

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 2009

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. 2008AP2254

Cir. Ct. No. 1993CF21

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH G. GERING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Florence County:
JAMES B. MOHR, Judge. *Affirmed.*

Before Hoover, Peterson and Brunner, JJ.

¶1 PER CURIAM. Kenneth Gering, pro se, appeals an order denying his petition for a writ of *coram nobis*. Gering argues his conviction should be vacated due to errors in his plea hearing. We affirm.

BACKGROUND

¶2 In 1993, Gering pled no contest to one count of second-degree sexual assault of a child and two counts of burglary. Gering initially intended to enter *Alford* pleas.¹ However, when the judge—who appeared at the hearing by telephone—informed Gering he did not accept *Alford* pleas, Gering’s counsel clarified Gering would plead no contest. The court conducted a plea colloquy and then asked Gering whether he still wanted to plead no contest. Gering responded that he did, and the court accepted his pleas. Gering was then convicted and sentenced.

¶3 Over thirteen years later, after completing his sentences, Gering filed a petition for a writ of *coram nobis*, requesting that the circuit court vacate his convictions due to various errors in his plea hearing. The court denied his motion, concluding it doubted it could reconstruct the record to a degree that it could say the result would have been different but for the alleged errors.

DISCUSSION

¶4 The only issue on appeal is whether the circuit court erroneously exercised its discretion when it declined to issue a writ of *coram nobis*. A writ of *coram nobis* “is a discretionary writ ... [which] afford[s] the trial court an opportunity to correct its own record of an error of fact ...” *Houston v. State*, 7 Wis. 2d 348, 350, 96 N.W.2d 343 (1959). Such a writ is available only when a person can show no other remedy is available to correct a factual error. *State v.*

¹ When a defendant enters an *Alford* plea, the defendant maintains his or her innocence but accepts the consequences of the charged offense. See *North Carolina v. Alford*, 400 U.S. 25 (1970).

Heimermann, 205 Wis. 2d 376, 384, 556 N.W.2d 756 (Ct. App. 1996). The factual error must be “crucial to the ultimate judgment *and* the factual finding to which the alleged factual error is directed must not have been previously visited or ‘passed on’ by the trial court.” *Id.*

¶5 We review a circuit court’s denial of a writ of *coram nobis* for the erroneous exercise of discretion. *Id.* at 386. To conclude the court properly exercised its discretion we need not adopt its rationale. Rather, we may “conduct an independent review of [the] petition and determine whether, as a matter of law, there is any legal basis” for the court’s decision. *Id.* at 386-87.

¶6 Gering argues the circuit court erroneously exercised its discretion when it denied his petition because the following errors deprived him of a fair plea hearing: (1) conducting the hearing by telephone violated his right to be present at his hearing; (2) the court relied on incorrect facts because it did not have a copy of the Amended Information; (3) his counsel did not consult him before changing his plea; (4) the court erroneously believed he understood his plea; and (5) his counsel did not inform the court of Gering’s mental state and intellectual capabilities. We conclude these allegations fail to show any factual errors that were crucial to the ultimate judgment and which the trial court has not already visited.

¶7 Gering’s argument that conducting the hearing by telephone violated his right to be present at his hearing is a question of law, not fact. Therefore, it fails to show a factual error. His argument that the court erred because it did not have a copy of the Amended Information does not show a factual error either. There is no dispute the court had the original, rather than the amended, Information during the hearing. However, the record demonstrates the court’s description of the charges was nevertheless correct. The court stated Gering was

charged with “one count of sexual contact with a person under the age of 16 years contrary to Section 948.02.” This is precisely the charge in the Amended Information. Likewise, when the court stated it did not have the burglary charges from the Amended Information, the prosecutor read the correct charges aloud.

¶8 Gering’s remaining arguments—that his counsel changed his plea without consulting him; that the court believed he understood his plea; and that his counsel did not inform the court of his mental state and intellectual capabilities—likewise all fail to show factual errors. All three arguments essentially allege Gering’s plea was not knowing, voluntary, and intelligent. But whether a plea is knowing, voluntary, and intelligent is a legal conclusion based on facts in the record. *See State v. Bangert*, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). The court conducted a plea colloquy and concluded Gering’s plea met the constitutional standard. Gering does not allege any of the facts the court relied on to make this determination are incorrect. While he contends his counsel should have told the court he was distraught and that his intelligence was slightly below average, he neither alleges nor establishes this affected his plea. Accordingly, the court did not erroneously exercise its discretion when it denied Gering’s petition for a writ of *coram nobis*.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2007-08).

