

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1888

Cir. Ct. No. 2009CV8041

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. VIRGIL SMITH,

PETITIONER-APPELLANT,

V.

GERALD A. BERGE, WARDEN, WISCONSIN SECURE PROGRAM FACILITY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Virgil Smith, *pro se*, appeals from a circuit court order dismissing his petition for a writ of *habeas corpus*. Smith, who originally filed his petition in Grant County, argues: (1) the circuit court in Grant County erred when it transferred venue to Milwaukee County; (2) the circuit court in

Milwaukee County should not have dismissed his petition; and (3) he is entitled to receive \$1000 from two judges who reviewed his petition, pursuant to WIS. STAT. § 782.09 (2009–10).¹ We reject Smith’s arguments and affirm the order dismissing his petition for a writ of *habeas corpus*.²

BACKGROUND

¶2 A Milwaukee County jury found Smith guilty of kidnapping and second-degree sexual assault with the use of force. Smith appealed and we affirmed his conviction. See *State v. Smith*, No. 2005AP525-CR (WI App. January 10, 2006).

¶3 In May 2009, Smith filed a petition for a writ of *habeas corpus* in Grant County, along with memoranda of law, personal affidavits and exhibits totaling over 240 pages.³ The documents discussed a variety of issues related to Smith’s conviction, including the destruction of evidence, alleged trial court errors and the performance of trial counsel and postconviction counsel. On May 14,

¹ All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

² Smith’s brief consists of fifty single-spaced, handwritten pages in which he raises many issues, some of which do not appear to have been raised below. His reply brief adds another thirteen pages of argument and case citations. We have carefully reviewed the Record and we are unconvinced that Smith has raised any issue on appeal that entitles him to relief from the circuit court’s order. Those arguments that we do not specifically address in this opinion are denied on grounds that they are unpersuasive, undeveloped or raised for the first time on appeal. See *State v. Champlain*, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 245, 744 N.W.2d 889, 895 (“We generally do not review an issue raised for the first time on appeal.”); *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court “may decline to review issues inadequately briefed”); see also *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

³ Whether there was actually a document entitled “Petition for a Writ of *Habeas Corpus*” is an issue we address in the discussion section of this opinion.

2009, the Grant County Circuit Court issued an order transferring venue to the Milwaukee County Circuit Court on grounds that venue was proper in Milwaukee County pursuant to WIS. STAT. § 801.50(4)(a).⁴

¶4 Once the petition was before the Milwaukee County Circuit Court, the State moved to dismiss the petition. The trial court granted the motion on several bases, including that Smith had not pursued relief under WIS. STAT. § 974.06. This appeal follows.

STANDARDS OF REVIEW

¶5 At issue is the denial of Smith’s petition for a writ of *habeas corpus*. “A circuit court’s order denying a petition for writ of *habeas corpus* presents a mixed question of fact and law.” *State v. Pozo*, 2002 WI App 279, ¶6, 258 Wis. 2d 796, 801, 654 N.W.2d 12, 14–15. “Factual determinations will not be reversed unless clearly erroneous,” but the issue of “[w]hether a writ of *habeas corpus* is available to the party seeking relief is a question of the law that we review *de novo*.” *Id.*, 2002 WI App 279, ¶6, 258 Wis. 2d at 801, 654 N.W.2d at 15.

¶6 In this appeal we are also called upon to interpret statutes. Statutory interpretation presents a question of law that appellate courts review *de novo*.

⁴ WISCONSIN STAT. § 801.50 provides in relevant part:

(4) Venue of an action seeking a remedy available by *habeas corpus* shall be in the county:

(a) Where the plaintiff was convicted or sentenced if the action seeks relief from a judgment of conviction or sentence under which the plaintiff’s liberty is restrained.

Rechsteiner v. Hazelden, 2008 WI 97, ¶26, 313 Wis. 2d 542, 557, 753 N.W.2d 496, 504.

