**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 1999

**Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin**

**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 § 808.10 and RULE 809.62, STATS.

No.   **99-1134**

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

**95 CV 784**

ROBERT GAREL,

                PETITIONER-APPELLANT,

        V.

WISCONSIN DEPARTMENT OF CORRECTIONS, MICHAEL
SULLIVAN, WILLIAM GROSSMAN, AND WAYNE MIRDORF,

                RESPONDENTS-RESPONDENTS.

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**95 CV 1718**

ROBERT GAREL,

                PETITIONER-APPELLANT,

        V.

MICHAEL SULLIVAN, AND DAVID H. SCHWARZ,

                RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

¶1      PER CURIAM.   Robert Garel appeals an order denying his motion to reopen his consolidated petitions for certiorari review of his probation and parole revocations.   He claims the circuit court erred by issuing a *nunc pro tunc* order adopting a prior order relating to the same petitions which had been vacated by another branch of the circuit court.   Although we agree that a *nunc pro tunc* order was technically not the proper mechanism to use in this instance, we conclude the circuit court could properly have accomplished the same result by vacating the earlier vacation order.   Therefore, we see no prejudicial error and affirm.

## BACKGROUND

¶2      Garel was convicted of various felonies in Branch 11 of the Dane County Circuit Court.   Garel's probation and parole for several of these convictions were revoked in 1994.  Judge Mark A. Frankel, sitting in Branch 12 of the Dane County Circuit Court, denied Garel's consolidated petitions for certiorari review of the revocations.   We affirmed Judge Frankel's determination that the revocations were proper.   The supreme court denied review.

¶3      In 1998, Garel moved to vacate Judge Frankel's order for lack of jurisdiction based upon a court of appeals decision holding that certiorari review of a revocation decision must be made by the same branch of the court in which the conviction was originally entered.   *See* ***Drow v. Schwarz***, 220 Wis.2d 415, 583 N.W.2d 655 (Ct. App. 1998) (***Drow I***).   Judge Frankel agreed to vacate his

order and reopen the matter, and he transferred Garel's petitions for certiorari review of the revocation proceedings to Judge Daniel R. Moeser, sitting in Branch 11.

¶4 After reviewing the files, briefs and written arguments in the record, Judge Moeser issued a *nunc pro tunc* order adopting Judge Frankel's vacated decision. Garel again moved to reopen his certiorari petitions, arguing that the *nunc pro tunc* adoption of Judge Frankel's order violated his due process rights because the prior order had been vacated on jurisdictional grounds. Judge Moeser denied Garel's motion to reopen the petitions, and he appeals.

## STANDARD OF REVIEW

¶5 We will review de novo Garel's allegation that he was denied due process. *See **State v. Evans***, 187 Wis.2d 66, 82, 522 N.W.2d 554, 560 (Ct. App. 1994). We will also independently determine whether Judge Moeser had jurisdiction to adopt and enter Judge Frankel's order *nunc pro tunc*. *See **Gomez v. LIRC***, 153 Wis.2d 686, 689, 451 N.W.2d 475, 476 (Ct. App. 1989) (holding that jurisdictional issues are questions of law).

## ANALYSIS

¶6 Garel asserts he was denied due process when Judge Moeser adopted and entered Judge Frankel's vacated order *nunc pro tunc*. However, Judge Moeser reconsidered Garel's entire case on its merits before deciding to adopt the prior order, and Garel does not point to any procedural violation prior to the issuance of Judge Moeser's opinion. Rather, we understand Garel's objection to be to the form and the jurisdictional basis of the order itself.

¶7    Garel argues that Judge Moeser could not have "adopted" Judge Frankel's decision on the merits, because a vacated order does not exist. However, while a vacated order does not exist *in a legal sense*, meaning that it has no legal effect, it of course still exists as a practical matter in the file of the case. Adopting language from another document is a convenience commonly employed by courts, and we see no reason why the document from which language is borrowed could not be a vacated order.

¶8    We next consider whether Judge Moeser's order adopting Judge Frankel's decision on the merits could properly have been entered *nunc pro tunc*. A *nunc pro tunc* order is one which is treated as though it had been entered on a prior date. *See* **Schmorrow v. Sentry Ins. Co.**, 138 Wis.2d 31, 36, 405 N.W.2d 672, 675 (Ct. App. 1987) (*citing* BLACK'S LAW DICTIONARY 964 (5th ed. 1979)). "A court's *nunc pro tunc* authority is limited to rectifying what might be termed mechanical errors; it is appropriately exercised to conform an order or judgment to that actually pronounced." **Id**. at 36-37, 405 N.W.2d at 675 (citation omitted). We agree with Garel that Judge Moeser was not attempting to correct any mechanical errors in the record when he adopted Judge Frankel's vacated decision and entered it *nunc pro tunc*. As the record stood, there was simply no valid order disposing of the petitions to be amended or corrected. Therefore, a *nunc pro tunc* order was inappropriate. *See* **Overson v. Overson**, 140 Wis.2d 752, 758, 412 N.W.2d 896, 898 (Ct. App. 1987).

¶9    A *nunc pro tunc* order was not, however, the only means available for Judge Moeser to give retroactive effect to his determination that Judge Frankel had correctly disposed of Garel's petitions. By vacating the order which had vacated Judge Frankel's decision, Judge Moeser could reinstate Judge Frankel's decision on the merits. *See* 60 C.J.S. *Motions and Orders* § 63 (1969). As Garel

correctly notes, it is black letter law that a vacated order cannot be reinstated if it was void for lack of jurisdiction. *Id*. It is also true, as Garel claims, that Judge Frankel vacated his initial order because he believed that he had lacked jurisdiction to enter it under *Drow I*. However, *Drow I* was subsequently reversed by the Wisconsin Supreme Court. *See **Drow v. Schwarz**,* 225 Wis.2d 362, 592 N.W.2d 623 (1999) (*Drow II*). Therefore, Judge Frankel *did* have jurisdiction to review Garel's revocation proceedings and to enter an order denying his petitions. Since Judge Frankel's initial order was not void for lack of jurisdiction, Judge Moeser did not lack jurisdiction to reinstate the order.

¶10 Because it was clearly Judge Moeser's intent that Judge Frankel's decision on the merits be treated as if it had been in effect all along, and because the proper means to do so were available, we consider the improper labeling of Judge Moeser's order as *nunc pro tunc* to have been harmless error. Accordingly, we see nothing which would have compelled Judge Moeser to grant Garel's motion to reopen the petitions.

*By the Court.*—Order affirmed.

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