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DISTRICT II

July 23, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP1967

State of Wisconsin v. David M. Hahn (L.C. #1994CF59)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

David Hahn appeals from a circuit court order denying his WIS. STAT. § 974.06 (2011-12)¹ motion seeking to withdraw a no contest plea he entered in 1994 and for which the sentence has been completed. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21. We affirm

¹ All subsequent references to the Wisconsin Statutes are to the 2011-12 version. We deem the motion filed pursuant to WIS. STAT. § 974.06 because the time to appeal the 1994 conviction under WIS. STAT. RULE 809.30 has long since expired.

because the circuit court did not have competency to decide Hahn's § 974.06 motion once Hahn was no longer in custody pursuant to his 1994 conviction.

A circuit court has the discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted). Although the circuit court did not state an explicit reason for denying Hahn's motion without a hearing, we independently review the record to determine whether it provides a basis for the circuit court's discretionary decision to deny Hahn's motion. *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). We conclude that the record supports the denial of Hahn's motion.

In 1994, Hahn pled no contest to second-degree sexual assault. The circuit court imposed a concurrent eight-year prison sentence. It is beyond dispute that Hahn is no longer in custody pursuant to the 1994 sentence. Hahn is now subject to a sentence arising from a subsequent 1998 conviction. The 1998 sentence was enhanced by the 1994 conviction.

Hahn's 2013 WIS. STAT. § 974.06 motion challenges his 1994 conviction. In the motion, Hahn alleges that in relation to the 1994 conviction, the State breached the plea agreement, and his trial counsel was ineffective for not objecting to the breach.

Being in custody under the challenged sentence is a prerequisite for WIS. STAT. § 974.06 relief. *State v. Bell*, 122 Wis. 2d 427, 431, 362 N.W.2d 443 (Ct. App. 1984); § 974.06(1) (“a prisoner in custody under sentence of a court ... may move the court” for relief from the sentence). In *Bell*, we held that the defendant could not bring a § 974.06 motion challenging his conviction because he had already completed the term of probation imposed for his crime. *Bell*, 122 Wis. 2d at 431. Similarly, because Hahn’s 1994 sentence has expired, and he is no longer in custody pursuant to that sentence, the circuit court lacked competency to proceed on his § 974.06 motion. Denial was appropriate.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals