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September 23, 2013

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

2012AP216

State of Wisconsin ex rel. Alan D. McCormack v. Marc W.
Clements (L.C. # 2011CV763)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Alan McCormack appeals a circuit court order and subsequent order denying reconsideration that: (1) dismissed a petition seeking habeas corpus relief based upon the alleged lack of a complete, reliable record justifying the restraint of McCormack's liberty; (2) refused McCormack's request to amend his petition to include an alternative request for a writ of mandamus involving alleged retaliatory actions being taken by various prison officials that were adversely affecting McCormack's ability to obtain parole; and (3) denied McCormack's motion for sanctions against opposing counsel. After reviewing the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).¹ We affirm.

A person whose liberty is being restrained in the absence of a valid judgment or order may apply to a court for a writ of habeas corpus to examine an alleged constitutional or jurisdictional error. *See* U.S. CONST. art. 1, § 9, cl. 2; WIS. CONST. art. 1, § 8, cl. 4; WIS. STAT. §§ 782.01(1), (3) and 782.02; *State ex rel. Cramer v. Wisconsin Court of Appeals*, 2000 WI 86, ¶47, 236 Wis. 2d 473, 613 N.W.2d 591. Habeas is an extraordinary remedy, however, which is not available when there exists an adequate alternate mechanism for seeking relief, such as a direct appeal or a postconviction motion. *See* WIS. STAT. §§ 782.02 and 974.06(8); *State ex rel. Fuentes v. Wisconsin Court of Appeals*, 225 Wis. 2d 446, 451, 593 N.W.2d 48 (1999).

McCormack's habeas corpus petition alleged that his detention was illegal for a number of reasons, the most prominent of which were that: (1) his trial transcripts were both incomplete (missing opening and closing arguments and portions of testimony) and had apparently been altered (based upon the use of different type faces); (2) the State had failed to turn over police photographs and other potentially exculpatory materials in its possession; and (3) new witnesses had come forward admitting to their involvement in the homicide for which McCormack was convicted. The circuit court denied McCormack's claim for habeas corpus relief on the dual grounds that—to the extent McCormack was attempting to challenge his judgment of conviction—the proper forum was the circuit court in the county of conviction and that an alternate remedy existed by means of a postconviction motion under WIS. STAT. § 974.06.

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

We note that McCormack's complaints about the accuracy of the trial transcripts do not go to the validity of his judgment of conviction, but rather to the meaningfulness of any appeal. Indeed, the transcripts could not even have been produced until after the judgment of conviction was entered. McCormack's contention that the State failed to turn over potentially exculpatory evidence does raise a constitutional issue that could affect the validity of his conviction; but we agree with the circuit court that it is the type of claim that could be raised in a WIS. STAT. § 974.06 motion in the county of conviction. Similarly, a court in the county of conviction would have authority to hear a claim for a new trial based upon new evidence that was not available to McCormack at the time of his trial.

McCormack seems to suggest that filing a postconviction motion in the county of conviction would not provide an adequate remedy because he has already filed a number of postconviction motions and writ petitions there without obtaining relief, or in some instances, even a response. However, a writ of habeas corpus will be procedurally barred when the petitioner asserts a claim that has already been litigated in a prior proceeding. *State v. Pozo*, 2002 WI App 279, ¶9, 258 Wis. 2d 796, 654 N.W.2d 12. Thus, the test for whether an alternate remedy exists is not whether a litigant has been unsuccessful in obtaining relief elsewhere; it is whether an alternate mechanism would be or would have been able to afford the relief sought if a timely and meritorious claim were filed. Because we conclude that McCormack did have alternate avenues available to seek relief on his claims regarding withheld and/or newly discovered exculpatory evidence, a writ of habeas corpus would not lie to address those issues.

Next, McCormack's habeas corpus petition also alleged that prison officials were taking various actions that were adversely affecting his ability to obtain parole in retaliation for McCormack's litigation activities. Most notable among these alleged actions was that Mark

Heise, the director of the Bureau of Offender Classification and Movement, changed McCormack's security classification from minimum to maximum security. McCormack subsequently attempted to amend his habeas corpus petition to designate his complaints regarding the actions of prison officials as an alternative petition for a writ of mandamus. The circuit court refused to allow the amendment, and denied relief on the grounds that any complaints about McCormack's security classification or parole would be more appropriately raised in a certiorari action.

For the purposes of this opinion, we do not need to determine what mechanism(s) would have been the most appropriate to raise McCormack's assorted claims regarding the actions of prison officials. It is sufficient to conclude that all of those claims were outside of the scope of his habeas corpus petition because they did not relate to the initial judgment of conviction, and that the prison officials about whom McCormack was complaining were not named and served parties to the action, however it was labeled.

Finally, McCormack's motion for sanctions against opposing counsel appears to have been based upon McCormack's perception that counsel mischaracterized his arguments or misstated facts established by his exhibits. Sanctions, however, lie within the discretion of the circuit court, which was in the best position to evaluate the actions of the parties before it within the context of the litigation.

IT IS ORDERED that the orders dismissing McCormack's petition for a writ of habeas corpus and denying reconsideration are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals