

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 4, 1997

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. 96-1583

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JERMAINE L. O'CONNOR,

Defendant-Appellant.

APPEAL from orders of the circuit court for Milwaukee County:
ELSA C. LAMELAS, Judge. *Affirmed.*

CURLEY, J. Jermaine L. O'Conner, *pro se*, appeals from two orders denying his motions filed pursuant to § 974.06, STATS., arising out of his November 1991 judgment of conviction for endangering safety by use of a dangerous weapon contrary to § 941.20, STATS. (1989-90). He raises essentially two issues for review: (1) whether his "Sixth Amendment Rights were violated, therefore denying him the effective assistance of counsel;" and (2) whether the trial court erred in accepting his guilty plea. This court concludes that the trial court lacked subject matter jurisdiction to hear his motions because he was no longer "a prisoner in custody under sentence of a court" within the meaning of

§ 974.06(1).¹ Accordingly, the orders denying his motions are affirmed, albeit for a different reason than that expressed by the trial court.²

On November 15, 1991, O'Conner pleaded guilty to one count of endangering safety by use of a dangerous weapon arising out of an incident in which he intentionally pointed a handgun at another person. On that same day, O'Conner was sentenced to 60 days incarceration consecutive to a two-year prison term he was already serving.

On March 4, 1996, O'Conner, while in federal custody at the Lompoc Federal Correctional Institution in California, filed a motion pursuant to § 974.06, STATS., "to strike his prior conviction." The trial court reviewed the motion and denied it, concluding that O'Conner had "failed to assert any grounds warranting relief." O'Conner then filed a motion for reconsideration that the trial court also denied.

This court concludes that the trial court erred when it decided O'Conner's motion on the merits because the trial court did not have subject matter jurisdiction to review the motions. Under § 974.06(1), only a "prisoner in custody under sentence of a court" satisfies the prerequisites for the vesting of subject matter jurisdiction for a § 974.06 proceeding. See *State v. Bell*, 122 Wis.2d 427, 428-31, 362 N.W.2d 443, 444-45 (Ct. App. 1984). Moreover, for the trial court to have jurisdiction, the prisoner must be in custody under the

¹ Section 974.06(1), STATS., provides:

Postconviction procedure. (1) After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 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.

² This appeal is decided by one judge pursuant to § 752.31(2), STATS.

sentence of “the sentencing court which imposed the sentence under attack.” *Id.* at 429, 362 N.W.2d at 444. O’Conner’s motion was filed nearly five years after the judgment of conviction was entered. At the time he filed the motion, he had already served the sentence for his conviction on the endangering safety by use of a dangerous weapon charge. Accordingly, he was no longer in custody under the sentence he was attacking in his motions. The trial court lacked subject matter jurisdiction and should have dismissed O’Conner’s motions. Nonetheless, because the trial court correctly entered orders denying the motions, this court affirms.

By the Court. – Orders affirmed.

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