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March 16, 2021

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

2019AP903 State of Wisconsin v. Haneef H. Chestnut (L.C. # 2005CF3997)

Before Dugan, Graham and White, 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).

Haneef H. Chestnut appeals from a circuit court order dismissing the motion for postconviction relief that he filed pursuant to WIS. STAT. § 974.06 (2019-20).[1] Based upon our

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

By way of background, Chestnut was convicted of possessing more than 40 grams of cocaine with intent to deliver as a second or subsequent offense. He was sentenced to four years of initial confinement followed by six years of extended supervision. Chestnut was released on extended supervision in April 2009, his extended supervision was revoked in August 2015 after a formal administrative hearing, and he returned to prison to serve the balance of his sentence.

In March 2019, Chestnut filed a WIS. STAT. § 974.06 motion to vacate the revocation order because, he asserted, the administrative process used to revoke his extended supervision was unconstitutional. The circuit court dismissed the motion. It reasoned that Chestnut's claims could not be addressed in a § 974.06 motion because he was not challenging his underlying conviction or the imposition of his sentence.[2] The court also noted that there was no indication that Chestnut complied with WIS. STAT. § 806.04(11), which requires any party challenging the constitutionality of a statute to serve a copy of the proceeding on the attorney general's office.

Chestnut appealed, and after the appeal was docketed, a dispute arose over whether he is required to pay an appellate filing fee pursuant to WIS. STAT. § 809.25(2). The clerk of the court of appeals ordered Chestnut to pay a filing fee and, approximately one month later, we extended his deadline for doing so. Rather than paying the fee, Chestnut submitted an affidavit of

[2] In its order, the circuit court indicated that it lacked jurisdiction to hear the motion, but the appropriate term for this situation is competency. *See* ***State v. Smith***, 2005 WI 104, ¶18, 283 Wis. 2d 57, 699 N.W.2d 508 (providing that competency is "'the power of a court to exercise its subject matter jurisdiction' in a particular case" (citation omitted)). Nevertheless, the court's mistaken use of the word jurisdiction has no bearing on the outcome of this appeal.

indigency. However, the affidavit was incomplete, and this court again extended Chestnut's deadline for filing a complete fee waiver application. In response, Chestnut argued that he was not required to pay a filing fee, and we ordered him to address the fee issue in his appellate brief. We address Chestnut's arguments about the filing fee before turning to the circuit court order that is the subject of his appeal.

WISCONSIN STAT. § 809.25(2) provides that the clerk of the court of appeals shall charge a $195 fee for filing an appeal. The filing fee is waived for appellants who are determined to be indigent pursuant to WIS. STAT. § 814.29(1)(a). The requirements for demonstrating indigency are heightened for appellants who are "prisoners," as that term is defined for purposes of Wisconsin's Prison Litigation Reform Act (PLRA), WIS. STAT. § 801.02(7)(a)2. Under the PLRA, prisoners may be found to be indigent if they satisfy the requirements of § 814.29(1)(a) plus additional PLRA-specific requirements found in § 814.29(1m).[3]

Chestnut argues that he is not required to pay an appellate filing fee because he is not a prisoner within the meaning of the PLRA. He contends that, although he is incarcerated, he meets one of the statutory exemptions because this is a collateral criminal appeal from an order dismissing his WIS. STAT. § 974.06 motion for postconviction relief. We agree with the State that Chestnut's argument is based on a fundamental misunderstanding of the statutes governing appellate fees, fee waivers, and the PLRA.

[3] For example, WIS. STAT. § 814.29(1m)(d) requires prisoners with money in their prison trust accounts to use those funds to satisfy the filing fee necessary to initiate a civil action.

First, with exceptions that are not applicable here, all appellants, even those who are not subject to the PLRA, must pay an appellate filing fee unless they are determined to be indigent under WIS. STAT. § 814.29(1). Chestnut does not allege in his appellate brief that he is indigent, nor does he allege that he has satisfied the requirements set forth in § 814.29(1).

Second, for reasons we now explain, Chestnut's argument that he is not a prisoner within the meaning of the PLRA is unfounded. Therefore, to be entitled to a fee waiver, Chestnut is required to satisfy not only the requirements of WIS. STAT. § 814.29(1), but also the additional PLRA-specific requirements in § 814.29(1m).

