

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 22, 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 Nos. 06AP391
06AP559**

**Cir. Ct. Nos. 2002CT2445
2002CT1279**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONNELLY SMITH,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
PAUL R. VAN GRUNSVEN, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Donnelly Smith appeals from orders denying his motions to withdraw his guilty pleas in two cases that have been consolidated for

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

appeal. Although the parties have briefed the merits of Smith's motions, we decline to address those arguments because, as we explain below, we conclude that Smith is not entitled to bring a WIS. STAT. § 974.06 motion to withdraw his guilty pleas in these cases. Therefore, we affirm the orders, but on a different basis than that advanced by the State.

BACKGROUND

¶2 Smith was cited for operating after revocation on January 7, 2002, and January 29, 2002. According to the judgment rolls, he appeared *pro se* on July 8, 2002, and entered guilty pleas to both offenses pursuant to a plea agreement that was stated in the Plea Questionnaire/Waiver of Rights form that Smith signed.² He was convicted and immediately sentenced to a \$200 fine for each offense, which was consistent with the plea agreement. He did not appeal his convictions.

¶3 On January 20, 2006, while incarcerated for an offense unrelated to this appeal, Smith filed a *pro se* motion to withdraw his guilty plea in 2002CT2445. He asserted that he should be allowed to withdraw his plea because the trial court gave him inaccurate legal advice, *i.e.*, it did not inform him that the fact he had a valid Illinois driver's license at the time of the offenses would negate the element of the charged offenses that the driver knows his license was revoked. *See* WIS. STAT. § 343.44(1)(b) (1999-2000) (WI JI Crim 2620).

² The Hon. Raymond E. Gieringer presided over the plea hearing and sentencing. The Hon. Paul R. Van Grunsven issued the orders at issue in this appeal.

¶4 The same day, the trial court denied Smith's motion on the ground that Smith had not provided any proof that he had a valid Illinois driver's license at the time of the offense, and that Smith had not previously raised this issue when he filed previous motions.³

¶5 On February 10, 2006, Smith moved the trial court for reconsideration. He argued that: (1) he was entitled to a hearing on whether he had a valid Illinois driver's license at the time of the offense; (2) there was an insufficient factual basis for his plea because he had a valid Illinois license; and (3) he has never challenged his conviction before and therefore has not waived his right to do so. Smith also filed a separate motion for production of transcripts and the case record, noting that he had filed an appeal with the Court of Appeals and that a transcript of the July 8, 2002, plea hearing would be needed.⁴

¶6 Also on February 10, 2006, Smith filed a motion for plea withdrawal in 2002CT1279. He alleged that the trial court had "never informed the defendant that he was pleading to two charges of operating after revocation" and that he had received "inaccurate legal advice." He asserted that he was allowed to drive in Wisconsin on the date of the offense because he had a valid Illinois driver's license. Thus, he argued, he "was not guilty of this charge while in possession of a valid license issued to him by his home state."

³ The previous motions related to Smith's request that the trial court impose a time-served disposition, rather than the \$200 fine that he had failed to pay. Smith did not appeal the orders denying those motions and they are not at issue in this appeal.

⁴ Smith's notice of appeal from the trial court's January 20, 2006 decision is dated February 7, 2006.

¶7 On February 13, 2006, the trial court denied Smith's motion for plea withdrawal in 2002CT1279. The trial court noted that the same claims had been raised in 2002CT2445. The trial court denied the motion on grounds that Smith had not provided proof he had a valid Illinois license, had not raised these issues in previously filed motions, and had not provided a record of the plea proceedings to support his contention that the trial court failed to follow the requisite plea hearing proceedings.

¶8 On February 14, 2006, the trial court denied Smith's motion for reconsideration in 2002CT2445 and denied his motion for the production of transcripts. The trial court concluded that Smith's motion had raised only conclusory allegations and that this was insufficient to justify a hearing, per *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). The trial court also denied Smith's motion for the production of transcript, stating:

The time for appeal has long since expired in this case. Where the time for appeal has expired, the court requires the assertion of an arguably meritorious claim for relief before it will consider ordering the production of transcripts at public expense. The court will not order the production of transcripts for purposes of demonstrating that there is a viable claim for relief.

¶9 On March 3, 2006, Smith appealed from the trial court's February 13, 2006, order in 2002CT1279. He also moved the trial court for reconsideration of the trial court's February 13 order. He provided a copy of his Illinois driver's license and argued that he should not have been found guilty of the offense. He also argued that the "inaccurate legal advice forced upon [him]" by the trial court rendered his plea involuntary. He asked the trial court to hold a hearing, and asked the trial court to provide him with the "relevant transcripts."

