COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-2691

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TOMAS RODREQUEZ CONSUEGRA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Tomas Consuegra appeals an order denying his postconviction motion. We conclude that relief under WIS. STAT. § 974.06 (1997-98)[1] is not available to Consuegra, and that even if his motion is construed as a

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

petition for a writ of *coram nobis*, the trial court did not err in denying relief. We therefore affirm the appealed order.

¶2 In 1986, Consuegra pled guilty and was convicted in La Crosse County of one felony count of delivery of cocaine. The court imposed and stayed a five-year prison sentence and placed Consuegra on five years of probation, from which he was granted an "early discharge" in 1990. Eleven years after his conviction, he filed a postconviction motion attacking that conviction. The 1997 motion alleges several grounds, and is captioned as one under WIS. STAT. § 974.06. It alleges that even though Consuegra may have completed his sentence under this conviction, he can properly bring this motion because he is currently serving a federal sentence that was enhanced by the Wisconsin conviction. The trial court denied the motion on its merits, without a hearing, and Consuegra appeals.

¶3 Before reaching the merits of the motion, the State argues that it should be denied on the ground that Consuegra cannot use WIS. STAT. § 974.06 because he is no longer in custody on the Wisconsin conviction. We agree with that argument. *See* § 974.06(1) and ***State v. Heimermann***, 205 Wis. 2d 376, 385, 556 N.W.2d 756 (Ct. App. 1996). However, in reply, Consuegra argues that his petition should be reconstrued as one for a writ of *coram nobis*.

¶4 As a general matter, courts are to read pro se prisoner pleadings liberally, and to relabel them as necessary to put them in the correct procedural posture. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 520-21, 335 N.W.2d 384 (1983). If we do not do that in this case, and we affirm because WIS. STAT. § 974.06 is not available, Consuegra could recaption and refile these same papers as a writ petition. In the interest of judicial economy, we therefore consider

whether Consuegra might obtain the relief he seeks by way of a petition for a writ of *coram nobis*.

¶5 The writ of *coram nobis* is available to a person who seeks relief from a conviction the sentence for which has already been served. *See* ***Heimermann***, 205 Wis. 2d at 381-84. A *coram nobis* petition is not barred by the decision in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because that decision relied on an interpretation of WIS. STAT. § 974.06, and is therefore limited to relief sought under that section. *See* ***Heimermann***, 205 Wis. 2d at 384-86.

¶6 Review of a *coram nobis* petition has an additional component not present in ordinary postconviction review: "[T]he 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." ***Id.*** at 384. And, as the foregoing suggests, the writ is "of very limited scope," being aimed at the correction of "an error of fact not appearing on the record." *See* ***Jessen v. State***, 95 Wis. 2d 207, 213-14, 290 N.W.2d 685 (1980). *Coram nobis* is not available "to correct errors of law and of fact appearing on the record," because those errors are reachable by way of "appeals and writs of error." *See* ***id***. at 214.

¶7 Consuegra first alleges that he should be allowed to withdraw his plea because the plea colloquy did not include a discussion of some of the constitutional rights he was giving up. Even if this allegation were to satisfy the additional *coram nobis* component we noted above, and even if the plea colloquy were inadequate, Consuegra's motion does not make a sufficient showing to

warrant an evidentiary hearing.[2] To obtain a hearing, the defendant must allege that he did not know the information that should have been provided, and also must allege, in a more than conclusional fashion, that he would have pled differently. *See* ***State v. Bentley***, 201 Wis. 2d 303, 313-15, 548 N.W.2d 50 (1996). In other words, the defendant must explain how a more complete understanding of his rights would have caused him to plead differently. Consuegra's motion does not do so, and therefore it was properly denied with respect to his first ground.

¶8 Consuegra's second claim is that he should be allowed to withdraw his plea because his trial counsel was ineffective in that counsel should have "formulated a winnable defense for trial and informed [Consuegra] thereof," but did not do so. Consuegra's proposed defense would have been based on impeachment of the State's main witness by using her testimony from the preliminary hearing. The witness testified that after purchasing a substance from Consuegra, she kept it overnight in an evidence locker in her car, and she conducted the chemical test the next day. According to her testimony, the test result was "inconclusive," which is contrary to the complaint based on her report, which stated the result was positive. Also, when asked to state the location of the drug transaction, the witness first said she was unsure of the address, but that it was somewhere in La Crosse. When asked again on cross-examination, she suggested an address that was quite different from the address in the complaint.