DISCUSSION

¶7 Smith presents three arguments on appeal: (1) the Grant County Circuit Court erroneously transferred venue to Milwaukee County; (2) the Milwaukee County Circuit Court should not have dismissed the petition; and (3) Smith is entitled to \$1000 from the Grant County and Milwaukee County judges that acted on his petition. We consider each argument in turn. But first, we briefly discuss the state of the appellate Record and our approach to analyzing the Record in this case.

I. State of the appellate Record.

¶8 While this appeal was pending, Smith filed numerous motions, including a motion to correct the Record. Smith asserted that the Record did not contain the petition for a writ of *habeas corpus* that he filed in Grant County. We requested information from the State and then, in a written order, we determined that there were disputed facts concerning whether a document was missing. We remanded the matter to the circuit court to resolve the factual dispute.

¶9 The circuit court issued an order explaining that it could not determine whether the Grant County Circuit Court had construed Smith's voluminous filing as a petition, or whether Smith had actually filed a document entitled "Petition for Writ of *Habeas Corpus*" that was not subsequently forwarded to Milwaukee County. The circuit court directed Smith "to supplement the Record with a copy of his 'Petition for Writ of *Habeas Corpus*,' that was allegedly filed on May 4, 2009 with the Grant County Circuit Court."

¶10 In response, Smith filed a nine-page, handwritten letter raising numerous issues, including an assertion that the Milwaukee County Circuit Court had intentionally destroyed his petition “because it will show proof that [the circuit court’s] 6-9-09 order dismissing the writ is clearly erroneous, among other things.”⁵ Smith’s letter stated that he had a copy of the 140-page petition, but he would not provide it to the circuit court that “took part in the destruction” of the petition that was in the Record. Smith’s letter stated that he would “supplement the record” with the petition by filing it in the Court of Appeals.

¶11 In light of Smith’s response, we held that he could not supplement the Record with the petition he allegedly filed in Grant County. We reasoned: “The circuit court gave Smith an opportunity to demonstrate that the [R]ecord should include additional materials and to provide the materials that are allegedly missing. Smith’s failure to submit additional materials constitutes a waiver.” We also noted that this court would not consider documents outside the official court Record.

¶12 Having reviewed the Record, it is clear that the Milwaukee County Circuit Court considered Smith’s voluminous filings as if they were his petition, and we will do the same. Smith’s numerous memoranda of law, affidavits and exhibits provide numerous arguments in support of a petition for a writ of *habeas corpus*, and his appellate briefs present the same arguments.

⁵ There is no evidence in the Record that supports Smith’s assertion that any court official intentionally destroyed documents related to this case.

II. Venue.

¶13 Smith argues that the Grant County Circuit Court erroneously exercised its discretion when it transferred venue to Milwaukee County. Smith appears to take issue with the fact that the circuit court did not provide him an opportunity to be heard prior to transferring venue, but he offers no persuasive argument why the case was not required to be venued in Milwaukee County.

¶14 WISCONSIN STAT. § 801.50(4) governs venue in *habeas corpus* cases. Pursuant to that statute, if the individual is seeking *habeas* relief “from a judgment of conviction or sentence under which the plaintiff’s liberty is restrained,” then venue “shall be in the county” where the individual “was convicted or sentenced.” See § 801.50(4)(a). Because Smith is challenging his conviction, venue was proper in Milwaukee County, where Smith was convicted and sentenced, and not in Grant County, where Smith was incarcerated. See *id.* Therefore, the circuit court did not err when it transferred venue to Milwaukee County.

III. Denial of the petition for a writ of *habeas corpus*.

¶15 In *Pozo*, we outlined the law that applies when considering a petition for a writ of *habeas corpus*:

Writ of *habeas corpus* is an equitable remedy that protects a person’s right to personal liberty by freeing him or her from illegal confinement. It arises in common law and is guaranteed by the state and federal constitutions, as well as by statute. Because it is an extraordinary writ, *habeas corpus* relief is available only where the petitioner demonstrates: (1) restraint of his or her liberty, (2) which restraint was imposed contrary to constitutional protections or by a body lacking jurisdiction and (3) no other adequate remedy available at law. *Habeas corpus* is not a substitute for appeal and therefore, a writ will not be issued where the

petitioner has an otherwise adequate remedy that he or she may exercise to obtain the same relief.

