

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 2014

Diane M. Fremgen
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. 2013AP2333

Cir. Ct. No. 1998CF626

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LANE P. CASKEY,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Outagamie County:
MARK J. MCGINNIS, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Lane Caskey, pro se, appeals an order denying his WIS. STAT. § 974.06 motion for postconviction relief.¹ Caskey also appeals the

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

order denying his motion for reconsideration. Caskey argues the circuit court erred by denying relief on the ground that Caskey failed to satisfy the custody requirement of § 974.06. The State concedes the circuit court erred. For the reasons outlined below, we reverse the orders and remand the matter to the circuit court for further proceedings.

BACKGROUND

¶2 In the underlying matter, Outagamie County Circuit Court case No. 1998CF626, Caskey was convicted, upon his no contest pleas, of four counts of failure to pay child support. In September 1999, the court imposed and stayed consecutive two-year sentences on each count and placed Caskey on seven years' probation. Caskey's probation was subsequently revoked in 2002 and he began serving his eight-year prison term.²

¶3 In 2002, Caskey was also convicted of a drug charge in Outagamie County Circuit Court case No. 2001CF298 and sentenced to eleven years' initial confinement and five years' extended supervision, consecutive to any other sentence he was then serving. In 2005, Caskey received discretionary parole from his eight-year prison sentence in the instant case and began serving the confinement portion of his sentence in case No. 2001CF298, leaving approximately two years and eight months of his sentence in this case to be served in the community after his ultimate release from confinement.

² Because the offenses occurred before December 31, 1999, the court imposed indeterminate sentences. "Truth-in-sentencing" revisions were enacted in 1998 and apply to felonies committed on or after December 31, 1999. *See* 1997 Wis. Act 283, § 419.

¶4 In June 2013, Caskey filed the underlying WIS. STAT. § 974.06 motion for plea withdrawal, claiming his trial counsel provided ineffective assistance in advising Caskey on the plea offer. The circuit court denied that motion and a subsequent reconsideration motion, concluding Caskey failed to meet the threshold custody requirement of § 974.06(1) because he was in confinement on a subsequent offense and although he still had supervision to serve on this case, it was irrelevant. This appeal follows.

DISCUSSION

¶5 WISCONSIN STAT. § 974.06(1) provides, in relevant part:

After the time for appeal or postconviction remedy provided in s. 974.02 has expired, *a prisoner in custody under sentence of a court* ... claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(Emphasis added). For the circuit court to have jurisdiction over a § 974.06 motion, a prisoner must be serving the sentence of the specific case for which relief is sought. *See State v. Theoharopoulos*, 72 Wis. 2d 327, 329, 240 N.W.2d 635 (1976). Thus, the circuit court lacks jurisdiction to consider a § 974.06 motion for postconviction relief if the defendant has been “discharged from supervision and custody.” *See id.*

¶6 As the State recounted, it appears that from 2001 until now, Caskey has been serving, and continues to serve, consecutive sentences in confinement, beginning with his eight-year sentence in this case. Significantly, Caskey’s sentence in the present case has not been fully discharged, as he must complete the

remainder of that sentence in the community after his release from confinement. A probationer is “in custody under sentence of a court” for purposes of conferring subject matter jurisdiction in postconviction proceedings. *See United States v. Essig*, 10 F.3d 968, 970 n.3 (3d Cir. 1993), *superseded by rule on other grounds as stated in United States v. Turner*, 677 F.3d 570 (3d Cir. 2012); *accord State v. Bell*, 122 Wis. 2d 427, 431, 362 N.W.2d 443 (Ct. App. 1984) (discharge from probation meant that *Bell* no longer satisfied § 974.06’s custody requirement). Because Caskey has not completed his sentence, he satisfies the custody requirement of WIS. STAT. § 974.06. We therefore reverse the orders and remand the matter to the circuit court to consider Caskey’s motion on its merits.

By the Court.—Orders reversed and cause remanded with directions.

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

