COURT OF APPEALS
DECISION
DATED AND RELEASED

April 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-1986
95-1987
95-1988
95-1989
95-1990

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DELBERT L. MANKE,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Sundby, JJ.

DYKMAN, J. Delbert L. Manke appeals from an order denying his request for copies of transcripts and other documents pertaining to his criminal cases under § 973.08(3), STATS. Manke argues that the trial court

erroneously exercised its discretion because it misconstrued his request and because he demonstrated that he needs to examine the documents to determine if there are any issues he could raise in a postconviction motion or on appeal. Because we conclude that Manke has not shown any particularized need for the transcripts or the other documents, we affirm.

BACKGROUND

In October 1991, Delbert L. Manke pleaded no contest to one count of battery, contrary to § 940.19(2), STATS., one count of intimidation of a victim, contrary to §§ 940.44(1) and 940.45(3), STATS., and one count of bail jumping, contrary to § 946.49(1)(b), STATS. At the sentencing hearing, the trial court dismissed several other charges and sentenced Manke to five years in prison and to two seven-year probation terms to run concurrent with one another but consecutive to the prison sentence.

In June 1992, Manke pleaded no contest to one count of armed robbery, contrary to § 943.32(1)(b) and (2), STATS. The trial court dismissed four other charges and sentenced him to a ten-year consecutive prison term. Later that month, the State Public Defender requested that copies of the transcripts in the armed robbery case be prepared and sent to Manke's postconviction counsel. The State surmises that such copies were sent because counsel later brought a postconviction motion to withdraw the plea Manke entered in that case. The trial court denied the motion and Manke did not appeal that decision.

In October 1994, Manke filed a "motion for production of any and all transcripts" relating to the above-mentioned criminal cases. He asked the court to order transcripts and copies of his judgments of convictions. He claimed that he was indigent, could not afford to make the copies of the documents and that he needed those documents "to pursue [his] post-conviction remedies." The trial court denied his motion, concluding that Manke had not shown that he never received or was denied access to those documents.

In February 1995, Manke filed another motion asking the trial court for papers, transcripts (except for his sentencing transcript), files and documents pursuant to § 973.08(3), STATS. He wanted to show that his pleas were not entered knowingly, voluntarily, or intelligently, and that his sentences were improper and unconstitutional. He also wanted to review the transcripts so that he could "know for certain whether other issues are in existence." The court denied his motion, concluding that he was not merely making a request for these documents but that he had raised a motion for postconviction relief under § 974.06, STATS., based upon issues already raised. Manke appeals.

DISCUSSION

Manke argues that the trial court erroneously exercised its discretion when it denied his motion for copies of his transcripts and other documents under § 973.08(3), STATS. He asserts that an examination of them would enable him to attack his sentences and pleas. He explains that he needs to view the documents before he can determine what precise issues he would raise in a postconviction motion or on appeal.

When a person is sentenced to the state prisons, a copy of the judgment of conviction and restitution order must be delivered to the warden or superintendent of the institution. Section 973.08(1), STATS. The transcript of any portion of the proceedings relating to the prisoner's sentencing must also be filed at the institution within 120 days from the date sentence is imposed. Section 973.08(2). The transcripts of all other testimony and proceedings upon order of a court must be delivered to a prisoner within 120 days of his or her request. Section 973.08(3).

The decision of a court to release transcripts to a prisoner under § 973.08(3), STATS., rests within the sound discretion of the trial court. ***State v. Wilson***, 170 Wis.2d 720, 723, 490 N.W.2d 48, 50 (Ct. App. 1992). To obtain these transcripts, a prisoner must show that he or she either never received or was denied access to the desired documents. ***Id.*** In other words, a prisoner must

demonstrate a particularized need for them before a court will grant his or her motion.

When denying Manke's request for these documents, the trial court concluded that he was not only requesting the documents, but that he was raising direct challenges to his pleas and sentences. Thus, the court concluded that Manke was seeking postconviction relief for claims he already raised which is barred by § 974.06(4), STATS.[1] The court also stated that had Manke been merely requesting the documents, it would have refused the request, relying on its 1994 decision in which it concluded that Manke had not demonstrated that he needed them.

We agree with Manke that the trial court misconstrued his request. A court erroneously exercises its discretion when its decision is based upon a mistaken view of the law. ***Schmid v. Olsen***, 111 Wis.2d 228, 237, 330 N.W.2d 547, 552 (1983). Nevertheless, even when there is an erroneous exercise of discretion, we need not automatically reverse the decision. ***Id.*** "A reviewing court is obliged to uphold a discretionary decision of a trial court, if it can conclude *ab initio* that there are facts of record which would support the trial judge's decision had discretion been exercised on the basis of those facts." ***Id.***

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

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

Our review of the facts of record supports a conclusion that Manke has not shown a particularized need for the documents. Manke has not claimed or shown that the documents he requested were not provided to him or his postconviction counsel or that he has been denied access to them by counsel or the prison. With respect to issues surrounding his sentences, Manke has access to the sentencing transcript. With respect to his plea, the sentencing transcript shows that the trial court dismissed all of the charges other than those to which he pleaded no contest. Accordingly, we conclude that Manke was not entitled to the documents under § 973.08(3), STATS.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

Nos. **95-1986(C)**
95-1987(C)
95-1988(C)
95-1989(C)
95-1990(C)

SUNDBY, J. (*concurring*). In 1995, 3,532 cases were filed in the court of appeals, one of them being this case. If the prison or the clerk of court had simply made photocopies of the documents this *pro se* inmate requests and given them to him, the matter would have been at an end. Instead, Manke has now filed two requests and if he is unsuccessful in his next request for those same documents, the matter will again come before the circuit court and, presumably, our court. The amount of administrative, legal, and judicial time spent on Manke's requests is all out of proportion to the importance of the issue involved. We would like to be able to devote our time to disposing of cases which cannot be resolved except through the judicial process. We need all the help we can get to cut down on the number of appeals which come to our court. I urge the department of corrections and the department of justice to dispose of such requests as Manke's, as ill-founded as they may seem, administratively, without burdening the judicial system.