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**DISTRICT II**

July 31, 2024

To:

Hon. Kent R. Hoffmann  
Circuit Court Judge  
Electronic Notice

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Chris Koenig  
Clerk of Circuit Court  
Sheboygan County Courthouse  
Electronic Notice

Macaulay T. Krueger #570850  
Green Bay Correctional Inst.  
P.O. Box 19033  
Green Bay, WI 54307-9033

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

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2023AP1079

State v. Macaulay T. Krueger (L.C. #2010CF307)

Before Neubauer, Grogan and Lazar, 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).**

Macaulay T. Krueger, pro se, appeals an order denying his petition for a writ of coram nobis. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).<sup>1</sup> We affirm.

In 2010, following a consolidated jury trial, Krueger was convicted of three counts of causing a child under the age of thirteen to view sexually explicit conduct in two cases. In the first case, which is the subject of the current appeal, Krueger was accused of twice exposing

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

himself to a then eleven-year-old boy, Bill.<sup>2</sup> On the first occasion, Krueger put a condom on his own erect penis in front of Bill. On the second occasion, Krueger masturbated in front of Bill. In the second case, Krueger was accused of exposing himself to a then eleven-year-old girl by putting a condom on his own erect penis in front of her.

Krueger has filed multiple postconviction motions and appeals, challenging his convictions. In 2023, Krueger filed the present petition for writ of coram nobis, challenging only one of his convictions, the one involving his putting on a condom in front of Bill. The circuit court denied the petition without a hearing, recognizing that Krueger had raised the same issue in numerous prior motions for postconviction relief and concluding that Krueger's claim was procedurally barred. Krueger appeals.

“The writ of coram nobis is a common law remedy which empowers the trial court to correct its own record.” *State v. Heimermann*, 205 Wis. 2d 376, 381-82, 556 N.W.2d 756 (Ct. App. 1996). The writ “give[s] the trial court an opportunity to correct its own record of an error of fact not appearing on the record and which error would not have been committed by the court if the matter had been brought to the attention of the trial court.” *State ex rel. Patel v. State*, 2012 WI App 117, ¶12, 344 Wis. 2d 405, 824 N.W.2d 862 (citation omitted). Coram nobis is not used to “correct errors of law and of fact appearing on the record since such errors are traditionally corrected by appeals and writs of error.” *Id.*, ¶13 (citation omitted).

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<sup>2</sup> Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym when referring to the victim in this case (“Bill”).

A person seeking a writ of coram nobis must establish, in part, “the existence of an error of fact which was unknown at the time of trial and which is of such a nature that knowledge of its existence at the time of trial would have prevented the entry of judgment.” *Heimermann*, 205 Wis. 2d at 383 (citation omitted). This means that a petitioner “must not only identify a mistake in the record, but this part of the record must have also been crucial to the court’s ultimate findings.” *Id.* There is also a procedural limitation on the writ—the alleged factual error “must not have been previously visited or ‘passed on’ by the trial court.” *Id.* at 384. “[A] writ of *coram nobis* may not be used to simply revisit [an] issue.” *Id.* at 383.

In his petition, Krueger first argued he is entitled to coram nobis relief because “[t]here is no statement in the Trial transcript/not testified to ... whereas [Bill] states that Krueger touched Krueger’s penis ‘to make it erect.’” However, Krueger is not entitled to coram nobis relief because his claim is contradicted by the record itself. At trial, when discussing the condom incident, the State asked Bill whether Krueger did “anything to get his penis erect?” Bill answered, “When he took his pants off and started kind of stroking it in a way kind of like -- I can’t explain it.” The State asked, “Did he touch it?” Bill answered, “Yes.” Accordingly, Krueger is not entitled to coram nobis relief on his first claim because there is no factual error for this court to correct.

