



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

March 19, 2015

To:

Hon. Martin J. Donald
Children's Court Center
10201 W. Watertown Plank Road
Wauwatosa, WI 53226

Anne Christenson Murphy
Assistant Attorney General
P. O. Box 7857
Madison, WI 53707-7857

John Barrett, Clerk
Milwaukee County Courthouse
821 W. State Street, Room 114
Milwaukee, WI 53233

Thomas Phillip Vitrano #06661-089
US Penitentiary
P.O. Box 1000
Leavenworth, KS 66048

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

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

2014AP1464

State of Wisconsin v. Thomas Phillip Vitrano
(L.C. # 1988CF882583)

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

Thomas Phillip Vitrano, *pro se*, appeals from a circuit court order denying his motion to “reopen” his 1989 criminal case so that his postconviction motion could be considered. We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2013-14).¹ We conclude that the circuit court lacked competency to consider Vitrano’s postconviction motion because Vitrano’s sentence had expired. Therefore, we summarily affirm the order.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In 1989, Vitrano pled guilty to one count of endangering safety by conduct regardless of life. He was sentenced to three years in prison. The trial court stayed the sentence and placed Vitrano on probation. In 1990, Vitrano's probation was revoked and he served his stayed sentence. He was released from prison in 1992.

In May 2014, Vitrano filed this motion to reopen his case, asserting that he was provided ineffective assistance at the time he pled guilty and that he was not guilty of the crime. The circuit court denied the motion without a hearing. Citing *State v. Bell*, 122 Wis. 2d 427, 362 N.W.2d 443 (Ct. App. 1984), the circuit court concluded that Vitrano's sentence had expired and that Vitrano could not raise his postconviction claim at this time.²

WISCONSIN STAT. § 974.06(1) allows a defendant who believes his or her sentence is unlawful to seek relief after the time for appeal or postconviction relief under WIS. STAT. § 974.02 has expired. However, the motion must be brought by "a prisoner in custody under sentence of a court." See § 974.06(1). A defendant who completes the sentence he or she wishes to attack and is subsequently discharged from custody and supervision is not "in custody" for § 974.06 purposes. *State v. Theoharopoulos*, 72 Wis. 2d 327, 329, 240 N.W.2d 635 (1976); see also *Jessen v. State*, 95 Wis. 2d 207, 211, 290 N.W.2d 685 (1980). Further, the defendant must be in custody under the specific sentence being attacked in order to obtain relief from it. See *Theoharopoulos*, 72 Wis. 2d at 334 (noting that under the federal equivalent of § 974.06, a motion "does not lie unless the petitioner is in custody *under the sentence he desires to attack*")

² The circuit court also noted in a single sentence that Vitrano's guilty plea waived his opportunity to challenge the evidence. We do not consider this basis for the denial of Vitrano's motion. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[A]n appellate court should decide cases on the narrowest possible grounds.").

(emphasis added); *Bell*, 122 Wis. 2d at 429 (“*Theoharopoulos* clearly indicates that our supreme court meant the sentencing court which imposed *the sentence under attack*”) (emphasis and bolding added). When a defendant who does not meet the custodial prerequisite files a § 974.06 motion, the circuit court lacks competency to hear it.³ See *Theoharopoulos*, 72 Wis. 2d at 330.

Applying those standards here, we agree with the circuit court that it lacked competency to consider Vitrano’s postconviction motion because Vitrano’s sentence had expired.⁴ See *Theoharopoulos*, 72 Wis. 2d at 330. Further, the fact that Vitrano is currently in federal prison for a different conviction does not change our analysis. See *Bell*, 122 Wis. 2d at 429.

On appeal, Vitrano objects to the law concerning competency, arguing: “[E]ven if the sentence has indeed expired ... the conviction on its face should still be able to be challenged when the defendant did not understand the charges, the plea process, or the future ramifications associated with a plea of guilty, and when the defendant[’]s legal [counsel] was clearly ‘ineffective.’” This court lacks the authority to overrule, modify, or withdraw language from its prior published opinions or Wisconsin Supreme Court opinions. See *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Arguments that our prior decisions are wrong and should be reversed are more properly addressed to the Wisconsin Supreme Court. See *id.*

³ Older cases often said that courts lacked subject matter jurisdiction over such motions. See, e.g., *State v. Theoharopoulos*, 72 Wis. 2d 327, 330, 240 N.W.2d 635 (1976); *State v. Bell*, 122 Wis. 2d 427, 428, 362 N.W.2d 443 (Ct. App. 1984). Subject matter jurisdiction is conferred by the Wisconsin Constitution; “[a]ccordingly, a circuit court is never without subject matter jurisdiction.” *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶1, 273 Wis. 2d 76, 681 N.W.2d 190. Instead, a court’s inability to exercise subject matter jurisdiction in a particular case because of noncompliance with a statutory mandate pertaining to that jurisdiction is known as a lack of competency. See *id.*, ¶¶9-10.

IT IS ORDERED that the circuit court order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

⁴ Although the circuit court did not use the term competency, its reference to *Bell* demonstrates that it was following the dictates of *Bell* and *Theoharopoulos* when it concluded that Vitrano's postconviction motion could not be considered.