COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 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 Nos. 2007AP1646
2007AP1647
2007AP1648
2007AP1649
2007AP1650

Cir. Ct. Nos. 1980CF221
1981CF53
1981CF78
1981CF160
1981CF382

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK E. LARKIN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Mark Larkin appeals an order denying his motion to vacate his convictions on five criminal charges. We affirm the trial court's decision on both procedural and substantive grounds.

BACKGROUND

¶2 In 1981, Larkin entered no contest pleas to one count of delivery of a controlled substance and four counts of burglary. The court sentenced him to consecutive terms totaling twelve years in prison on the burglary counts, with a concurrent two-year sentence on the drug charge. In 1983, counsel filed a sentence modification motion on Larkin's behalf and was able to reduce Larkin's initial prison time to eight years by changing a four-year sentence on one of the consecutive counts to probation.

¶3 In 2007—well after his sentences had been completed—Larkin filed a "Motion to Vacate Convictions and Resentence the Defendant to Reinstate His First Appeal of Right." The motion sought relief from the 1981 convictions under WIS. STAT. § 974.06 (2005-06)[1] on the grounds that Larkin's postconviction attorney had failed to file an appeal on his behalf. Larkin complained that the convictions had been used to enhance his sentence for a subsequent offense, on which he is currently serving a federal term in excess of thirty-three years.

¶4 After holding an evidentiary hearing, the trial court rejected as not credible Larkin's testimony that counsel had failed to follow through on an appeal,

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

instead relying upon materials from the Public Defender's file to find that counsel had successfully pursued a sentence modification motion instead of an appeal. The court therefore denied the motion and Larkin appeals.

DISCUSSION

¶5 A defendant who wishes to challenge a sentence which has already been served generally must overcome two procedural barriers: mootness and competency to proceed.[2] ***State v. Theoharopoulos***, 72 Wis. 2d 327, 332, 240 N.W.2d 635 (1976) (using the terms mootness and subject matter jurisdiction); ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶¶10-12, 273 Wis. 2d 76, 681 N.W.2d 190 (explaining that circuit courts have general subject matter jurisdiction through the state constitution and that statutory limitations on their exercise of that jurisdiction involve competency to proceed).

¶6 Here, Larkin's challenge to his completed sentences is not moot because he is still experiencing the collateral consequences of his convictions in the form of an enhanced federal sentence. *See* ***Theoharopoulos***, 72 Wis. 2d at 332-33. However, under WIS. STAT. § 974.06, a court has competency to proceed only when the claimant is still "in custody under the sentence he desires to attack." ***State v. Bell***, 122 Wis. 2d 427, 429, 362 N.W.2d 443 (Ct. App. 1984) (again, we

[2] A writ of coram nobis is another mechanism by which a person may seek relief from a judgment of conviction after the sentence has already been served. *See* ***State v. Heimermann***, 205 Wis. 2d 376, 381-84, 556 N.W.2d 756 (Ct. App. 1996). However, it is limited to correcting "an error of fact not appearing on the record," and is not available to reach errors of fact or law which could be addressed by way of appeal. *See* ***Jessen v. State***, 95 Wis. 2d 207, 213-14, 290 N.W.2d 685 (1980). Therefore, it would not be available to reach an ineffective assistance of counsel claim such as Larkin is attempting to raise here.

have substituted the term competency to proceed for the previously misused term subject matter jurisdiction). In short, since Larkin is not being held in Wisconsin custody, Wisconsin courts lack the authority to grant him relief from his current sentence.

¶7 Furthermore, even if the trial court did have the authority to entertain a collateral challenge to Larkin's prior convictions, we would nevertheless affirm the court. "An appellate court will only substitute its judgment for that of the trier of fact [regarding credibility determinations when the evidence is] inherently or patently incredible—that kind of evidence which conflicts with nature or with fully established or conceded facts." ***State v. Daniels***, 117 Wis. 2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983) (footnote omitted). Under that standard, the trial court's finding that Larkin was not credible must stand. Thus, given the trial court's factual finding that counsel did not abandon Larkin, Larkin has no factual basis to support a claim of ineffective assistance of counsel on appeal.

By the Court.—Order affirmed.

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