Id., 2002 WI App 279, ¶8, 258 Wis. 2d at 801–802, 654 N.W.2d at 15 (citations, quotation marks and footnotes omitted). WISCONSIN STAT. § 974.06(8) is a statutory provision that explains “the availability, or lack thereof, of writ of *habeas corpus* in postconviction proceedings.” *Pozo*, 2002 WI App 279, ¶9, 258 Wis. 2d at 802, 654 N.W.2d at 15. Section 974.06(8) provides in relevant part:

A petition for a writ of habeas corpus or an action seeking that remedy in behalf of a person who is authorized to apply for relief by motion under this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced the person, or that the court has denied the person relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his or her detention.

¶16 In this case, Smith never filed a WIS. STAT. § 974.06 motion alleging ineffective assistance of postconviction counsel or other errors. Yet, his arguments in filings with the circuit court and on appeal allege ineffective assistance of postconviction counsel and trial counsel, trial court error and constitutional violations—issues that should be raised in a § 974.06 motion. We conclude that WIS. STAT. § 974.06 provides a potential remedy at law and, therefore, *habeas corpus* relief is not available to Smith at this time. *See Pozo*, 2002 WI App 279, ¶8, 258 Wis. 2d at 802, 654 N.W.2d at 15; *see also* § 974.06(8) (*habeas corpus* relief is not available if applicant fails “to apply for relief, by motion, to the court which sentenced the person”).

¶17 Smith argues that a WIS. STAT. § 974.06 motion does not provide an adequate remedy for him because “Judge Jean DiMotto has an interest in the

outcome.”⁶ Smith contends that Judge DiMotto would not have recused herself because his claims are so strong that they would have required “automatic reversal” and would subject the judge to civil damages. Thus, he concludes, because Judge DiMotto “has an interest in the outcome of this case and could not sit in judgment ... Smith would not [have] been able to obtain a remedy by [§ 974.06].” We reject Smith’s argument. The fact that a circuit court may be called upon to review its decisions or that of a prior circuit court does not preclude a § 974.06 motion. Further, if Smith believes that any particular judge should be recused, he can make such a motion with the court and, if it is denied, Smith can pursue appeal of that decision with this court.

¶18 Because Smith has an “adequate remedy available at law,” his petition for *habeas corpus* was properly dismissed by the circuit court. See *Pozo*, 2002 WI App 279, ¶8, 258 Wis. 2d at 802, 654 N.W.2d at 15. We affirm the circuit court’s order.

IV. Request for monetary relief.

¶19 Smith asserts that he is entitled to \$1000 from the judge that transferred his case to Milwaukee County and \$1000 from the judge that denied his petition. Smith relies on WIS. STAT. § 782.09, which provides: “Any judge who refuses to grant a writ of habeas corpus, when legally applied for, is liable to the prisoner in the sum of \$1,000.”

⁶ The Hon. Jean J. DiMotto entered the original judgment of conviction and denied the postconviction motion that was filed by postconviction counsel before Smith’s first appeal. Judge DiMotto was not involved in the consideration of Smith’s 2009 petition for a writ of *habeas corpus*.

¶20 We reject Smith’s argument. Pursuant to WIS. STAT. § 782.06, a judge “to whom such petition shall be properly presented shall grant the same without delay *unless it shall appear from the petition or from the documents annexed that the party applying therefor is prohibited from prosecuting the same.*” (Emphasis added.) Like the judges that examined Smith’s petition, we have concluded that Smith was not entitled to a writ of *habeas corpus*. Therefore, Smith is not entitled to monetary relief under WIS. STAT. § 782.09.⁷

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

⁷ The State notes that Smith’s request for payment also fails because there is nothing in the Record to indicate that Smith complied with WIS. STAT. § 782.04. Because we deny Smith’s claim for monetary relief under WIS. STAT. § 782.09 on grounds that he was not entitled to a writ of *habeas corpus*, we do not consider this argument. See *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44, 46 (1997) (cases should be decided “on the narrowest possible grounds”).

