

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 28, 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 No. 2010AP1469

Cir. Ct. No. 1996CF2331

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW M. OBRIECHT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed.*

¶1 VERGERONT, P.J.¹ Andrew M. Obriecht seeks relief through a writ of coram nobis vacating three 1997 misdemeanor convictions and the resulting sentences. We affirm the circuit court's order dismissing the writ.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶2 On January 27, 1997, Obrieht entered into a plea agreement under which he agreed to plead no contest to three misdemeanor counts: theft, criminal damage to property, and criminal trespass to a dwelling. Pursuant to the plea agreement, the State agreed to recommend that the court withhold adjudication so the matter could be referred to the First Offender Program. The court accepted the plea and withheld adjudication, referring Obrieht to the First Offender Program.

¶3 Obrieht was terminated from the program, and in August 1997 he was returned to the court for adjudication and sentencing. The court adjudicated Obrieht guilty of each of the three misdemeanor counts, withheld sentence, and placed him on probation for three years. Obrieht's probation was revoked, and in August 1998 the circuit court sentenced him to 240 days on each of the three counts, to be served consecutive to each other.

¶4 After Obrieht was sentenced, he filed three motions for postconviction relief: a motion to withdraw his guilty plea on two of the three charges on grounds he did not voluntarily and knowingly waive his constitutional rights; a motion to compel procedural due process, which he claimed he was denied when he was terminated from the First Offender Program; and a motion to modify sentence based on new factors. The motions were denied by the circuit court, and the circuit court's decision was affirmed by this court in February 2000. *State v. Obrieht*, No. 1999AP1626-CR, unpublished slip op. (WI App Feb. 3, 2000).

¶5 Obrieht then petitioned for a writ of habeas corpus on the grounds of ineffective assistance of counsel, claiming that appellate counsel had been ineffective for failing to preserve some of his objections to the validity of the pleas he entered in 1997. In a decision dated December 1, 2004, we denied the petition on the grounds of laches. *State ex rel. Obrieht v. Bartow*, No. 2004AP2740-W,

unpublished slip op. (WI App Dec. 1, 2004). We concluded that Obrieht unreasonably delayed by waiting four and one-half years after our February 2000 decision to challenge appellate counsel's effectiveness on that appeal, given that the challenge was to a 1997 plea.

¶6 Obrieht's petition for a writ of coram nobis seeks vacation of the three misdemeanor convictions and the resulting sentences on the grounds that his plea was not knowingly entered because he was required to enter a plea in order to participate in the First Offender Program. He asserts that the prosecutor exceeded his authority in requiring this and that this unauthorized requirement violated his due process rights. The circuit court denied the petition.

¶7 The scope of the writ of coram nobis is very narrow. *State v. Heimermann*, 205 Wis. 2d 376, 382, 556 N.W.2d 756 (Ct. App. 1996). It provides a means to remove errors of fact that were unknown at the time of trial and are of such a nature that knowledge of the fact's existence would have prevented the entry of judgment. *Id.* at 383 (citation omitted). The writ does not lie to correct errors of law that appear on the record. *Jessen v. State*, 95 Wis. 2d 207, 214, 290 N.W.2d 685 (1980). A decision whether to issue a writ of coram nobis is left to the circuit court's discretion. *Id.* at 213. We affirm a circuit court's decision if the court applied the correct law to the facts of record and reached a reasonable conclusion. *See State v. Manuel*, 2005 WI 75, ¶24, 281 Wis. 2d 554, 697 N.W.2d 811.

¶8 We conclude the court properly exercised its discretion in deciding that Obrieht's petition is directed to legal arguments and not to a factual error that was unknown at the time of the trial. On appeal he attempts to characterize his complaint as one of factual error, asserting that the district attorney intentionally made a false representation on the requirements for participating in the First

Offender Program and the circuit court relied on that inaccurate statement. Despite this reframing of the error, it remains in substance a legal question concerning requirements for participation in the First Offender Program.

¶9 Obrieht’s argument on appeal that the circuit court lacks subject matter jurisdiction is based on the error that Obrieht claims the court made regarding the legal requirements for participation in the program. Accordingly, this argument, too, does not come within the scope of a writ of coram nobis.

¶10 Finally, we conclude there is no basis for exercising our discretionary power of reversal under WIS. STAT. § 752.35.

By the Court.—Order affirmed.

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

