

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 11, 2012

Diane M. Fremgen
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. 2011AP698

Cir. Ct. No. 2006CF2687

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LARRY C. DUPREE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL GOULEE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Larry C. Dupree appeals an order correcting the judgment of conviction to rectify an error, but denying his motion for

postconviction relief brought pursuant to WIS. STAT. § 974.06 (2009-10).¹ Dupree argues that the circuit court lacked subject matter jurisdiction over him because he was charged with a crime not known to law. He also argues that he received ineffective assistance of trial counsel. We affirm.

¶2 Dupree was charged with conspiracy to deliver more than forty grams of cocaine, as a party to a crime. During the jury instruction conference, the circuit court amended the charge to remove the party to a crime designation, and this change was reflected in the jury instructions and the verdict. The jury convicted Dupree of conspiracy to deliver cocaine. Dupree did not appeal his conviction. Five years later, Dupree brought this motion for postconviction relief pursuant to WIS. STAT. § 974.06. The circuit court corrected the judgment of conviction to rectify an error, but otherwise denied the motion.²

¶3 Dupree first argues that the circuit court lacked subject matter jurisdiction over him because the complaint charged him with a crime not known to law, conspiracy to deliver heroin, as a party to a crime. He points to WIS. STAT. § 939.72(2), which provides: “**No conviction of both inchoate and completed crime.** A person shall not be convicted under both ... [s]ection 939.31 for conspiracy and [section] 939.05 as a party to a crime which is the objective of the conspiracy.”

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. Dupree appeals only the order, not the amended judgment of conviction.

² The original judgment of conviction incorrectly stated that Dupree had been convicted of conspiracy to deliver cocaine, as a party to a crime. By order of February 25, 2011, the circuit court ordered that the judgment of conviction be corrected to reflect the fact that Dupree was not convicted as a party to a crime.

¶4 Dupree’s argument is unavailing for two reasons. First, the crime Dupree was accused of being a party to was conspiracy, not the completed crime of delivery of cocaine. This did not violate WIS. STAT. § 939.72 because delivery of cocaine was the objective of the conspiracy. Even if Dupree had been charged with conspiracy to deliver cocaine and with being a party to delivery of cocaine, § 939.72 does not bar the State from *charging* a defendant with both crimes; it prohibits a defendant from being *convicted* of both crimes. See *State v. Moffett*, 2000 WI 130, ¶12, 239 Wis. 2d 629, 619 N.W.2d 918. Second, the circuit court amended the charge during the jury instruction conference, so Dupree was convicted of conspiracy to deliver cocaine, but not as a party to a crime. Dupree’s *conviction* did not run afoul § 939.72. We therefore reject Dupree’s argument that the circuit court lacked subject matter jurisdiction over him based on a violation of § 939.72.

¶5 Dupree next argues that he received ineffective assistance of trial counsel because his lawyer should have raised the argument that the complaint violated WIS. STAT. § 939.72. As we just explained, the complaint did not violate § 939.72. Moreover, Dupree’s lawyer *did* challenge the fact that Dupree was charged both as a conspirator and as a party to a crime at the jury instruction conference, which prompted the trial court to amend the charge. Because Dupree’s lawyer did exactly what he now complains his lawyer should have done, we reject Dupree’s claim that he received ineffective assistance of counsel.

By the Court.—Order affirmed.

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

