

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2006AP2157

Cir. Ct. No. 1993CF418

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH G. GERING,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Kenneth Gering appeals from an order denying his petition for writ of coram nobis. We affirm.

¶2 Gering is attempting to use coram nobis, instead of WIS. STAT. § 974.06 (2005-06),¹ to withdraw his plea in this 1993 case because he is no longer confined pursuant to this judgment of conviction. His petition seeks to withdraw his no-contest plea on several grounds, mainly relating to whether it was entered knowingly, voluntarily, and intelligently. The circuit court denied the petition on the ground of laches.

¶3 On appeal, the State argues that coram nobis is not available to Gering because he could have raised these issues under WIS. STAT. § 974.06 while that remedy was still available to him. This argument is inconsistent with our discussion and conclusion in *State v. Heimermann*, 205 Wis. 2d 376, 381-86, 556 N.W.2d 756 (Ct. App. 1996), to the effect that coram nobis is a proper remedy for use by defendants who can no longer use § 974.06 because they are no longer confined pursuant to that judgment of conviction.

¶4 We ordered supplemental briefing on whether coram nobis is an available remedy to reach the specific substantive issues that Gering is attempting to raise. The purposes of the writ of coram nobis have been described in *Heimermann* and other cases. *Id.* at 381-84. In *Heimermann* we stated that a coram nobis petitioner must show the existence of an error of fact which was unknown at the time of trial and which is of such a nature that knowledge of its existence at the time of trial would have prevented the entry of judgment. *Id.* at 382-83. In addition, we stated that the factual error the petitioner wishes to correct must be crucial to the ultimate judgment, and the factual finding to which the

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

alleged factual error is directed must not have been previously visited or “passed on” by the trial court. *Id.* at 384.

¶5 Of the several claims that Gering made, the State argues that only one of them relates to a “fact” that can be reached under the above standard. We agree. Gering claims that the circuit court was provided with incorrect information on the plea questionnaire and during the plea colloquy as to whether Gering had previously been committed or received treatment for mental or emotional problems. Gering asserts that the form said he had not, but in fact he had been committed and undergone counseling. This is a factual issue.

¶6 However, we see nothing of consequence about this alleged error because Gering fails to show that this lack of correct information was relevant. The only time that information would be relevant would be if he was entering a plea of not guilty by reason of mental disease or defect, which did not happen here. We note that Gering is not arguing that he did not understand the plea proceedings because he was mentally incompetent at the time of the plea colloquy.

¶7 As to the remainder of Gering’s claims, we conclude they are legal issues, not factual ones. These claims relate to whether the court concluded a proper plea colloquy with respect to the rights he was waiving with his plea, the elements of the charge, and the potential penalty. As we discussed above, coram nobis is available to raise only factual issues, not legal ones.

By the Court.—Order affirmed.

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

