COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 1998

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. 98-2187

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NORMAN O. BROWN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RONALD S. GOLDBERGER, Judge. *Affirmed.*

SCHUDSON, J.[1] Norman O. Brown, *pro se*, appeals from the circuit court's July 13, 1998, order denying his motion for relief from previous circuit court orders which denied his motion for postconviction relief without a

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

hearing.[2] Brown argues that the circuit court erred in concluding that he was no longer serving a sentence in conjunction with the underlying offense and, therefore, that he could not gain postconviction relief under § 974.06, STATS. This court affirms.

On March 19, 1992, Brown pled no contest to possession of cocaine. He was sentenced to one year at the House of Correction. The sentence, however, was stayed and Brown was placed on probation for two years with conditions including thirty days of incarceration. According to the parties, Brown's probation was revoked on October 15, 1993, and, subsequently, he was convicted and sentenced on new charges.

On July 26, 1993, Brown filed a motion to withdraw his no contest plea to the possession charge. Having received no response to his motion, on September 28, 1993, he wrote a letter to the clerk of circuit court requesting that he be advised of the status of the motion and, on October 20, 1993, he filed an additional motion. The record reflects no further litigation of or decision on Brown's motion until correspondence in December 1995, and the circuit court's first decision and order of January 26, 1996, denying his motion for postconviction relief.

The parties argue over whether the lack of action on the 1993 motion, and what the State maintains was Brown's failure to pursue it further, precluded the circuit court from addressing the merits years later. Without an

[2] The original order was entered by the Honorable Charles F. Kahn, Jr., on January 26, 1996. Two subsequent letters were issued by the Honorable Ronald S. Goldberger, the last of which, dated July 13, 1998, this court shall construe to be the order from which Brown now appeals.

evidentiary hearing, however, the record remains so uncertain about whether Brown, the circuit court, or both were responsible for this lack of action that this court, on appeal, will give Brown the benefit of the doubt and attempt to reach what appears to be his substantive argument.

Unfortunately, however, Brown's argument and the limited record in this case render confusion. From most of his argument and by virtue of his primary reliance on ***Garlotte v. Fordice***, 515 U.S. 39 (1995), one would assume that Brown is contending that, even though he had completed his sentence for possession of cocaine, he could still challenge that conviction because the *consecutive* sentence he still was serving for a subsequent conviction was affected by the former sentence; that is, that because the commencement date of the latter sentence was affected by his former sentence, he remained "in custody" for purposes of challenging the former conviction.

The State, however, responds:

> Like the ***Garlotte*** case, the defendant was in custody when he filed his motion in 1996. However, *he was not serving a sentence which had been imposed consecutively to the sentence in the misdemeanor possession case before the court*. The conclusion of the ***Garlotte*** court was based on the fact that the initial sentence did adversely affect the defendant while serving his *consecutive* sentence. *Based on the record before the court in the instant case, there is no such demonstration on the part of the defendant*.

(Emphasis added.) In reply, Brown does not refute the State's position. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted). He bases no further argument on ***Garlotte***, and does not maintain that he was "in custody" by virtue of serving a consecutive sentence. Instead, he maintains that his "current sentence has been extended by deprivation of 'time-credit' in

connection with his revocation in October 1993, which should have been applied toward his current sentence." In an argument that is anything but clear, Brown asserts:

> In the case at bar, Brown was awarded jail-time credit by the revocation order, which included all time spent in custody prior to the revocation order. Further, Brown was required to serve the rest of the sentence for which he was revoked, prior to having to begin service of the sentence which he is now serving. Taken together, Brown's current sentence has been extended by eight months, give or take a few days. Therefore, his current sentence is directly and adversely affected by his conviction in the case underlying this appeal.

Thus, it appears that Brown may be complaining that credit, which he concedes was already awarded on the possession of cocaine sentence, *also* should have been awarded on the subsequent sentence. If, indeed, that is his contention, Brown's challenge would not be to anything in the former case, but rather, would be related to the credit computation in the latter sentence.

Brown has failed to provide this court with record references to support what may be his arguments and, indeed, he has failed to provide any record documenting the possible interplay between the possession of cocaine case and the subsequent case. Thus he effectively has denied himself the opportunity for meaningful appellate review. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).

In his brief in chief, Brown writes that he "must concede that he has failed to present sufficient allegations or facts before the trial court which would tend to show that he was indeed 'in custody' for the purposes of his postconviction motion pursuant to either § 974.06, STATS., or habeas corpus." This court agrees and, further, even attempting to make sense of Brown's argument and attempting

to bring flexibility to the review of a *pro se* litigant's appeal, this court can discern no basis for the relief Brown seeks. Accordingly, this court affirms the denial of his postconviction motion.

By the Court.—Order affirmed.

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