

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 3, 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. 2007AP726

Cir. Ct. No. 1994CF940760

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES ALFRED SMITH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 PER CURIAM. James Alfred Smith appeals from an order dismissing his postconviction motion for relief pursuant to WIS. STAT. § 974.06

(2005-06).¹ We conclude that the trial court lacked competency to decide the motion because the record in Smith's underlying case was in the appeals court incident to appellate proceedings involving the same judgment Smith sought to challenge in his postconviction motion, depriving the trial court of jurisdiction.² Therefore, we affirm.

¶2 A jury found Smith guilty of armed robbery, contrary to WIS. STAT. § 943.32(1)(a) (1993-94). The trial court imposed a fifteen-year sentence. Appointed counsel filed a direct appeal that Smith voluntarily dismissed. Smith then filed another direct appeal. We affirmed the judgment. *See State v. Smith*, No. 95-1967-CR (Wis. Ct. App. May 29, 1996). Over seven years later, we reinstated Smith's appellate rights, holding that he had not waived his right to appellate counsel in his 1995 *pro se* appeal. Smith raised substantially similar issues to those he had raised in his 1995 *pro se* appeal, which we had previously rejected on their merits. Because we reinstated Smith's appellate rights, we declined to consider our prior decision as the law of the case, and instead rejected those issues on their merits independently of our previous decision. *See State v. Smith*, No. 2004AP1716-CR (WI App Aug. 29, 2006). Smith petitioned the Wisconsin Supreme Court for review of our 2006 decision. The supreme court denied Smith's petition for review on February 12, 2007, and the record was remitted to the trial court on February 20, 2007. *See* WIS. STAT. RULE 809.26.

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

² The Wisconsin Supreme Court and the Wisconsin Court of Appeals share the same clerk and clerk's office. Consequently, we refer to the location of the record in this case generically as the appeals court because there was a petition for review pending (but never granted) in the supreme court, from a court of appeals decision reviewing the same underlying judgment that was the subject of Smith's postconviction motion.

¶3 Smith filed a postconviction motion pursuant to WIS. STAT. § 974.06 in the trial court on February 7, 2007. The trial court dismissed that motion on February 12, 2007. In its postconviction order dismissing Smith’s motion, the trial court explained that “[Smith’s] case is currently pending in the Wisconsin Supreme Court, and the file is in Madison. Under the circumstances, this court is without the file and without jurisdiction to review his motion.”³ Smith appeals, raising eleven substantive issues, some of which he has raised in prior appeals.

¶4 The dispositive issue is whether the record being filed in the appeals court incident to a pending appeal deprives the trial court of jurisdiction to decide a postconviction motion filed pursuant to WIS. STAT. § 974.06, challenging the same judgment that is on appeal. Absent a remand of the record, it does deprive the trial court of jurisdiction. *See* WIS. STAT. § 808.075(3)-(6); *State v. Neutz*, 73 Wis. 2d 520, 522, 243 N.W.2d 506 (1976) (“[T]he trial court lacked jurisdiction to enter judgment prior to receiving the remittitur and the record from this court. This has been the general rule.”); *Hengel v. Hengel*, 120 Wis. 2d 522, 524, 355 N.W.2d 846 (Ct. App. 1984), *partly superseded by statute, as noted in Schmidt v. Smith*, 162 Wis. 2d 363, 369-71, 469 N.W.2d 855 (Ct. App. 1991) (“[T]he service [and filing] of a notice of appeal ... strips th[e trial] court of all jurisdiction

³ We presume that the trial court’s reference to “the file,” was actually to the record, which was then in Madison incident to Smith’s pending petition for review.

with reference to the case ... and transfers jurisdiction of the entire case to this [appellate] court.”) (citation omitted).⁴

¶5 Smith filed his postconviction motion in the trial court on February 7, 2007. The record in this case, however, was in the appeals court incident to Smith’s petition for review until remittitur occurred, on February 20, 2007. Consequently, when Smith filed his motion on February 7, 2007, the trial court had no jurisdiction to consider that motion. *See* WIS. STAT. § 808.075(3).

¶6 We do not decide the substantive issues Smith raises because the jurisdictional issue is dispositive. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to address non-dispositive issues). Therefore, we affirm the trial court’s order dismissing Smith’s postconviction motion.

By the Court.—Order affirmed.

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

⁴ *Hengel v. Hengel*, 120 Wis. 2d 522, 524, 355 N.W.2d 846 (Ct. App. 1984), has been partly superseded by various statutes in certain circumstances, none of which apply here. *See Schmidt v. Smith*, 162 Wis. 2d 363, 369-71, 469 N.W.2d 855 (Ct. App. 1991). Smith contends that there are exceptions to the general rule, and “if extraordinary circumstances exist” we have the discretion to modify that rule. The exceptions Smith refers to are codified in WIS. STAT. § 808.075; none of them apply to his situation. We have discretion to determine whether to apply the law of the case doctrine to preclude re-litigation; this appeal does not involve that doctrine.