In his petition, Krueger next argued he is entitled to coram nobis relief because the amended criminal complaint did not inform him of the “nature and cause” against him. Krueger believes he was “not found guilty of putting a condom on in front of [Bill], which was the nature and cause of accusation in the criminal complaint” but was found “guilty of an act that was not stated in the criminal complaint of touching his penis to make it erect.” Krueger argues that putting on the condom was not a lewd act because the circuit court found that his “showing [Bill]

how to put a condom on by Krueger putting a condom on Krueger's erect penis in front of [Bill] was not lewd." (Emphasis omitted.)

This claim is not properly raised in a petition for writ of coram nobis because it does not allege "an error of fact not appearing on the record and which error would not have been committed by the court if the matter had been brought to the attention of the trial court." *See Patel*, 344 Wis. 2d 405, ¶12 (citation omitted). The facts underlying this claim are plainly in the record, i.e., in the amended criminal complaint.

In any event, Krueger cannot demonstrate that any alleged factual error was not "previously visited or 'passed on' by the trial court." *See Heimermann*, 205 Wis. 2d at 384. Contrary to Krueger's assertion, the circuit court did not find that Krueger's act of putting a condom on his erect penis in front of Bill was not lewd. Although Krueger's counsel made that argument in support of a motion for a judgment of acquittal, the circuit court denied the motion on the basis that there was sufficient evidence presented of which the jury could determine Krueger's conduct was sexually explicit. Then, in our opinion affirming Krueger's conviction and denying his motion for postconviction relief, we recognized that the evidence at trial, specifically testimony that Krueger put a condom on his erect penis in front of a child, was sufficient to support the jury's determination that Krueger caused Bill to view sexually explicit conduct. *State v. Krueger*, Nos. 2012AP51-CR and 2012AP52-CR, unpublished slip op. ¶¶11-12 (WI App Mar. 13, 2013). We also concluded the evidence that "Krueger had a preoccupation with his penis," and "either had an erection or touched himself to get to that point," was sufficient for the jury to find that "Krueger acted with the purpose of sexually gratifying himself." *Id.*, ¶14. Krueger is not entitled to coram nobis relief on this issue.

Finally, in his petition, Krueger argued that his trial, which commenced after his first trial ended in a mistrial, “constitute[d] double jeopardy.” Krueger asserts the factual error that needs to be corrected is

the court stated that there is no bar to double jeopardy based on [*State v.*] *Copening*, [100 Wis. 2d 700, 303 N.W.2d 821 (1981)] and that Krueger must meet *Copening*, when the proper case law to the defense[']s arguments is [*State v.*] *Lettice*, [221 Wis. 2d 69, 585 N.W.2d 171 (Ct. App. 1998)] where Krueger clearly is due the relief of double jeopardy.

We disagree. Even if the circuit court applied the wrong case, which it did not, that would be an error of law, not one of fact, and a writ of coram nobis does not correct an error of law. See *Patel*, 344 Wis. 2d 405, ¶13. In any event, Krueger’s claim fails because he already raised a double jeopardy claim, the circuit court rejected it, and we affirmed. *Krueger*, Nos. 2012AP51-CR and 2012AP52-CR, ¶¶8, 24-31. He therefore is not entitled to coram nobis relief with respect to this last issue.

Because Krueger’s petition fails to demonstrate a factual error that has not previously been considered or passed on by the circuit court, he is not entitled to coram nobis relief. The circuit court properly denied his petition without a hearing. See *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds*, WIS. STAT. § 940.225(7) (concluding that this court may affirm a circuit court’s decision on other grounds).<sup>3</sup>

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<sup>3</sup> The circuit court denied Krueger’s petition for coram nobis because it recognized that Krueger had raised his claims previously, and it concluded that he was therefore barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), from raising them again. However, *Escalona-Naranjo* is not a bar to a petition for a writ of coram nobis. *State v. Heimermann*, 205 Wis. 2d 376, 385, 556 N.W.2d 756 (Ct. App. 1996). In *Heimermann*, we determined that *Escalona-Naranjo*

(continued)

Upon the foregoing,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*

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applies to motions under WIS. STAT. § 974.06, which a defendant can bring only when he or she is in custody, while a defendant can only bring a petition for a writ of coram nobis when he or she is not in custody. *Id.*