COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1802 **Cir. Ct. No. 94TR008406**

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

WINNEBAGO COUNTY,

PLAINTIFF-RESPONDENT,

V.

PAUL M. NIGL,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed*.

¶1 ANDERSON, P.J.[1] Paul M. Nigl complains that the circuit court erred when it refused to issue a writ of error coram nobis. We affirm for multiple reasons. First, we see nothing in Nigl's petition requiring the circuit court to

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(g) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

correct an error of fact in its record; second, if we were to construe his petition as a direct appeal, he is not entitled to relief because the time limits for a direct appeal have expired; third, if we were to construe Nigl's petition as a postconviction motion under WIS. STAT. § 974.06, he is not entitled to relief because he is not in custody as a result of the conviction he seeks to challenge; and, finally, the issue Nigl seeks to challenge is waived because he entered a no contest plea to the charge without first challenging the error he claims is fatal to his conviction.

¶2 Sometime in 1994, Nigl was arrested for a first offense of operating a motor vehicle while intoxicated (OWI) and by stipulation entered a no contest plea on July 5, 1994. On April 4, 2003, Nigl, appearing pro se, filed a Petition for Writ of Coram Nobis, contending that his ***Miranda***[2] rights were violated when a forced blood draw was conducted after his arrest. The circuit court denied Nigl's petition because the time limits for appeal from a civil forfeiture action had long since expired and there was no error because ***Miranda*** does not apply to civil forfeiture actions. Nigl then filed a motion for reconsideration, asserting the arresting officer violated the procedure required by the implied consent statute by failing to serve Nigl a Notice of Intent to Revoke before ordering a forced blood draw. The circuit court denied the motion for reconsideration, adopting the reasons detailed in its earlier order. Nigl appeals from both orders.

¶3 "The writ of coram nobis is a common law remedy which empowers the trial court to correct its own record." ***State v. Heimermann***, 205 Wis. 2d 376, 381-82, 556 N.W.2d 756 (Ct. App. 1996).

> A person seeking a writ of coram nobis must pass over two hurdles. First, he or she must establish that no other

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

> remedy is available. What this means for criminal defendants is that they must not be in custody because if they are, § 974.06, STATS., as an example, provides them a remedy. Second, the factual error that the petitioner wishes to correct 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.

Heimermann, 205 Wis. 2d at 384.

¶4 While Nigl has passed the first hurdle, he is not in custody because of his 1995 conviction for first offense OWI, he cannot pass the second hurdle. The errors he complains of—noncompliance with ***Miranda*** or noncompliance with the implied consent procedures—are not errors of fact that prevent the entry of a judgment. His claimed errors are not crucial because first, ***Miranda*** does not apply to a civil forfeiture action, ***Village of Menomonee Falls v. Kunz***, 126 Wis. 2d 143, 147-48, 376 N.W.2d 359 (Ct. App. 1985); and second, an error in following the implied consent procedure does not prevent the entry of a judgment for OWI, WIS. STAT. § 343.305(9)(d). Additionally, any errors are errors of law and the writ is not available to correct errors of law. ***Jessen v. State***, 95 Wis. 2d 207, 214, 290 N.W.2d 685 (1980).

¶5 We note that Nigl is in custody in an out-of-state facility. Because he is a prisoner, we can liberally construe his petition and relabel it to put him in the correct procedural posture. ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 520-21, 335 N.W.2d 384 (1983). In his case, we could relabel his petition as either a direct appeal or a postconviction motion under WIS. STAT. § 974.06. As a direct appeal, the petition is untimely. Nigl was convicted on July 5, 1994, and an appeal from the judgment of conviction is required to be initiated within ninety days of the date of entry of the judgment. WIS. STAT. RULE 809.40(2) and WIS. STAT. § 808.04. As a postconviction motion under § 974.06, he is not entitled to relief because he

is not in custody under a sentence imposed by the court for this specific offense. ***Jessen***, 95 Wis. 2d at 211; § 974.06(1).

¶6 Finally, even if we were to get to the merits of Nigl's petition, we would hold that he is not entitled to relief. Nigl entered a no contest plea to a first offense OWI charge; the record of that case has been destroyed, SCR 72.01(24) (2001) (all records of traffic forfeiture cases may be destroyed five years after entry of judgment), and is not included in the record filed with this court. When the record on appeal is incomplete, we will assume that the record contains every fact essential to sustain the circuit court's decision. ***Suburban State Bank v. Squires***, 145 Wis.2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988). In Nigl's case, we must assume that before his plea, he did not challenge either the alleged ***Miranda*** violation or the failure to follow the procedure dictated by the implied consent statute. Nigl forfeited his right to appeal when he plead no contest to first offense OWI in this civil forfeiture action without first challenging his arrest and blood draw. ***County of Racine v. Smith***, 122 Wis. 2d 431, 434-37, 362 N.W.2d 439 (Ct. App. 1984).

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.