COURT OF APPEALS
DECISION
DATED AND RELEASED

December 12, 1995

NOTICE

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

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

No. 95-0117

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN EX REL.,
ALLEN J. THOMAS,

Petitioner-Appellant,

v.

STATE OF WISCONSIN,

Respondent-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Allen J. Thomas appeals, *pro se*, from an order dismissing his petition for *coram nobis* relief. The petition requested that his 1976 arson judgment be vacated on the grounds that he had previously been acquitted of this charge. He claims that the 1976 judgment violated his constitutional right against double jeopardy. Because Thomas failed to introduce any evidence to show that he was previously acquitted of the

identical charge, the trial court reached the correct decision in dismissing his petition. Accordingly, we affirm.

I. BACKGROUND

In July 1976, Thomas pled guilty to one count of arson, contrary to § 943.03, STATS. The arson occurred on April 26, 1974. He was sentenced to three years probation, but after violating the conditions of his probation, his probation was revoked and he served eighteen months. He is currently incarcerated on an unrelated charge.

In December 1994, Thomas filed a petition for *coram nobis* requesting that the 1976 judgment be vacated. He claimed that he had been acquitted on the same charge in 1975 and if the trial court would have examined the 1975 record, it would not have allowed Thomas to be convicted of the arson charge in 1976. The trial court presiding over the *coram nobis* petition dismissed the petition. The trial court treated the *coram nobis* petition as a motion pursuant to § 974.06, STATS., because of its mistaken belief that *coram nobis* relief was no longer available. Accordingly, the trial court dismissed the petition because § 974.06 relief is only available when a defendant is in custody on "the original criminal action." Although Thomas was in custody at the time he filed his petition, he was imprisoned on an unrelated charge.

Thomas appeals from the order dismissing his petition.

II. DISCUSSION

We affirm the trial court because it reached the right result, although its reasoning was incorrect.[1] *See* ***State v. Holt***, 128 Wis.2d 110, 124, 382

[1] The trial court applied the wrong reason for dismissing Thomas's petition. His petition should not have been treated as a § 974.06, STATS., motion because the common law remedy of a writ of error *coram nobis* still exists despite the fact that the Wisconsin legislature abolished the corresponding statutory right. *See* ***Jessen v. State***, 95 Wis.2d 207, 213, 290 N.W.2d 685, 688 (1980).

N.W.2d 679, 687 (Ct. App. 1985). The trial court correctly dismissed Thomas's petition, however, because Thomas failed to provide any evidence to prove that he was acquitted in 1975 of the same arson charge on which he was convicted in 1976.

A writ of error *coram nobis* is a common law remedy of very narrow scope. ***Jessen v. State***, 95 Wis.2d 207, 213, 290 N.W.2d 685, 688 (1980). It "encompasses only errors of fact outside the record which are unknown to the trial court and which if known would have prevented the entry of judgment." ***State v. Kanieski***, 30 Wis.2d 573, 576, 141 N.W.2d 196, 198 (1966). A trial court should grant a *coram nobis* petition only if "it is satisfied that the verified petition on its face shows sufficient grounds for the issuance of the writ." ***Houston v. State***, 7 Wis.2d 348, 353, 96 N.W.2d 343, 346 (1959). Thomas failed to satisfy this requirement. He did not submit any evidence to demonstrate that he was acquitted on the identical arson charge in 1975, and the record does not contain any evidence to support his contention. His conclusory allegation alone is insufficient to satisfy his burden. Further, there is no evidence in the record that supports his claim. Accordingly, the trial court was correct to dismiss his petition.

By the Court.—Order affirmed.

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