¶10 On March 6, 2006, the trial court denied Smith's motion for reconsideration in 2002CT1279. The trial court concluded that the exemption for persons from holding a valid Wisconsin driver's license that is conferred by WIS. STAT. § 343.05(4) "does not extend to persons whose privilege to operate in Wisconsin had been revoked and who had not complied with conditions imposed by Wisconsin law for restoring such privilege." The trial court explained that the Department of Motor Vehicles "has informed the court that ... the defendant was revoked for a refusal violation in case 97TR705979 from which he had not reinstated at the time the offenses were committed...."

¶11 On March 23, 2006, Smith filed an amended notice of appeal in 2002CT1279, which is appellate case number 06AP559-CR, to appeal from the February 13 and March 6, 2006 order as well.⁵

¶12 Smith filed a motion with this court to consolidate the cases for appeal. We granted that motion on May 17, 2006, reasoning that "[i]t appears ... that both appeals actually revolve around the circuit court's denial of transcripts relative to the appeals. The court will, on that basis, grant the consolidation request."

¶13 In the same order, however, we denied Smith's motion for the production of transcripts of the July 8, 2002 plea hearing. We explained: "The subject of this appeal is, in part, whether the circuit court should have granted Smith's motion for production of transcripts at public expense. To order

⁵ Although no amended notice of appeal was filed in 2002CT2445, appellate case number 06AP391, it is clear from correspondence and Court of Appeals orders that both parties and the Court of Appeals have considered the trial court's February 14, 2006, order to be part of this appeal, and we will address it as such.

production of transcripts at this point would effectively overturn the circuit court's orders and render the appeals moot." The appeal proceeded.

DISCUSSION

¶14 The parties have briefed the merits of Smith's motions. We decline to address the merits of Smith's claims because his motions should have been denied on grounds that Smith was not entitled to bring them under WIS. STAT. § 974.06. That statute provides in relevant part:

Postconviction procedure. (1) After the time for appeal or postconviction remedy provided in s. 974.02^[6] 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) A motion for such relief is a part of the original criminal action, is not a separate proceeding and may be

⁶ WISCONSIN STAT. § 974.02 provides in relevant part:

Appeals and postconviction relief in criminal cases. (1) A motion for postconviction relief other than under s. 974.06 or 974.07 (2) by the defendant in a criminal case shall be made in the time and manner provided in s. 809.30. An appeal by the defendant in a criminal case from a judgment of conviction or from an order denying a postconviction motion or from both shall be taken in the time and manner provided in ss. 808.04 (3) and 809.30. An appeal of an order or judgment on habeas corpus remanding to custody a prisoner committed for trial under s. 970.03 shall be taken under ss. 808.03 (2) and 809.50, with notice to the attorney general and the district attorney and opportunity for them to be heard.

made at any time. The supreme court may prescribe the form of the motion.

¶15 “This court has on several occasions held that a trial court has no jurisdiction to entertain a 974.06 motion brought by a person who is not in custody under sentence of a court.” *Jessen v. State*, 95 Wis. 2d 207, 211, 290 N.W.2d 685 (1980). *Jessen* relied on *State v. Theoharopoulos*, 72 Wis. 2d 327, 240 N.W.2d 635 (1976), in which the court addressed a defendant’s attempt to obtain relief under sec. 974.06:

“The facts are undisputed that, at the time of the filing of the motion for postconviction relief, the defendant was no longer under sentence, nor in custody under the sentence of the state court. On the face of it, therefore, it appears indisputable that the circuit court had no jurisdiction to entertain the petition for relief.”

Jessen, 95 Wis. 2d at 211 (quoting *Theoharopoulos*, 72 Wis. 2d at 330).

¶16 Applying these cases here and based on the undisputed facts in the record, we conclude that Smith was not entitled to seek relief for his two convictions using WIS. STAT. § 974.06 because he is not in custody as a result of sentence imposed for those convictions. Where a defendant’s direct appeal rights have expired, as they have here,⁷ WIS. STAT. § 974.06 provides a mechanism to raise constitutional challenges, but only if the movant is “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.” Smith is neither. He was never incarcerated or placed on probation for the challenged crimes; he was given two \$200 fines.

⁷ The record indicates that Smith’s WIS. STAT. § 809.30 direct appeal rights have expired, and does not reflect any attempt on Smith’s part to enlarge the time to file a direct appeal.

Although Smith is now incarcerated for an unrelated crime,⁸ the convictions that he challenges here have not resulted in his current imprisonment. Therefore, he is not entitled to use § 974.06 to seek review of these convictions.

¶17 We affirm the trial court's orders denying Smith's motions because we conclude that Smith had no right to challenge these convictions using WIS. STAT. § 974.06. *See id.*; *Theoharopoulos*, 72 Wis. 2d at 330.

By the Court.—Orders affirmed.

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

⁸ The fact that all of Smith's *pro se* correspondence indicates that he is incarcerated is likely the reason that neither the trial court nor the State recognized that he cannot proceed under WIS. STAT. § 974.06 in these cases.

