

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 28, 2006

Cornelia G. Clark
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. 2005AP1515

Cir. Ct. No. 1994CM410515

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PRIEST JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DANIEL L. KONKOL, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Priest Johnson appeals from an order denying a petition for writ of *coram nobis* and a motion for access to transcripts. Johnson claims his writ of *coram nobis* should be granted because new facts were

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

presented to the court that would have prevented entry of judgment. He also claims the circuit court erred in denying him access to existing records that would clarify the question presented on appeal. Because the appellant's factual allegations are legal defenses not applicable to a writ of *coram nobis* motion, and because the circuit court's denial of access to the record was not clearly erroneous, we affirm.

BACKGROUND

¶2 On November 9, 1994, Johnson was charged with impersonating a police officer and two counts of carrying a concealed weapon, contrary to WIS. STAT. §§ 946.70(1) and 941.23 (1993-94), respectively. The complaint alleged that a man matching Johnson's description was seen walking in the 5400 block of West Center Street, Milwaukee, Wisconsin, with what appeared to be a handgun. Johnson was approached by police and identified himself with a badge bearing the words "Special Police" and an identification card bearing the words "State of Wisconsin, Special Police."² The officers also found in Johnson's possession what appeared to be a .32 caliber revolver, which was later determined to be a starter's pistol.

¶3 On March 16, 1995, Johnson pled guilty to an amended charge of operating as a private detective without a license, contrary to WIS. STAT. § 440.26 (1995-96), and carrying a concealed weapon, contrary to WIS. STAT. § 941.23

² Also found in Johnson's possession were numerous items representing that he was an investigator for the "Wisconsin Investigative Bureau." These items included business cards and identification cards, some bearing pictures, fingerprints, and other imitation features.

(1995-96), as originally charged. During the plea, Johnson and the State stipulated to the facts in the complaint as a factual basis for acceptance of the pleas.

¶4 On February 10, 2005, Johnson filed a *pro se* Petition for a Writ of Error *Coram Nobis* (hereinafter referred to as writ of *coram nobis*) which the circuit court denied because Johnson's claims did not fall within the scope of a writ of *coram nobis*. The court reasoned that Johnson was not alleging facts as required under a writ of *coram nobis*, but was actually asserting defenses to the charges. Johnson's subsequent "Motion for Reconsideration for Issuance of a Writ of Error *Coram Nobis*" filed on March 17, 2005, was also denied by the court for essentially the same reason: Johnson failed to demonstrate that his convictions were based on any error of fact.

¶5 Finally, on May 4, 2005, Johnson filed documents titled, "Motion for Reconsideration for Issuance of a Writ of Error *Coram Nobis* based upon the Circuit Court Error of the Record," "Memorandum for Transcripts and Access to Pre-Existing Records," "Memorandum In Support for the Motion for Transcripts and Access to Pre-Existing Records," and "Affidavit in Support of Motion for Transcripts and Access to Pre-Existing Records." The circuit court denied the second motion for reconsideration because, again, Johnson had not raised any new factual issues. The circuit court also denied the motion for transcripts because Johnson had not asserted any arguably meritorious claim for relief. This appeal followed.

ANALYSIS

A. *Writ of Error Coram Nobis*

¶6 When reviewing decisions regarding petitions for writs of *coram nobis*, appellate courts apply an erroneous exercise of discretion standard. *Jessen v. State*, 95 Wis. 2d 207, 213, 290 N.W.2d 685 (1980). The writ of *coram nobis* is of very limited scope. *State v. Kanieski*, 30 Wis. 2d 573, 576, 141 N.W.2d 196 (1966). A writ of *coram nobis* concerns only errors of fact which are outside the record and unknown to the trial court and which, if known, would have prevented entry of the judgment. *Id.* This writ does not exist “to correct errors of law and of fact appearing on the record since such errors are traditionally corrected by appeals and writs of error.” *Id.* A claim that one may have had a defense to a charge cannot be brought in a petition for a writ of *coram nobis*: *coram nobis* does not lie to challenge the merits of the original controversy. *See Jessen*, 95 Wis. 2d at 214.

¶7 We agree with the trial court that Johnson’s arguments in support of a writ of *coram nobis* are not based upon errors of fact, but are instead potential legal defenses or facts in the record known to all parties. Johnson argues that WIS. STAT. § 440.26 (1995-96) did not apply to him because he was employed by Walgreen’s at the time of his arrest. He alleges that this fact, if known by the court, would have prevented entry of the judgment against him. Notwithstanding whether this defense was waived when Johnson pled guilty, Johnson asserts a potential legal defense that is not applicable to a writ of *coram nobis*. Furthermore, the matter which Johnson claims was an error of fact—that he was working at a commercial establishment—was known by all parties involved at the time of his plea. Because neither of these assertions are proper under a writ of

coram nobis, the trial court did not erroneously exercise its discretion when it denied the writ.

¶8 Johnson also alleges he is entitled to writ of *coram nobis* relief on Count 2 because the starter pistol he was carrying at the time of his arrest was not a “dangerous weapon” under WIS. STAT. § 941.23 (1995-96). He alleges that because he was not doing some independent illegal act with the pistol, his case is distinguishable from the State’s theory based on *State v. Antes*, 74 Wis. 2d 317, 246 N.W.2d 671 (1976). We again agree with the trial court that Johnson failed to present facts outside the record that would prevent entry of judgment. It is of no consequence to this appeal whether Johnson’s starter pistol falls outside the provisions of § 941.23. Before pleading guilty, Johnson stipulated that the gun was a dangerous weapon. On this appeal, Johnson merely asserts a potential legal defense grounded on facts to which he stipulated. We agree with the trial court that this is outside the scope of writ of *coram nobis* relief.

¶9 In sum, however articulated, Johnson’s motions for *coram nobis* relief do not contain facts outside the record that, if known to the court, would prevent entry of judgment. At best, Johnson’s assertions are legal defenses more suited for a direct appeal, but they do not properly fit under a writ of *coram nobis*. Because Johnson failed to meet the requirements of *coram nobis* relief, this court finds that the trial court did not erroneously exercise its discretion in denying Johnson’s motions.

B. Access to Transcripts and Public Records

¶10 WISCONSIN STAT. § 814.29(1) (2003-04) allows for indigent persons to defend any action without having to pay costs and fees as long as certain conditions are met. If an affidavit of indigency is submitted to the court under

§ 814.29(1), the court then determines whether the action is arguably meritorious. *State ex rel. Richards v. Circuit Court for Dane County*, 165 Wis. 2d 551, 553-54, 478 N.W.2d 29 (Ct. App. 1991). Whether a petitioner's action is arguably meritorious, such that costs and fees will be waived, is a question of law which an appellate court reviews *de novo*. *Id.* at 554.

¶11 Johnson's motion for access to transcripts and his affidavit in support of that motion fail to meet the requirements of WIS. STAT. § 814.29. Johnson failed to file an affidavit of indigency form with the circuit court so that the court could determine if his action was arguably meritorious. Furthermore, nowhere does Johnson make mention of his financial need for indigent status so the court could make any sort of eligibility determination. Therefore, we agree with the trial court that Johnson did not comply with the statutory provisions required for a finding of indigency, and thus the court's denial of Johnson's motion was not clearly erroneous.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

