witnesses, appellant's trial counsel, are all still alive and would have been available to testify in an evidentiary hearing," he concludes that "the respondent has failed to show how the [S]tate is being prejudiced against."