The relevant sections of the PLRA define "prisoner" to mean "any person who is incarcerated, imprisoned, or otherwise detained in a correctional institution …." WIS. STAT. § 801.02(7)(a)2. There is, however, an exemption carved out for persons who are "bringing an action seeking relief from a judgment of conviction or a sentence of a court, including an action for an extraordinary writ or a supervisory writ … or an action under s. 809.30, 809.40, 973.19, 974.06 or 974.07." *See* § 801.02(7)(a)2.c. Chestnut contends that he falls within this exemption because he is "seeking relief from … a sentence of a court … under … [WIS. STAT. §] 974.06." However, he is actually attempting to challenge the revocation of his extended supervision, and this type of relief is not excluded from the PLRA's requirements.

Our supreme court addressed a similar situation in ***State ex rel. Cramer v. Schwarz***, 2000 WI 86, 236 Wis. 2d 473, 613 N.W.2d 591. In that case, Cramer, an incarcerated individual, filed a writ of certiorari challenging a probation revocation decision. He claimed that his writ was not subject to the PLRA because he was challenging the sentence that had been imposed in his criminal case. Our supreme court disagreed. It explained that the statutory phrase "relief from a

judgment of conviction or a sentence of a court" was unambiguous, ***id.***, ¶24, and that "WIS. STAT. § 801.02(7)(a)2.c. contemplates challenges to a conviction or sentence, not attacks on a subsequent civil determination, such as probation revocation," ***id.***, ¶33. *See also* ***State ex rel. Marth v. Smith***, 224 Wis. 2d 578, 582-84, 592 N.W.2d 307 (Ct. App. 1999) (per curiam) (holding that the exemption from the definition of "prisoner" is not met when one files a habeas corpus petition challenging the revocation of probation).

Likewise, here, Chestnut claims to be challenging his "supervised release sentence," but this argument is unavailing. In ***Cramer***, our supreme court instructed us to look to the relief actually sought, rather than the label used by the appellant, when determining whether a legal claim is subject to the PLRA. *See* ***Cramer***, 236 Wis. 2d 473, ¶34 ("[r]elabeling the challenge as an attack on the sentence" could not save Cramer's challenge from the requirements of the PLRA). As with revocation of probation, a revocation of extended supervision is a subsequent civil determination, and Chestnut's challenge to this determination is not an attack on his conviction or sentence.

Chestnut does not attempt to distinguish ***Cramer*** by arguing that revocation of extended supervision is meaningfully different from probation revocation, or that a motion under WIS. STAT. § 974.06 is meaningfully different from a writ of certiorari. He instead urges us to conclude that ***Cramer*** and ***Marth*** are "unauthorized" and "void" because they rely on ***Newlin v. Helman***, 123 F.3d 429 (7th Cir. 1997), a Seventh Circuit case which has been overruled. This argument is unavailing for at least the following three reasons. First, ***Newlin*** was interpreting the reach of the federal Prison Litigation Reform Act, not its Wisconsin counterpart that governs this case. *See* ***id.*** at 431; *see also* ***Marth***, 224 Wis. 2d at 582-83. Second, the ***Cramer*** court held that the Wisconsin PLRA was more far-reaching than the federal legislation that inspired it. ***Cramer***,

236 Wis. 2d 473, ¶¶39-40. Finally, this court is bound to follow the interpretation of the Wisconsin PLRA set forth in ***Cramer*** and ***Marth*** unless those cases are overruled or abrogated by statutory amendment. *See* ***Cook v. Cook,*** 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).[4]

In sum, Chestnut falls within the statutory definition of "prisoner" under the PLRA and does not meet the WIS. STAT. § 801.02(7)(a)2.c. exception. Accordingly, we direct Chestnut's counsel to pay the appellate filing fee required by WIS. STAT. RULE 809.25(2) unless Chestnut is able to demonstrate that he is indigent based on the requirements set forth in WIS. STAT. § 814.29(1) and (1m).

