

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 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. 2005AP2683

Cir. Ct. No. 2000CF4961

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA T. HOWARD,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
WILLIAM W. BRASH, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Joshua Howard appeals from a circuit court order denying his petition for a writ of *coram nobis* and from an order denying his motion for reconsideration. Howard brought the petition in an effort to reinstate his direct appeal rights which he claims lapsed due to certain failures of his trial

counsel. Because the circuit court properly rejected the petition, we affirm the circuit court's orders.

¶2 Howard entered a plea of no contest to a charge of being a felon in possession of a firearm on February 14, 2001. On May 31, 2001, the circuit court sentenced him to nine months in the House of Correction. The court files show that Howard and his attorney signed a "Notice of Right to Seek Postconviction Relief" on May 31, 2001. The form provided in part as follows:

DEFENDANT'S ACKNOWLEDGEMENT:

I have discussed my right to seek postconviction relief with the lawyer who represented me at sentencing, if any. I understand that if I intend to seek postconviction relief, I must file a Notice of Intent in the trial court within 20 days after sentencing and send a copy to the District Attorney. If I want my lawyer to file the Notice of Intent for me, I must timely inform my lawyer of my decision to seek postconviction relief. I have received a copy of this Notice.

The form listed three alternatives for the defendant to mark:

- I plan to seek postconviction relief.
- I do not plan to seek postconviction relief.
- I am undecided about seeking postconviction relief and I know I need to decide and tell my lawyer within 20 days.

Howard failed to mark any of the boxes, and no notice of intent was filed.

¶3 On January 31, 2005, Howard submitted a motion to this court seeking to reinstate his direct appeal rights. The motion claimed that on the day of Howard's sentencing, Howard's attorney "said that he could preserve my right to appeal and [that] as long as he didn't ask them to appoint an attorney and I did not order any transcripts then I could appeal this case at any time down the road." Howard enclosed a copy of a letter he allegedly sent to his trial attorney on

August 21, 2001, in which he stated, “I want to confirm that there aren’t any deadlines and that I’m going to be able to appeal this case when my other court stuff is done.”

¶4 On February 16, 2005, this court issued an order denying Howard’s motion to reinstate his appeal rights:

Howard does not adequately justify why he waited over three and one half years to ask this court to extend the twenty day deadline for filing a notice of intent to pursue postconviction relief. Although Howard includes with his motion a letter to his counsel dated August 18, 2001, he does not include counsel’s response to that letter, nor does he provide the court with a reasonable explanation of why Howard waited this long to follow up on his appeal.

¶5 Howard then turned to the circuit court and filed a petition for *coram nobis*, arguing that his trial counsel was ineffective for failing to preserve his direct appeal rights. The circuit court denied the petition, concluding that Howard’s claim was not an error falling within the scope of the writ of *coram nobis*. The circuit court also relied on this court’s February 16, 2005 order in which we held Howard responsible for failing to pursue the matter for more than three and one-half years.

¶6 Howard moved the circuit court to reconsider its denial, explaining that he had pursued relief via a petition for *coram nobis* because he was ineligible to pursue *habeas* relief under WIS. STAT. § 782.01 or postconviction relief under WIS. STAT. § 974.06(1) since he is no longer in custody. Howard also listed a number of reasons supporting his contention that his lawyer was at fault for permitting Howard’s appellate rights to lapse.

¶7 The trial court denied the motion for reconsideration:

[T]he same argument was made before the Court of Appeals when the defendant attempted to reinstate his appellate rights three and a half years after he was sentenced. The Court of Appeals was in possession of all pertinent documentation ... and defendant's argument that trial counsel told him his appellate rights would be preserved as long as he didn't file a notice of intent or seek the appointment of counsel. The Court of Appeals could have ordered the circuit court to hold a hearing to determine if counsel properly informed him of his appellate rights, but it instead determined that the defendant waited too long without adequate explanation, to pursue postconviction relief.

Howard appeals.

¶8 A writ of *coram nobis*¹ is a discretionary writ whose purpose is to “give the trial court an opportunity to correct its own record of an error of fact not appearing on the record and which error would not have been committed by the court if the matter had been brought to the attention of the trial court.” *Jessen v. State*, 95 Wis.2d 207, 213-14, 290 N.W.2d 685 (1980). The petition must demonstrate “the existence of an error of fact which was unknown at the time of trial and which is of such a nature that knowledge of its existence at the time of trial would have prevented the entry of judgment.” *Id.* at 214. The key requirements for the writ are not present in this case. Accordingly, the circuit

¹ It would have been to no avail for the circuit court to re-label Howard's petition as one for *habeas corpus* relief or one brought pursuant to WIS. STAT. § 974.06(1). Both remedies require that the petitioner or movant be in custody. Because Howard was not in custody, neither remedy was available to him. His related argument that his equal protection rights were violated because these remedies were not available lacks merit. He is identically situated with every other prisoner who failed to timely raise claims on direct appeal or pursuant to § 974.06 when those remedies were available to him.

court correctly held that a petition for *coram nobis* is not available to test whether trial counsel delivered constitutionally effective assistance to Howard.

¶9 Furthermore, this court concluded in its February 16, 2005, order that Howard failed to demonstrate sufficient cause justifying the more than three-and-one-half year lapse between the deadline for filing a notice of intent to pursue postconviction relief and his request for this court to extend the deadline. The proper and timely course for Howard to challenge this court's order was to file a motion for reconsideration with the court of appeals or a petition for review in the supreme court. Howard failed to pursue either course of action. Having failed to properly test this court's February 16, 2005, order, it is now the law of the case. *State v. Stuart*, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82, *rev'd on other grounds*, 2005 WI 47, 279 Wis. 2d 659, 695 N.W.2d 259 (citation omitted).

By the Court.—Orders affirmed.

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

