

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 2008

David R. Schanker
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. 2007AP1819

Cir. Ct. No. 2004CF772

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS FERNANDO MAZARIEGOS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MARTIN J. DONALD, Judge. *Affirmed.*

Before Fine, Kessler, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Luis Fernando Mazariegos appeals from the order denying his petition for a writ of *coram nobis*. He argues that the circuit court erred when it denied his petition. Because we conclude that the writ of *coram nobis* is not available to Mazariegos, we affirm.

¶2 Mazariegos pled guilty to one count of first-degree sexual assault of a child. Prior to sentencing, Mazariegos moved to withdraw his plea. His attorney, Carlos Gamino, Esq., also moved to be allowed to withdraw. The court denied Gamino's request to withdraw, and set a hearing date for Mazariegos's plea withdrawal motion. Before the hearing was held on the motion, Gamino told the court that Mazariegos would like to proceed to sentencing. The court subsequently sentenced Mazariegos to ten years of initial confinement and ten years of extended supervision.

¶3 Mazariegos, represented by a different attorney, then filed a postconviction motion to withdraw his guilty plea, arguing that he had received ineffective assistance of trial counsel because, among other things, his counsel had not discussed with him the possibility of plea withdrawal. The court held a hearing on this issue, concluded that Mazariegos was just unhappy with his sentence, and denied the motion. He appealed to this court, and we affirmed the judgment of conviction and the order denying his motion for postconviction relief.

¶4 In January 2007, Mazariegos filed a motion for postconviction relief under WIS. STAT. § 974.06 (2005–06),¹ alleging that he received ineffective assistance of postconviction counsel. The circuit court denied the motion, and Mazariegos appealed. His appeal was dismissed because he failed to pay the filing fee.

¶5 In July 2007, Mazariegos filed a petition for a writ of *coram nobis*, in which he asked the court to reconsider its previous decision denying his motion

¹ All references to the Wisconsin Statutes are to the 2005–06 version unless otherwise noted.

for postconviction relief. He argued that when the circuit court denied his previous motion, it was not aware that the supreme court had suspended Gamino's license to practice law at the time Gamino was representing him. The circuit court denied the petition, finding that Mazariegos was not entitled to a writ of *coram nobis*.

¶6 A writ of *coram nobis* is available to a person who can establish that no other remedy is available to correct a factual error. *State v. Heimermann*, 205 Wis. 2d 376, 384, 556 N.W.2d 756 (Ct. App. 1996). For a criminal defendant, this means that they cannot be in custody, because those in custody can file a WIS. STAT. § 974.06 motion. *Id.* In addition, “the 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.* (emphasis by *Heimermann*).

¶7 Mazariegos was in custody when he brought the petition. Further, he has not established that there was a factual error to be corrected. Mazariegos argues that the factual error was that the court did not know that Gamino's license to practice law was suspended. At the time Gamino represented Mazariegos, however, his license to practice law was not suspended. *See Office of Lawyer Regulation v. Gamino*, 2005 WI 168, ¶57, 286 Wis. 2d 558, 707 N.W.2d 132.

¶8 Mazariegos also argues that he received ineffective assistance of trial counsel because his attorney did not file a motion to suppress and he did not receive *Miranda*² warnings in Spanish. Further, he argues that his appellate

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

counsel was also ineffective for failing to raise this issue. Mazariegos did not raise these issues in the circuit court in his petition for a writ of *coram nobis*, and he may not now raise them for the first time on appeal.³ See *State v. Rogers*, 196 Wis. 2d 817, 828–829, 539 N.W.2d 897 (Ct. App. 1995).

¶9 For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

³ Mazariegos did raise these issues in his motion for postconviction relief under WIS. STAT. § 974.06, which was previously denied by the circuit court. As noted, his appeal from the order denying that motion was dismissed when he failed to pay the filing fee.

