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May 30, 2018

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

2017AP1389

State of Wisconsin v. Mark A. Krieger (L.C.# 1996CF152)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Mark Krieger appeals from a circuit court order denying his WIS. STAT. § 974.06 (2015-16)¹ motion to withdraw the guilty plea he entered in 1996. Based upon our review of the briefs

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We reverse the circuit court's order because the court lacked competency to address Krieger's motion once Krieger was no longer subject to the sentence arising from his 1996 guilty plea.² We remand to the circuit court to vacate its order and dismiss Krieger's § 974.06 motion.

In December 1996, Krieger pled guilty to a drug offense and received a three-year prison term, stayed, two years of probation, sixty days in jail, a fine and costs. Krieger was discharged from his sentence in December 1998.

In June 2016, Krieger, who was no longer subject to the sentence imposed in this case, moved the circuit court to withdraw his guilty plea because the circuit court failed to establish that he understood the nature of the charge, the potential punishment, and the constitutional rights waived by his guilty plea. The circuit court held an evidentiary hearing on the motion and denied the motion on the merits. Krieger appeals.

As applicable to this case, criminal defendants have two primary avenues for relief from a conviction: (1) direct appeal pursuant to WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30 and (2) collateral attack pursuant to WIS. STAT. § 974.06 or a petition for a writ of habeas corpus. *State v. Henley*, 2010 WI 97, ¶44, 328 Wis. 2d 544, 787 N.W.2d 350.³ Krieger's direct appeal

² Even if the State did not make this argument in the circuit court, which we do not decide, we may exercise our discretion to decide the appeal on this basis. *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987).

³ In his reply brief, Krieger states that his motion was not brought as a writ of error *coram nobis*. Therefore, we do not address this avenue for relief. *State v. Henley*, 2010 WI 97, ¶53 n.21, 328 Wis. 2d 544, 787 N.W.2d 350.

rights expired in 1997. While Krieger’s reply brief denies that his plea withdrawal motion was brought pursuant to § 974.06, we conclude that the motion was necessarily brought pursuant to § 974.06 because the other avenues for postconviction relief do not apply.

A defendant seeking WIS. STAT. § 974.06 relief must be in custody under the sentence being challenged. Sec. 974.06(1). A defendant who has completed a sentence and has been discharged from custody is not “in custody” for purposes of seeking § 974.06 relief. *State v. Theoharopoulos*, 72 Wis. 2d 327, 329-30, 240 N.W.2d 635 (1976). It is undisputed that Krieger was no longer in custody in relation to his sentence. Therefore, the circuit court lacked competency to entertain Krieger’s motion. See *id.*; see *State v. Bell*, 122 Wis. 2d 427, 431, 362 N.W.2d 443 (Ct. App. 1984).⁴

Krieger does not cite any authority for the proposition that a circuit court has inherent authority to address a plea withdrawal motion after a defendant is no longer in custody. *Henley* indicates that such inherent authority does not exist. Cf. *Henley*, 328 Wis. 2d 544, ¶76 (no inherent authority to order new trial in the interest of justice).

Because the circuit court lacked competency to address Krieger’s WIS. STAT. § 974.06 motion on the merits, we summarily reverse the circuit court’s order denying the motion and

⁴ *State v. Theoharopoulos*, 72 Wis. 2d 327, 240 N.W.2d 635 (1976), and *State v. Bell*, 122 Wis. 2d 427, 362 N.W.2d 443 (Ct. App. 1984), speak in terms of subject matter jurisdiction. “[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. A court’s inability to act in a particular case because of noncompliance with a statutory mandate is a lack of competency, not a lack of subject matter jurisdiction. *Id.*, ¶¶ 9–10.

remand to the circuit court with directions to vacate the order and dismiss Krieger's § 974.06 motion. *Theoharopolous*, 72 Wis. 2d at 334.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed pursuant to Wis. STAT. RULE 809.21 and the cause is remanded with directions.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals