

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 19, 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. 2010AP766

STATE OF WISCONSIN

Cir. Ct. No. 1992CF924162

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH LEE MOORE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joseph Lee Moore, *pro se*, appeals a circuit court order that denied his postconviction motion without addressing its merits. We agree that the motion should have been denied, so we affirm the order.

¶2 In 1994, a jury convicted Moore of armed robbery, false imprisonment, and armed burglary, all as party to a crime. Appellate counsel filed a no-merit report on Moore's behalf; this court affirmed the convictions. Moore subsequently filed at least seven *pro se* postconviction motions. At least five of those motions¹ related in some fashion to what Moore believes is an illegal charge, conviction, and sentence for armed burglary.

¶3 After Moore's March 2009 motion, the circuit court warned Moore that additional motions regarding the armed burglary charge would not receive a response from the court. When the circuit court then denied without response Moore's August 2009 motion, Moore petitioned this court for a supervisory writ. We granted the request, directing the circuit court to enter an order disposing of the motion, but we declined to order the court to hold a hearing.

¶4 The circuit court rejected Moore's 2009 motion in March 2010, essentially but not explicitly invoking procedural bars to deny Moore's motion without addressing its merits. Moore now appeals, contending the circuit court should have to address his motion on its merits. We conclude such a directive is unnecessary, because Moore's motion is meritless.

¶5 Moore's fundamental claim is that: (1) he was never charged with armed burglary, and someone else—here, he alleges it was a court reporter—must have added it to his case; (2) it violates his Fifth and Fourteenth Amendment rights

¹ These motions include an October 1998 motion complaining that no preliminary hearing had been held on the armed burglary charge, a May 2004 motion regarding an illegal sentence, a June 2008 motion for independent review by the chief judge to vacate a void judgment, a March 2009 motion for independent review, and an August 2009 motion to vacate a void judgment.

to be tried on charges for which he was not bound over; and (3) without an arraignment on an amended information containing armed burglary, the judgment on that count is null and void. Moore's complaint, however, is based on a misapprehension of the record and the law.

¶6 The criminal complaint in this matter was filed on November 3, 1992. It charged Moore with armed robbery and false imprisonment, both as party to the crime.² Moore made his initial appearance on November 14, 1992. The preliminary hearing was held on December 4, 1992, and the court found there was sufficient evidence on which Moore could be bound over for trial on the armed robbery and false imprisonment charges.

¶7 Following the court decision to bind Moore over, the State filed the *original* information, which included a charge of armed burglary, as party to a crime. On the record and in open court, defense counsel acknowledged receipt of the information and waived its reading. When counsel then asked for an adjourned arraignment to preserve Moore's right to judicial substitution, the court entered a not-guilty plea on Moore's behalf. In other words, the record demonstrates that *the original information in this case charged Moore with armed burglary prior to the arraignment*, at which a not-guilty plea was entered on all three charges.

¶8 It is simply not true that a defendant can only be tried on the specific charges for which he is bound over. The purpose of a preliminary hearing is simply to determine whether there is probable cause to believe that the defendant

² The false imprisonment charge did not specify "party to a crime" in the charge heading, but referenced the relevant statute in the charge description.

has committed *a* felony. *See* WIS. STAT. § 970.03(1) (2009-10).³ Once a defendant is properly bound over on *one* count, the State may include any transactionally related charges in the information. *See State v. White*, 2008 WI App 96, ¶11, 312 Wis. 2d 799, 754 N.W.2d 214. The armed burglary in this case is unquestionably transactionally related to the armed robbery, about which the victim testified at the preliminary hearing. There was no impropriety in the State's inclusion of armed burglary in the original information,⁴ and no erroneous or surreptitious addition of the charge at some later stage.⁵

³ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

⁴ Moore appears to believe that the armed burglary charge in this case erroneously stems from an amended complaint, filed before trial, in a different case that had been consolidated with this case. It is true that there was an amended information filed for the companion case, and that no amended information was filed in this case. As noted, however, the armed burglary in this case was charged in the original information, filed on December 4, 1992.

⁵ Moore claims that this court acknowledged the void judgment in an opinion and order denying his petition for a supervisory writ relating to a John Doe petition. We wrote:

The essence of this John Doe petition appears to be that in 1994 two felony cases against Moore were set to be tried together; that the circuit court permitted an amended information to be filed in one of the cases adding a count of armed burglary; that the court clerk erroneously added that count in both cases; and that the prosecutor proceeded to trial against Moore as if that charge was present in both cases, even though in one case that count was not charged in an information or based on probable cause shown at a preliminary hearing. Moore alleges that by these acts the clerk and prosecutor committed the crime of misconduct in public office under WIS. STAT. § 946.12 (1993-94).

We agree with the circuit judge that Moore's allegations do not support a reasonable belief that a crime was committed. *Even if we accept all of Moore's factual allegations as true*, there is nothing here to suggest that these acts were intentional, rather than the result of merely negligent error or genuine misunderstanding by the actors.

(continued)

¶9 The State requests sanctions for frivolity under *State v. Casteel*, 2001 WI App 188, 247 Wis. 2d 451, 634 N.W.2d 338, including an order limiting Moore’s future filings and making Moore “responsible for ‘the full filing fee’ for this appeal.” We decline to impose sanctions at this time, because it appears there has been some ongoing confusion about when and how the armed burglary charge was actually filed. Now that we have clarified the point, however, we caution Moore that continued litigation on points previously addressed and rejected, if such litigation is deemed frivolous, will likely subject him to sanctions. *See id.*, ¶¶23-27.

By the Court.—Order affirmed.

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

State ex rel. Joseph Lee Moore v. Circuit Ct. for Milwaukee County, No. 2008AP2346-W, unpublished slip op. and order (WI App Oct. 21, 2008) (emphasis added). However, these paragraphs merely restate Moore’s argument and provide the reason for which a writ would not issue.

