

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 11, 2014**

Diane M. Fremgen  
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. 2014AP319**

**Cir. Ct. No. 2009CF55**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARK ALLEN LINDBLOM,**

**DEFENDANT-APPELLANT.**

---

APPEAL from an order of the circuit court for Burnett County:  
KENNETH L. KUTZ, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Mark Lindblom appeals an order denying his WIS. STAT. § 974.06 motion for plea withdrawal.<sup>1</sup> Because Lindblom has been discharged from his sentence and is no longer “in custody” as required by § 974.06, we conclude the circuit court lacked competency to entertain Lindblom’s motion. As a result, we reverse and remand for the circuit court to vacate its order and dismiss Lindblom’s motion.

### BACKGROUND

¶2 On May 27, 2009, Lindblom was charged with a single count of possession of child pornography based upon his landlord’s report that Lindblom had left behind a computer containing sexually explicit images of children. The Information was later amended to add four additional charges of possession of child pornography.

¶3 Motivated by the flight of its primary witness, the State reached a plea agreement with Lindblom on March 15, 2011. Lindblom agreed to plead no contest to a single count of exposing a child to harmful material contrary to WIS. STAT. § 948.11(2)(a),<sup>2</sup> with a felony intimidation of a witness charge in a companion case dismissed and read in for sentencing purposes. The parties jointly recommended the maximum penalty, three years’ and six months’ imprisonment. The court accepted Lindblom’s no contest plea and sentenced him to a bifurcated

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

<sup>2</sup> The factual basis for the plea was that the landlord’s children saw some of the child pornography.

sentence of one year and six months' initial confinement followed by two years' extended supervision.

¶4 Because Lindblom was due 599 days' sentence credit, he was placed on extended supervision immediately and extradited to Minnesota, then Colorado to face pending charges. On February 5, 2013, the Wisconsin Department of Corrections notified the court that Lindblom completed his Wisconsin sentence and had been discharged, but he remained confined in Colorado on unrelated charges.

¶5 On July 26, 2013, Lindblom filed a motion to withdraw his plea pursuant to WIS. STAT. § 974.06. He alleged that neither the court nor his attorney informed him he would be required to register as a sex offender as a result of his conviction, and that he was unaware of that fact before he entered his plea.<sup>3</sup> Lindblom asserted he first learned of his registration obligation when his Wisconsin probation agent met with him in Minnesota to review his sentence and the conditions of extended supervision. Lindblom acknowledged he had been discharged from his Wisconsin sentence but argued his claim was not moot "because his ongoing responsibilities as a registered sex offender survives [sic] his sentence."

¶6 The circuit court denied Lindblom's motion without an evidentiary hearing. The court concluded Lindblom had failed to establish manifest injustice resulting from his plea. Based on the applicable case law, the court determined sex offender registration was a collateral consequence of Lindblom's conviction.

---

<sup>3</sup> Registration is compulsory for individuals convicted of exposing a child to harmful material. See WIS. STAT. § 301.45(1d)(b), (1g)(a).

Therefore, according to the court, Lindblom’s attorney was not required to address such registration with him, and the court did not need to raise it during the plea colloquy. Lindblom appeals.

## DISCUSSION

¶7 WISCONSIN STAT. § 974.06(1) allows a defendant who believes his or her sentence is unlawful to seek relief after the time for appeal or postconviction relief under WIS. STAT. § 974.02 has expired. However, the motion must be brought by “a prisoner in custody under sentence of a court.” WIS. STAT. § 974.06(1). A defendant who completes the sentence he or she wishes to attack and is subsequently discharged from custody and supervision is not “in custody” for § 974.06 purposes. *State v. Theoharopoulos*, 72 Wis. 2d 327, 329, 240 N.W.2d 635 (1976); *see also Jessen v. State*, 95 Wis. 2d 207, 211, 290 N.W.2d 685 (1980).

¶8 When a defendant who does not meet the custodial prerequisite files a WIS. STAT. § 974.06 motion, the circuit court lacks competency to hear it and must dismiss the motion.<sup>4</sup> *See Theoharopoulos*, 72 Wis. 2d at 330; *State v. One 2000 Lincoln Navigator*, 2007 WI App 127, ¶3 n.5, 301 Wis. 2d 714, 731 N.W.2d 375 (dismissal appropriate where circuit court lacks competency to adjudicate the

---

<sup>4</sup> Older cases often said that courts lacked subject matter jurisdiction over such motions. *See State v. Theoharopoulos*, 72 Wis. 2d 327, 330, 240 N.W.2d 635 (1976); *State v. Bell*, 122 Wis. 2d 427, 428, 362 N.W.2d 443 (Ct. App. 1984). Subject matter jurisdiction and competency to proceed are often confused. *Kett v. Community Credit Plan, Inc.*, 228 Wis. 2d 1, 13 n.12, 596 N.W.2d 786 (1999). Subject matter jurisdiction is conferred by the Wisconsin Constitution; “[a]ccordingly, 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. Instead, a court’s inability to exercise subject matter jurisdiction in a particular case because of noncompliance with a statutory mandate pertaining to that jurisdiction is known as a lack of competency. *Id.*, ¶¶9-10.

matter before it). Any order or judgment entered by a court lacking competency is invalid. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶14, 273 Wis. 2d 76, 681 N.W.2d 190.

¶9 On appeal, the State raises a competency challenge to Lindblom’s WIS. STAT. § 974.06 motion. The State notes that in his motion, Lindblom conceded he had been discharged from his Wisconsin sentence on January 25, 2013.<sup>5</sup> The State requests that we affirm the circuit court’s decision denying Lindblom’s § 974.06 motion, albeit on different grounds. See *State v. King*, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984) (“If a trial court reaches the proper result for the wrong reason it will be affirmed.”).

¶10 Lindblom fails to respond in any manner to the State’s argument that the circuit court lacked competency to rule on his motion. He therefore concedes the circuit court lacked competency. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). The closest Lindblom comes to addressing competency is in his brief-in-chief, where he asserts his WIS. STAT. § 974.06 motion is not moot. However, “[m]ootness and [competency] are separate issues, and both must be overcome by a convicted person seeking relief under a statutory postconviction remedy.” *Theoharopoulos*, 72 Wis. 2d at 332. The State directly argues this distinction in its argument regarding the circuit court’s lack of

---

<sup>5</sup> For purposes of our analysis, it does not matter that Lindblom was incarcerated in Colorado at the time he filed his WIS. STAT. § 974.06 motion. The statutory phrase “in custody under sentence of a court” refers to the sentencing court which imposed the sentence under attack. *Bell*, 122 Wis. 2d at 429. In *Bell*, for example, a defendant who had completed his Wisconsin sentence could not obtain relief under § 974.06 even though he was incarcerated in Illinois pursuant to conviction in that state. *Id.*

competency, but, again, Lindblom offers no argument against the distinction in his reply brief.

¶11 While we agree with the State that the circuit court lacked competency to entertain Lindblom’s WIS. STAT. § 974.06 motion, we cannot affirm the order as the State requests. The circuit court lacked competency to resolve the motion on the merits, rendering the resulting order invalid. *See Village of Trempealeau*, 273 Wis. 2d 76, ¶14. Accordingly, we reverse and remand with directions for the circuit court to vacate its order and dismiss Lindblom’s § 974.06 motion. *See One 2000 Lincoln Navigator*, 301 Wis. 2d 714, ¶3 n.5.

*By the Court.*—Order reversed and cause remanded with directions.

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