[2] On the adequacy of the plea colloquy, the State argues that the plea was taken before ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and therefore the strict plea standards of that case should not apply. However, the requirement that a plea colloquy address the waiver of the defendant's rights predates ***Bangert***. *See* ***State v. Cecchini,*** 124 Wis. 2d 200, 210, 368 N.W.2d 830 (1985), *overruled on other grounds by* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). And, if Consuegra's plea were to be evaluated under ***Cecchini***, which was the controlling case at the time, the standard would potentially be even less favorable to the State than ***Bangert***.

¶9 Consuegra argues that based on these inconsistencies between the complaint and the witness's testimony at the preliminary hearing, a jury could have reasonable doubt about whether the substance purchased was cocaine, and whether the substance the witness submitted to the lab was the same one she purchased from Consuegra. In contrast to his first claim, Consuegra alleges that if he had been aware of this possible defense, he would not have pled guilty. The difficulty with the claim, however, is that it raises a question of law, not one of "fact not appearing on the record." *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985) ("The questions of whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law….").

¶10 We acknowledge that in ***Heimerman***, we said that the "'fact'" sought to be corrected was "the trial court's earlier posttrial finding that [the defendant's] trial attorney performed adequately." ***Heimerman***, 205 Wis. 2d at 387. The defendant in ***Heimerman*** claimed in his *coram nobis* petition that the trial court did not address certain facts in its original analysis of his ineffective assistance claim. We concluded that the petition was "fatally flawed because it is aimed at an issue already 'passed on' by the trial court," inasmuch as the facts in question were before the trial court at the initial ***Machner*** hearing. *See* ***id.*** at 388. We did not consider in ***Heimerman***, because it was not necessary for us to do so, whether a claim of ineffective assistance of counsel may be raised for the first time by way of a *coram nobis* petition. We now conclude that Consuegra cannot raise the legal question of whether his counsel rendered ineffective assistance by way of a petition for a writ of error *coram nobis*. *See* ***Jessen***, 95 Wis. 2d at 214; *see also* ***State v. Kanieski***, 30 Wis. 2d 573, 141 N.W.2d 196 (1966).

¶11 As a third claim, Consuegra argues that he should be allowed to withdraw his plea because his trial counsel was ineffective by failing to object to

the State's alleged breaches of the plea agreement. As we have discussed, construing Consuegra's motion as a petition for a writ of error *coram nobis* would not allow us to sustain a claim of ineffective assistance of counsel. Moreover, even if Consuegra could surmount the procedural obstacles to raising the issue at this late date, there is no merit to his claim that the State breached its plea agreement with him.

¶12 He first alleges that the State breached its agreement not to make a sentencing recommendation. Consuegra is correct that this was part of the plea agreement. The breach, according to Consuegra, came when the prosecutor made comments about his ownership of a gun and ammunition, and about his cooperativeness. He argues that these comments had the effect of supporting the sentence recommendation in the presentence report. We disagree. The prosecutor's comments came as factual responses to things defense counsel said during the sentencing argument. The prosecutor did not make a sentencing recommendation, and his comments cannot reasonably be read as intended to support the recommendation in the report.

¶13 Consuegra also asserts that the plea agreement was breached by the prosecution's failure to remove a read-in from the record. When Consuegra's plea was taken, the stated plea agreement included dismissal and read-in for an additional charge. At the first scheduled sentencing hearing, defense counsel asserted that this was not accurate, because the original agreement had been to dismiss the additional charge *without* reading it in. The prosecutor agreed to that change, and sentencing was rescheduled for a different reason. At the actual sentencing hearing, defense counsel reminded the court of the removal of the read-in, without objection by the prosecutor. There is no indication that the trial court relied on the dismissed charge when setting the sentence.

¶14 Consuegra asserts that in 1990 a Wisconsin trial court that was sentencing him relied on the read-in that was supposed to be removed in this case, and that this shows the prosecution violated the plea agreement by failing to remove the read-in. In our view, even if the prosecution did breach the agreement by failing to amend the records, it is not clear why this would entitle Consuegra to any relief from the criminal conviction in *this* case. For the purpose of sentencing in this case, the prosecution complied with the plea agreement enough so that the trial court knew the additional charge was not included as a read-in. If the prosecution failed to make some change to the record, then it seems the more likely remedy, if any, would be in the later case where the nonexistent read-in was improperly used.

¶15 In summary, we conclude that the trial court properly denied Consuegra's motion for postconviction relief. His motion was nominally brought under WIS. STAT. § 974.06, but that section is not available to Consuegra because he is not in custody on the conviction he seeks to set aside. Moreover, even if we were to construe his motion as a petition for a writ of error *coram nobis*, we would affirm the appealed order for the reasons discussed above.

By the Court.—Order affirmed.

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