

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2711-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MAZEN JAWDET JABER,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County:
KITTY K. BRENNAN, Judge. *Reversed and cause remanded.*

FINE, J. Mazen Jawdet Jaber appeals from the trial court's order denying his motion, pursuant to § 971.08(2), STATS., to vacate the criminal judgment against him. The State concedes error, and joins in the defendant's request to remand for an evidentiary hearing. See *State v. Issa*, 186 Wis.2d 199, 211, 519 N.W.2d 741, 746 (Ct. App. 1994). We agree, reverse, and remand.

Section 971.08, STATS., provides, as material here:

- Pleas of guilty and no contest; withdrawal thereof.** (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
- (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
 - (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.
 - (c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."
- (2) If a court fails to advise a defendant as required by sub. (1)(c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other grounds.

The trial court denied Jaber's motion because it pegged the motion as one brought under § 974.06, STATS., and ruled that the motion was not timely because Jaber was no longer in custody. *See* § 974.06(1), STATS. (a defendant must be "in custody" or in a "volunteers in probation program" to challenge the constitutionality of his or her sentence).

The clear language of § 971.08(2), STATS., establishes the event that triggers a defendant's motion under that section as the time when the defendant is able to "show[]" that "the plea is likely to result in the defendant's

deportation, exclusion from admission to this country or denial of naturalization.” A common sense view of this provision is that the defendant's time to make the motion should not be cut off before he or she has discovered that he or she is a “likely” candidate for deportation or the other consequences identified in § 971.08(2), merely because that discovery comes after the defendant is released from custody or the “volunteers in probation program.” Accordingly, we reverse the trial court's order, and remand for further proceedings.¹

By the Court. – Order reversed and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

¹ We note that the scope of inquiry at the required evidentiary hearing is not limited to the sentencing transcript or proceedings. See *State v. Lopez*, 196 Wis.2d 725, 729–732, 539 N.W.2d 700, 701–703 (Ct. App. 1995).