

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 5, 2010

A. John Voelker
Acting 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. 2009AP2196-CR
2009AP2197-CR
2009AP2198-CR
2009AP2199-CR**

**Cir. Ct. Nos. 1987CF009231
1988CF880813
1988CF880814
1988CF880815**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL DANIELS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
KEVIN E. MARTENS, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. In these consolidated appeals, Michael Daniels appeals from an order denying a petition for a writ of *coram nobis*. The circuit court denied Daniels's petition. We affirm.

BACKGROUND

¶2 In 1988, Daniels pled guilty to three counts of possession of a controlled substance—marijuana; two counts of possession of a firearm by a felon; two counts of bail jumping; and one count of possession of a controlled substance—cocaine. Three additional counts of delivery of marijuana were dismissed as part of the plea negotiations. Daniels received a total sentence of thirty-six months.

¶3 In 2006, Daniels filed a WIS. STAT. § 974.06 (2007-08)¹ postconviction motion seeking to withdraw his guilty plea in one of the underlying matters. The circuit court denied the motion. Because Daniels was no longer “a prisoner in custody” and, therefore, not entitled to bring a § 974.06 motion, we affirmed.² *State v. Daniels*, No. 2006AP467, unpublished slip op. (WI App March 20, 2007).

¶4 On December 30, 2008, Daniels filed the petition for a writ of *coram nobis* that underlies this appeal. In the petition, Daniels contends that his trial attorney was ineffective and effectively “tricked” him into pleading guilty. Specifically, Daniels complains that his attorney did not identify a statute of limitations defense to the three counts of delivery of marijuana that were dismissed and told him that he would likely receive a maximum sentence if the

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² There is no question that Daniels is no longer in custody under any Wisconsin sentence, and the State does not dispute Daniels’s assertion that his federal sentence was enhanced because of the Wisconsin convictions.

cases went to trial and Daniels lost. Daniels claims that counsel's actions gave him "a sense of false desirability to accept the State's plea offer." The circuit court denied Daniels's petition.

DISCUSSION

¶5 A writ of *coram nobis* is a limited writ and is not applicable to correct errors traditionally corrected by appeal or writs of *habeas corpus*. *Jessen v. State*, 95 Wis. 2d 207, 213-14, 290 N.W.2d 685 (1980). The writ allows a circuit court to correct an error of fact that was unknown at the time of trial where the nature of the error is such that knowledge of its existence would have prevented entry of judgment. *Id.* at 214. The writ "is a common law remedy which empowers the [circuit] court to correct its own record." *State v. Heimermann*, 205 Wis. 2d 376, 381-82, 556 N.W.2d 756 (Ct. App. 1996). A person seeking the writ must meet two tests. First, "he or she must establish that no other remedy is available" and, second, "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.* at 384. Because Daniels is no longer serving a sentence in any of the cases, he satisfies the first test. *See id.* at 385 (writ of *coram nobis* available to a petitioner no longer in custody under a sentence of the court).

¶6 Daniels, however, does not satisfy the second test. To succeed on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The

“ultimate determination of whether counsel’s performance was deficient and prejudicial to the defense are questions of law.” *State v. Thiel*, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305 (citations omitted). Daniels’s claim that his trial attorney was ineffective presents legal issues rather than factual issues and, therefore, it falls outside the scope of *coram nobis*. Further, as stated in *Jessen*, 95 Wis. 2d at 214, Daniels seeks “to correct errors of fact and of law appearing on the record.”

¶7 We review a circuit court’s denial of a writ of *coram nobis* for the erroneous exercise of discretion. *Heimermann*, 205 Wis. 2d at 386. Because the circuit court correctly applied the law to the facts before it, discretion was properly exercised.

By the Court.—Order affirmed.

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