Ordinarily, we would end our inquiry here and decline to decide the merits of Chestnut's appeal until after the clerk's office received the filing fee. Here, however, the parties have fully briefed the issue, its resolution is a straightforward matter, and it would not serve judicial economy to withhold our decision until a later date. Accordingly, under these unique circumstances, we also address whether the circuit court properly dismissed Chestnut's postconviction motion because it lacked competency to decide the issues Chestnut raised. "Whether a circuit court has lost competency is a question of law that we review independently." ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶7, 273 Wis. 2d 76, 681 N.W.2d 190.

[4] We also reject Chestnut's underdeveloped argument that WIS. STAT. § 895.044(7) exempts him from paying the appellate filing fee. Section 895.044 addresses civil liability for costs and fees for commencing, using, or continuing a frivolous action, and it allows courts to award costs and fees to parties or their attorneys under certain circumstances, such as when a lawsuit "was commenced … in bad faith." Sec. 895.044(1)(a). Section 895.044 has no bearing on appellate filing fees, which are paid to the clerk of court and are not an item of damages for filing frivolous actions.

Chestnut argues that the circuit court erroneously dismissed his postconviction motion. Specifically, he points to WIS. STAT. § 974.06 and seems to suggest that the plain language of the statute permits his constitutional challenge to the process used to revoke his supervised release.

We disagree. Section 974.06 is available to persons in custody who, among other things, claim that their "sentence was imposed in violation of the U.S. constitution or the laws of this state," and it allows such persons to "move the court which imposed the sentence to vacate, set aside or correct the sentence." Sec. 974.06(1). In ***State v. Johnson,*** 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981), we explained that "relief under sec. 974.06, Stats., is available only to a prisoner attacking the imposition of his sentence." Here, Chestnut is challenging the execution of his sentence, rather than its imposition. To be clear, a sentence is not "imposed" at the time a decision is made to revoke community supervision.[5] As we have explained, a sentence is "imposed at the time of sentencing" unless the circuit court withholds the sentence, which did not occur in this case. ***State v. Thompson***, 208 Wis. 2d 253, 256-57, 559 N.W.2d 917 (Ct. App. 1997); *see also* ***State v. Cole***, 2000 WI App 52, ¶7, 233 Wis. 2d 577, 608 N.W.2d 432 (quoting ***Thompson***, 208 Wis. 2d at 256-57.) A revocation proceeding "merely triggers the execution or implementation of the sentence," not its imposition. ***Thompson***, 208 Wis. 2d at 257.

Chestnut further argues that he is attacking the supervised release statutes themselves, not the revocation decision. Chestnut may intend to challenge the constitutionality of the supervised release statutes, but that does not mean that he can do so in a proceeding under WIS. STAT.

[5] "Probation, parole and extended supervision all involve persons under community supervision." ***State v. Rowan***, 2012 WI 60, ¶10, 341 Wis. 2d 281, 814 N.W.2d 854.

§ 974.06. Nothing in § 974.06 authorizes declaratory relief. If Chestnut wanted to challenge the constitutionality of the revocation process, he was required to seek relief through an action for certiorari, as provided in WIS. STAT. § 302.113(9)(g).[6]

Therefore, we summarily affirm the circuit court's order, which properly dismissed Chestnut's motion because the court lacked competency to grant the relief he requested. Having determined that the circuit court properly dismissed Chestnut's motion, we need not address the parties' remaining arguments, which include, among other things, Chestnut's admitted noncompliance with WIS. STAT. § 806.04(11) for failing to timely serve the attorney general's office.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this matter is subject to the $195 filing fee, and within thirty (30) days of the date of this order, the fee must be received by the clerk of this court, unless Chestnut completes the petition for waiver of the filing fee by forwarding a certified copy of his trust fund account statement and a completed authorization to withhold funds, pursuant to WIS. STAT. § 814.29(1m), to the clerk of this court.

[6] We also reject Chestnut's argument that "certiorari is not available because he is not challenging the constitutionality of the revocation determination." Constitutional challenges may be raised in certiorari actions following revocation decisions. *See* ***State ex rel. Saffold v. Schwarz***, 2001 WI App 56, ¶¶1, 6-7, 241 Wis. 2d 253, 625 N.W.2d 333.

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

Sheila T. Reiff
Clerk of Court of Appeals