

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 25, 2003

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. 02-2910-CR
STATE OF WISCONSIN**

Cir. Ct. No. 95-CF-31

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

REUBEN G. MAY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County:
RAYMOND THUMS, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Reuben May appeals the trial court's order denying his request for a free transcript of a preliminary hearing to compare the witness's testimony with her testimony at a later trial for different charges. Because the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

court reasonably exercised its discretion when denying May's request, the order is affirmed.

¶2 The underlying facts are undisputed. In January 1995, May was charged with second-degree sexual assault of a child involving Angel J., circuit court no. 95-CF-31. A preliminary hearing was held on January 30, and four months later May pled guilty to an amended count of fourth-degree sexual assault, receiving a sentence of 144 days in the county jail with credit for time served. In January 1998, May was charged with three counts of second-degree sexual assault involving three other children. A jury trial was held where two "other acts" testimonies were admitted, with one of those acts involving Angel J. May was convicted of all charges and he subsequently appealed the conviction, which this court affirmed on December 19, 2000.

¶3 Although May has filed numerous appeals, petitions and motions since the last conviction, his most recent appeal involves the circuit court's denial of his motion for a free transcript of Angel J.'s testimony in the preliminary hearing in the 1995 case. He argues that he needs to compare her 1995 testimony with her "other acts" testimony at his 1998 trial in order to proceed with any further appeals relating to his 1998 conviction.

¶4 Under WIS. STAT. § 973.08, a prisoner may request copies of transcripts, but the statute "plainly contemplates an exercise of discretion." *State v. Wilson*, 170 Wis. 2d 720, 723, 490 N.W.2d 48 (Ct. App. 1992). A prisoner making a request under this section must provide a reason for seeking the transcripts in order to supply a court with a basis upon which to base its determination. *Id.* at 722-23. When deciding whether the prisoner meets the need requirement, the court may consider the value of the transcript to the defendant in

connection with the appeal or trial for which it is sought, and the availability of alternative devices that would fulfill the same functions as a transcript. *State v. Oswald*, 2000 WI App 3, ¶34, 232 Wis. 2d 103, 606 N.W.2d 238.

¶5 Here, the circuit court concluded there was no need for the transcript. By May's own statement in his motion for the transcript, he intends to use it to demonstrate some credibility issue regarding Angel J.'s testimony at his 1998 trial. This alone is insufficient to show a need for the transcript. His 1998 conviction has been appealed and affirmed, leaving him with possible further relief only under WIS. STAT. § 974.06. However, motions under this section are limited to jurisdictional and constitutional matters, none of which May identifies in his motion.

¶6 If we were to construe May's motion as a means to seek relief from his 1995 conviction, as it appears the trial court did, then we would also agree with the circuit court's reasoning for denying the motion when it held:

The Defendant's motion for transcripts makes it clear that he is fishing for a basis for his anticipated post-judgment motion. His non-specific request certainly does not show the value of any particular transcript, nor does it provide a basis for the Court to assess his need for the requested transcripts.

Moreover, no such need is apparent, since the Defendant may no longer bring the postconviction motion he claims to be considering. Sec. 974.06, Stats., permits defendants to bring jurisdictional or constitutional challenges to their sentences after the time for filing an appeal or postconviction motion has otherwise expired. *See* § 974.06(1), Stats. However, to bring a motion under § 974.06, the defendant must be "a prisoner in custody *under sentence of a court*," and must be "claiming the right to be released upon the ground that *the sentence* was imposed" in violation of a constitutional or jurisdictional provision or is otherwise subject to collateral attack. § 974.06(1), Stats. (emphasis added). This means that a defendant who is no longer in custody may not bring a

motion under § 974.06. *Jessen v. State*, 95 Wis. 2d 207, 211, 290 N.W.2d 685 (1980). Even if a defendant is still in custody but not for the sentence against which the challenge is asserted, the clear statutory language makes relief under § 974.06 unavailable, since the prisoner “in custody under sentence of a court” must be challenging “the sentence” from which his custody arises; if the prisoner were not required to still be serving the challenged sentence, the statute would say “a sentence” instead of “the sentence.” Here, the Defendant’s sentence in 95-CF-31 was 114 days in the local jail, and that was imposed on May 19, 1995. No other sentence was imposed on the Defendant until July 20, 1998, and no mention was made of making the new sentence consecutive to any existing sentence. This 1998 sentence (40 years in prison, plus 10 years consecutive to the prison term on probation) is the sentence the Defendant is currently serving. Because he has completed his sentence in 95-CF-31, he is not entitled to relief under § 974.06, and no amount of transcripts could change that. Therefore, he has not satisfied the need component of the transcript inquiry and is not entitled to free transcripts.

¶7 Thus, we agree with the circuit court that May has failed to sufficiently state a need for the transcript and accordingly the order is affirmed.

By the Court.—Order affirmed.

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

