COURT OF APPEALS DECISION DATED AND FILED

February 23, 2011

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. 2010AP590-CR

Cir. Ct. No. 1995CF953519

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER HOLMES,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Christopher Holmes, *pro se*, appeals from an order denying his motion to reconstruct the record. He also appeals from an order denying his reconsideration motion. We conclude the circuit court properly denied the motion, and we affirm the orders.

BACKGROUND

¶2 In December 1995, Holmes was sentenced to an aggregate seventy years' imprisonment for his convictions on three counts of first-degree sexual assault and one count of kidnapping. The convictions were entered following Holmes's guilty pleas. No appeal was taken.

¶3 In August 2009, Holmes wrote to the circuit court clerk, seeking a copy of the plea hearing transcript. The clerk advised Holmes that no transcript could be provided. The transcript was not prepared following conviction because without a direct appeal, the transcript had never been requested.[1] After ten years, the original reporter's notes had been destroyed. *See* SCR 72.01(47).

¶4 Holmes then filed a "petition to order the record reconstructed," explaining that he would need the plea hearing transcript to support the WIS. STAT. § 974.06 motion he planned to file. The circuit court denied the motion, explaining that Holmes waited too long to pursue relief. Holmes moved for reconsideration, which the circuit court also denied. Holmes appeals.

DISCUSSION

¶5 In ***State v. DeLeon***, 127 Wis. 2d 74, 377 N.W.2d 635 (Ct. App. 1985), we established procedures the circuit court should use when a reporter's notes are lost. We relied on the Federal Rules of Appellate Procedure, as well as a

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[1] *Cf.* WIS. STAT. § 973.08(2) (2009-10), which requires the transcript "of the proceedings relating to the prisoner's sentencing" to be filed at the prisoner's institution within 120 days of the date that sentence is imposed.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

case from the District of Columbia Court of Appeals. *See* ***id.*** at 78-80. We explained that "[b]efore any inquiry concerning missing notes takes place, common sense demands that the appellant claim some reviewable error occurred during the missing portion" of the proceedings. ***Id.*** at 80. If the circuit court determines there is a facially valid claim of error, the first inquiry the court must make is whether the record can be reconstructed. ***Id.*** at 80-81. ***DeLeon*** further explains that if reconstruction is insurmountable, a new trial should be ordered. ***Id.*** at 81.[2]

¶6 ***DeLeon*** and subsequent cases utilize this rationale out of concern for a defendant's right to a meaningful review of a conviction. *See* ***id.***, at 79-80, 82; *see also* ***State v. Perry***, 136 Wis. 2d 92, 104, 401 N.W.2d 748 (1987). Thus, ***DeLeon*** noted that when a record portion is lost "*through no fault of the aggrieved party*, that party should not be made to bear the burden of this loss." ***Id.***, 127 Wis. 2d at 77 (emphasis added).

¶7 Holmes's case, though, implicates neither concern. While he argues that he is entitled to "meaningful review," he is not in that procedural posture. Both ***DeLeon*** and ***Perry*** dealt with the loss of notes during the direct appeal process. The time for Holmes to seek direct appeal has passed; at best, he intends to lodge a collateral attack on his conviction. Further, like the circuit court, we cannot conclude the plea hearing transcript is unavailable "through no fault" of Holmes. Retention of the record he seeks was only required for ten years; Holmes

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[2] The case goes on to describe additional steps, but they are irrelevant to our discussion in this case.

inexplicably waited fourteen years to seek any sort of relief.[3] The fault for the transcript's unavailability lies squarely with Holmes, by his pure inaction. He cannot benefit by sitting on his rights for fourteen years, then claiming error. The circuit court properly denied the motion to reconstruct the record.[4]

By the Court.—Orders affirmed.

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

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[3] We also conclude this case is similar to ***State v. Taylor***, 2004 WI App 81, 272 Wis. 2d 642, 679 N.W.2d 893. There, Taylor sought a new trial under ***State v. DeLeon***, 127 Wis. 2d 74, 377 N.W.2d 635 (Ct. App. 1985), because there was no transcript of *voir dire*. ***Taylor***, 272 Wis. 2d 642, ¶11 n.4. We declined to grant a new trial because "nothing was 'lost.'" ***Id.*** Instead, the law at the time had not required *voir dire* be recorded. Here, after ten years, the notes were no longer required to be maintained, similar to as if they were never required to be kept in the first place.

[4] Holmes contends the circuit court erred because his motion can be brought "at any time." A motion under WIS. STAT. § 974.06, alleging "that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack," may be brought at any time. *See* § 974.06(1)-(2). Holmes's motion to correct the record in anticipation of a § 974.06 motion does not fall under the same rule.