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DISTRICT II

March 25, 2026

To:

Hon. Frank M. Gagliardi
Circuit Court Judge
Electronic Notice

Sonya Bice
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Mark A. Weiss, #210143
Wisconsin Resource Center
P.O. Box 220
Winnebago, WI 54985-0220

You are hereby notified that the Court has entered the following opinion and order:

2024AP715

State of Wisconsin v. Mark A. Weiss (L.C. #1995CF178)

Before Neubauer, P.J., Gundrum, and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Mark A. Weiss appeals pro se from an order denying his WIS. STAT. § 974.06 (2023-24)¹ motion for relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. For the reasons that follow, we vacate the order and remand with directions that the circuit court dismiss Weiss' motion.

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

In 1995, Weiss was charged with second-degree sexual assault, criminal damage to property, and criminal trespass to a dwelling. He entered pleas of not guilty by reason of mental disease or defect (NGI), to which the State stipulated. The circuit court ordered Weiss to be committed to the department of health and social services for institutional care. He was discharged from that commitment in June 2002.

Over 21 years later, in March 2024, Weiss filed a WIS. STAT. § 974.06 motion for relief. In it, he sought to reopen his case due concerns about the credibility of the victim, the sufficiency of the evidence, and the effectiveness of his trial counsel. The circuit court denied the motion in a written order. Weiss now appeals.

On appeal, Weiss renews the arguments made in his WIS. STAT. § 974.06 motion. The problem for Weiss is that his motion failed to meet a threshold requirement for consideration.

A defendant seeking WIS. STAT. § 974.06 relief must be “in custody” in relation to the case being challenged. Sec. 974.06(1). A defendant who has been discharged from state supervision is not “in custody” for purposes of seeking § 974.06 relief. *See State v. Theoharopoulos*, 72 Wis. 2d 327, 329-30, 240 N.W.2d 635 (1976).

Because Weiss was no longer in custody in relation to this case when he filed his WIS. STAT. § 974.06 motion, the circuit court lacked competency to entertain it. *See id.*; *see State v.*

Bell, 122 Wis. 2d 427, 431, 362 N.W.2d 443 (Ct. App. 1984).² Accordingly, the court should have dismissed Weiss’ motion. We will vacate its order and remand the matter so that it can do so.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily vacated pursuant to WIS. STAT. RULE 809.21, and the cause is remanded with directions to dismiss Weiss’ motion.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

² *State v. Theoharopoulos*, 72 Wis. 2d 327, 329-30, 240 N.W.2d 635 (1976), and *State v. Bell*, 122 Wis. 2d 427, 431, 362 N.W.2d 443 (Ct. App. 1984), speak in terms of subject matter jurisdiction. “[A] circuit court is never without subject matter jurisdiction.” *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶1, 273 Wis. 2d 76, 681 N.W.2d 190. A court’s inability to act in a particular case because of noncompliance with a statutory mandate is a lack of competency, not a lack of subject matter jurisdiction. *Id.*, ¶¶9-10.