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DISTRICT I

September 22, 2016

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

2014AP1807 State v. Walter Richard Burnley (L.C. # 1996CF963270)

Before Kessler, Brennan, JJ., and Daniel L. LaRocque, Reserve Judge.

Walter Burnley, *pro se*, appeals the circuit court's order denying his postconviction motion seeking to vacate his 1997 conviction for first-degree reckless injury. The issue is whether the circuit court properly denied the motion because Burnley is no longer in custody in connection with the conviction. After review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm.

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

To challenge a conviction by postconviction motion pursuant to WIS. STAT. § 974.06, a defendant must be in custody serving the sentence for the conviction. ***State v. Bell***, 122 Wis. 2d 427, 429, 362 N.W.2d 443 (Ct. App. 1984). When a defendant who is not in custody brings a motion for postconviction relief under § 974.06, the circuit court lacks competency to hear the motion and must dismiss it. *See* ***State v. Theoharopoulos***, 72 Wis. 2d 327, 329, 240 N.W.2d 635 (1976). Burnley served his sentence for first-degree reckless injury and was discharged from custody for this conviction by the Department of Corrections in 2004. Because Burnley was no longer in custody in connection with his conviction, the circuit court properly concluded that it could not grant Burnley relief.

Burnley argues that this procedural bar does not apply to him because he is actually innocent of the crime, relying on ***McQuiggin v. Perkins***, 133 S. Ct. 1924, 1928 (2013). In ***McQuiggin***, the United States Supreme Court held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass" regardless of any procedural bar or statute of limitations. ***Id.*** Burnley's reliance on ***McQuiggin*** is misplaced. ***McQuiggin*** applies to persons seeking federal *habeas* review. It does not apply where, as here, a person is seeking state postconviction relief under WIS. STAT. § 974.06.

Burnley next argues that we should construe his motion for postconviction relief under WIS. STAT. § 974.06 as a writ of error *coram nobis*. A writ of error *coram nobis* "is a tool that enables a trial court to remove erroneous facts from the record and correct its judgment." ***State v. Heimermann***, 205 Wis. 2d 376, 379, 556 N.W.2d 756 (Ct. App. 1996). It is a common law remedy that may be sought when "no other remedy is available." ***Id.*** at 384. We will not construe Burnley's motion as a writ of error *coram nobis* because the circuit court did not have the opportunity to consider Burnley's claims in that context. *See* ***State v. Caban***, 210 Wis. 2d

597, 604, 563 N.W.2d 501 (1997) (the general rule is that we will not consider issues raised for the first time on appeal). Upon the foregoing,

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

Diane M. Fremgen
Clerk of Court of Appeals