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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 II

April 22, 2015

To:

Hon. Kathryn W. Foster
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Kathleen A. Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Susan Lee Opper
Assistant District Attorney
515 W. Moreland Blvd., Rm. G-72
Waukesha, WI 53188-2486

Christine A. Remington
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

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

2014AP1903

State of Wisconsin v. Thomas P. Vitrano (L.C. #1995CF361)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Thomas P. Vitrano appeals pro se from an order denying his WIS. STAT. § 974.06 (2013-14)¹ motion to reopen a case he finished serving the sentence on in 1995. 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. Because the circuit court lacked competency to decide the merits of the motion, we affirm.

In May 1995 while serving a sentence with Huber privileges, Vitrano walked away from the Huber facility. The State charged him with escape. Vitrano pled no contest in July 1995 and

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

was sentenced to thirty days in the county jail. Vitrano filed a notice of intent to pursue postconviction relief but did not seek direct review of his conviction.

Vitrano now is serving a federal sentence in Leavenworth, Kansas. An enhanced federal sentence of thirty years as an armed career criminal was imposed in reliance on three Wisconsin convictions, one of them the 1995 escape charge.

On May 30, 2014, Vitrano filed a motion under WIS. STAT. § 974.06 to reopen his case. He alleged that the ineffective assistance of his counsel led him to plead no contest to escape. After a hearing to determine the motion's timeliness, the circuit court denied the motion. We construe the denial as being based on a lack of competency to entertain the motion's merits. Vitrano appeals.

After the time for appeal ... has expired, a prisoner in custody under sentence of a court ... claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

WIS. STAT. § 974.06(1).

WISCONSIN STAT. § 974.06 offers Vitrano no relief. A person must be a “prisoner in custody under sentence of a court” for the circuit court to have competency over the postconviction motion. See *State v. Bell*, 122 Wis. 2d 427, 428, 362 N.W.2d 443 (Ct. App.

1984) (quoting § 974.06(1)).² Specifically, he or she must be in custody under the sentence of the court that imposed the sentence under attack. *Bell*, 122 Wis. 2d at 429. Custody due to the unrelated sentence of a court in another jurisdiction does not suffice. *See id.* Therefore, once discharged from his 1995 state sentence, Vitrano no longer was “in custody under a sentence of a court” within the meaning of § 974.06. *See Bell*, 122 Wis. 2d at 431.

Competency is “a threshold requirement which must be satisfied before the circuit court may act.” *Brandt v. LIRC*, 166 Wis. 2d 623, 630, 480 N.W.2d 494 (1992) (citation omitted); *see also State v. Theoharopoulos*, 72 Wis. 2d 327, 334, 240 N.W.2d 635 (1976) (“For jurisdiction, the prisoner must be in custody under the sentence of a state court.”). That prerequisite for vesting in the circuit court competency to address the WIS. STAT. § 974.06 proceeding was not met. *See Bell*, 122 Wis. 2d at 431. Dismissal therefore was proper. *Brandt*, 166 Wis. 2d at 627. Therefore,

² *State v. Bell*, 122 Wis. 2d 427, 362 N.W.2d 443 (Ct. App. 1984), refers to subject matter jurisdiction rather than competency to proceed.

Competency is a narrower concept than subject matter jurisdiction and is grounded in the court’s power to exercise its subject matter jurisdiction. Although a court is vested with subject matter jurisdiction by the constitution, the legislature may enact statutes which limit a court’s power to exercise subject matter jurisdiction. Such legislative measures affect a court’s competency rather than its jurisdiction.

Kohler Co. v. Wixen, 204 Wis. 2d 327, 336-37, 555 N.W.2d 640 (Ct. App. 1996) (citation omitted).

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