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DISTRICT II

August 7, 2013

To:

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

2012AP2668

State of Wisconsin v. David D. Austin (L.C. #2006CF503)

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

David D. Austin appeals from orders denying his motions for recusal/substitution of judge, for reconsideration of the denial of that order, for postconviction discovery, to allow him to use release funds to pay costs related to his court filings, and for postconviction relief under WIS. STAT. §§ 974.06, 805.14(3), (4), (5)(b), (d), and 805.15(1) (2011-12).¹ Austin's appellate claims are moot, meritless and/or procedurally barred. Based on our review of the briefs and the

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

record, we conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21. We affirm the orders.

In 2007, a jury found Austin guilty of first-degree sexual assault of a child. This court affirmed his judgment of conviction and the order denying postconviction relief. *See State v. Austin*, No. 2008AP2894-CR, unpublished slip op. at 1 (WI App Aug. 5, 2009). After his petition for review was denied, Austin filed a pro se petition for a writ of habeas corpus, alleging ineffective assistance of trial and appellate counsel. This court denied his petition. *State ex rel. Austin v. Pugh*, No. 2010AP1183-W, unpublished slip op. and order (WI App July 19, 2010). The supreme court denied review.

In September 2010, Austin filed several more pro se motions that were denied after a hearing. In January 2011, he filed a motion for postconviction relief, purportedly under WIS. STAT. § 809.30, raising matters relating to the hearing on his previous motions. The circuit court denied the motion, Austin appealed, and this court summarily affirmed the order. *See State v. Austin*, No. 2011AP511-CR, unpublished slip op. at 1 (WI App Dec. 14, 2011). We also observed that, although Austin claimed to be seeking relief under RULE 809.30, he already had a direct appeal. *Austin*, No. 2011AP511-CR, unpublished slip op. at 4.

In the latter half of 2012, Austin filed the series of pro se motions that form the basis for this appeal. The motions asked for an order allowing him to use funds from his prison release account for litigation expenses;² for Judge Daniel Bissett to recuse himself, as he had signed the

² As Austin concedes on appeal that the issue is moot because he seeks no relief in regard to this particular motion, we address it no further. *See State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425.

probable cause finding when he was a court commissioner; for a variety of postconviction discovery; and for postconviction relief pursuant to WIS. STAT. §§ 974.06, 805.14(3), (4), (5)(b) and (d), and 805.15(1). The motions were summarily denied. Austin appeals.

Austin contends that Judge Bissett erred by summarily denying Austin's recusal motion and his motion to reconsider the denial. As court commissioner, Judge Bissett had found probable cause to bind Austin over, despite what Austin alleges was an illegal arrest. Austin contends he might call Judge Bissett as a witness to see what or if he knew of the police officers' allegedly illegal conduct. He also asserts that an illegal arrest deprives the court of personal and subject matter jurisdiction.

There is no basis to reverse those orders. We need not address whether a magistrate who made a probable cause finding can even be called as a witness in a challenge to the legality of the arrest because Austin cites no authority for that assertion. See *Kruczek v. DWD*, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286. Further, an illegal arrest does not deprive a court of personal jurisdiction, *State v. Jermaine T.J.*, 181 Wis. 2d 82, 90, 510 N.W.2d 735 (Ct. App. 1993), and the court had criminal subject-matter jurisdiction because the complaint charged Austin with an offense known to law, see *State v. Aniton*, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994), violating WIS. STAT. § 948.02(1).

Austin's remaining two issues involve postconviction discovery, and postconviction relief under WIS. STAT. §§ 974.06, 805.14(3), (4), (5)(b), (d), and 805.15(1). We agree with the State that the claims are procedurally barred. See *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). To the extent they included motions regarding postconviction discovery, rather than substantive challenges to his conviction, motions for postconviction

discovery are not distinct from other postconviction motions within the meaning of *Escalona-Naranjo*. *State v. Kletzien*, 2011 WI App 22, ¶¶11-13, 331 Wis. 2d 640, 794 N.W.2d 920. Austin offers no reason, let alone a sufficient one, for not having raised these claims in his 2010 or 2011 postconviction motions. *See Escalona-Naranjo*, 185 Wis. 2d at 181-82.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals