

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2011

A. John Voelker
Acting 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. 2010AP2718

Cir. Ct. No. 1989CF892063

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE LEE ELLIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
REBECCA F. DALLET, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Jimmie Lee Ellis, *pro se*, appeals from an order denying his motion to withdraw his guilty plea. We conclude that Ellis's motion is barred because his sentence has expired. Therefore, we affirm.

BACKGROUND

¶2 In July of 1989, Ellis was charged with carrying a concealed weapon and being a felon in possession of a firearm. In February of 1991, he entered a guilty plea to the possession charge and the carrying concealed charge was dismissed. The trial court imposed and stayed a two-year prison sentence consecutive to previous sentences and placed Ellis on probation for three years. The trial court also imposed five months of jail time as a condition of probation. Ellis did not appeal or file any postconviction motions.

¶3 Nearly twenty years later, on September 27, 2010, Ellis filed a motion in the trial court entitled “MOTION FOR ORDER” that sought to withdraw his guilty plea on grounds that “there is no factual basis to support the plea.” The trial court denied the motion in a written order, concluding that the motion was “both insufficient and untimely.” It noted that “this case discharged in 1994.”

¶4 On October 12, 2010, Ellis filed a second motion to withdraw his guilty plea, which was again entitled “MOTION FOR ORDER,” that made the same argument presented in Ellis’s first motion and also added an allegation that his trial lawyer provided constitutionally deficient representation. The trial court denied the motion, citing the same reasons it relied on in denying the first motion, including its conclusion that Ellis’s postconviction motion was barred because his

sentence had long since expired. It is from the second trial court order that Ellis appeals.¹

DISCUSSION

¶5 The trial court concluded that Ellis’s motion was untimely, citing *State v. Bell*, 122 Wis. 2d 427, 362 N.W.2d 443 (Ct. App. 1984). In *Bell*, we held that the defendant could not bring a WIS. STAT. § 974.06 motion challenging his conviction because he had already completed the term of probation imposed for his crime. See *Bell*, 122 Wis. 2d at 428–429, 362 N.W.2d at 444 (citing § 974.06 and *State v. Theoharopoulos*, 72 Wis. 2d 327, 240 N.W.2d 635 (1976)). Further, we concluded that the fact the defendant was subsequently imprisoned for an unrelated crime did not change the result. See *id.*, 122 Wis. 2d at 429–430, 362 N.W.2d at 444.

¶6 On appeal, Ellis does not disagree that his sentence has expired. Rather, he argues that his motion was not brought pursuant to WIS. STAT. § 974.06 and, therefore, his motion is not barred by *Bell*. We disagree. “Once the time for direct appeal has passed, a defendant in a criminal case may collaterally attack his conviction pursuant to a WIS. STAT. § 974.06 motion, or via a petition for writ of habeas corpus.” *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶16, 290 Wis. 2d 352, 361, 714 N.W.2d 900, 904 (citations omitted). At the time Ellis filed his motion in the trial court, the time for a direct appeal had long since expired, so the motion was properly construed as one filed under § 974.06. See *bin-Rilla v.*

¹ The appellate record also contains a motion for reconsideration that was denied after Ellis filed this appeal from the denial of his second motion. The trial court’s third order is not before this court.

Israel, 113 Wis. 2d 514, 521, 335 N.W.2d 384, 388 (1983) (court looks to facts pleaded, not to label given the papers filed, to determine whether party should be granted relief). Because Ellis’s sentence has expired, his § 974.06 motion is barred. *See Bell*, 122 Wis. 2d at 430, 362 N.W.2d at 445 (under § 974.06, a court has competency to proceed only when the claimant is still “in custody under the sentence he desires to attack”). Accordingly, we affirm the order denying Ellis’s untimely postconviction motion.

By the Court.—Order affirmed.

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

