**COURT OF APPEALS DECISION DATED AND RELEASED**

February 8, 1996

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.

**NOTICE**

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

**No. 95-1071**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**CHARLES B. DIETZEN,**

**Defendant-Appellant.**

APPEAL from an order of the circuit court for Waupaca County: JOHN P. HOFFMAN, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

DYKMAN, J. Charles B. Dietzen appeals from a trial court order denying his petition for writ of error *coram nobis*. Dietzen makes the following arguments on appeal: (1) the trial court erroneously exercised its discretion in denying the petition; (2) the trial court erroneously exercised its discretion when it failed to hold an evidentiary hearing on the *coram nobis* petition; and (3) because the trial court judge was biased, we should exercise our

discretionary right to reverse under § 752.35, STATS. We reject Dietzen's claims and, therefore, affirm.

## BACKGROUND

In April 1990, Dietzen was convicted of one count of theft, contrary to § 943.20(1)(e), STATS., after entering a no contest plea. He later appealed, raising numerous issues including whether several misdemeanor theft charges could be aggregated into a single felony charge and whether the prosecutor acted vindictively when it issued a third criminal complaint. We affirmed Dietzen's conviction in August 1991. *See* ***State v. Dietzen***, 164 Wis.2d 205, 474 N.W.2d 753 (Ct. App. 1991).

In August 1994, Dietzen filed a petition for writ of error *coram nobis*. He argued that the judgment of conviction should be vacated because the prosecutor acted vindictively and deceived Dietzen and the trial court. He asserted that the prosecutor improperly aggregated three misdemeanor charges into a felony charge. He also raised numerous constitutional issues. After a telephone conference, the court denied Dietzen's petition, concluding that he failed to allege a factual error in the petition or supporting affidavit sufficient to warrant the writ. Dietzen appeals.

## *CORAM NOBIS*

The writ of error *coram nobis* has a limited scope. ***Jessen v. State***, 95 Wis.2d 207, 213, 290 N.W.2d 685, 688 (1980). Whether the writ should be granted rests within the sound discretion of the trial court. ***Id.*** The writ is intended to give the court an opportunity to correct its own record of an error of fact. ***Id.*** In order to constitute grounds for the issuance of the writ, a defendant must show the existence of an error of fact which was unknown at the time of trial and that, but for the error, the court would have never entered the judgment. ***Id.*** The writ is intended to secure relief from the court for factual errors and to correct the record when no other remedy exists. ***State v. Kanieski***, 30 Wis.2d 573, 576, 141 N.W.2d 196, 198 (1966).[1] A writ of *habeas corpus* is the

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[1] The writ of error *coram nobis* differs from an ordinary writ of error in that the latter:

proper remedy to attack a conviction obtained in violation of a defendant's constitutional rights. ***Jessen***, 95 Wis.2d at 214, 290 N.W.2d at 688.

Dietzen alleges several errors including vindictive prosecution and prosecutorial misconduct. He first asserts that the prosecutor filed an amended complaint aggregating five misdemeanors into three felonies. He argues that the prosecutor did not have the authority to aggregate the charges in this manner and claims that this complaint mysteriously disappeared from the record. He then asserts that the prosecutor again amended the complaint, charging him with one felony and two misdemeanors. He later pleaded no contest because he feared further vindictiveness.

But these very same issues were decided adversely to Dietzen by this court on direct appeal. *See* ***State v. Dietzen***, 164 Wis.2d 205, 474 N.W.2d 753 (Ct. App. 1991). With respect to the vindictiveness claim, we concluded that because Dietzen never raised this argument before the trial court, he waived it. ***Id.*** at 212, 474 N.W.2d at 755. We also added that there was nothing in the record indicating that such a complaint was ever filed and that the only complaint of record was the one charging Dietzen with a single felony count. ***Id.***, 474 N.W.2d at 755-56. We stated that Dietzen was responsible for seeing that the document, if it existed, was made part of the record. ***Id.***, 474 N.W.2d at 756.

Moreover, these errors, and an ineffective assistance of trial and appellate counsel claim, raise constitutional issues which are the subject of *habeas corpus* and not *coram nobis*. Thus, the trial court properly dismissed the

(..continued)

is brought for a supposed error in law apparent on the record, and takes the case to a higher tribunal, where the question is to be decided and the judgment, sentence, or decree to be affirmed or reversed, while the [former] is brought for an alleged error in fact not appearing on the record and lies to the same court in order that it may correct the error which it is presumed would not have been committed had the fact in the first instance been brought to its notice.

***State v. Wagner***, 232 Wis. 138, 141, 286 N.W. 544, 545 (1939) (quoted source omitted).

petition because Dietzen failed to allege any mistakes of fact which, if known to the court, would have prevented the entry of the judgment.

Dietzen next argues that he should have been afforded a hearing before the trial court dismissed his *coram nobis* petition. We disagree. A court has no duty to issue a writ of error *coram nobis* and to try issues unless it is satisfied that the petition, on its face, shows sufficient grounds for the issuance of the writ and the necessity for a hearing. ***Houston v. State***, 7 Wis.2d 348, 353, 96 N.W.2d 343, 346 (1959).

The trial court asked Dietzen what information, other than what was alleged in his petition, he would present at an evidentiary hearing. He explained that he would call witnesses to testify about matters relating to his constitutional claims, his pretrial confinement, his being charged without statutory authority and a factual basis, and his no contest plea. Dietzen's petition raises legal, not factual, issues and in the absence of any grounds alleged in the petition upon which the court could have granted Dietzen's petition, the court was under no duty to hold a hearing. Accordingly, the court did not err when it refused to hold an evidentiary hearing before denying Dietzen's petition.

Lastly, Dietzen urges us to use our discretionary reversal power under § 752.35, STATS.[2] Dietzen argues that the trial court judge had a personal

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[2] Section 752.35, STATS., provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

interest in the outcome and, therefore, lacked the requisite appearance of fairness when he denied Dietzen's *coram nobis* petition. Dietzen named the judge as a defendant in a separate civil action. Section 757.19(2)(b), STATS., provides that a judge shall disqualify himself or herself from any action or proceeding when the judge is a party except that the judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.

Although Dietzen named the trial court judge as a defendant in a separate civil action, Dietzen did not seek the judge's recusal. Since the alleged basis for the recusal was known to Dietzen before the judge denied his petition, he waived any right he might have had to request the trial judge's disqualification. ***State v. Marhal***, 172 Wis.2d 491, 504-05, 493 N.W.2d 758, 764-65 (Ct. App. 1992). Consequently, we see no reason to exercise our discretionary reversal power in this case.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.