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DISTRICT II/IV

February 3, 2015

To:

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

2014AP1230

State of Wisconsin ex rel. Aman Deep Singh v. Paul Kemper
(L.C. # 2014CV913)

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

Aman Singh appeals an order that dismissed his habeas corpus petition for review of an alleged due process error committed during a prior certiorari proceeding as well as a claim for additional sentence credit. He also appeals the order denying his motion for reconsideration. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm in part and reverse in part.

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

Singh alleges that the circuit court improperly dismissed his prior certiorari action for failure to serve an authenticated copy of his petition upon the respondent, when the court never issued an order for a return or a response that Singh could serve with his petition. Respondent Paul Kemper, the warden of the Racine Correctional Institution, points out that Singh has already attempted to challenge the dismissal of his prior certiorari action by means of an appeal from a circuit court order denying reconsideration of Singh's motion to reopen the certiorari action. *See State ex rel. Singh v. Schwarz*, Appeal No. 2013AP572, unpublished summary order (WI App Oct. 9, 2013). In response, Singh cites the rule that habeas corpus is the appropriate mechanism to litigate a due process claim that judicial review has not occurred or has been delayed in a certiorari action. *See State ex rel. McMillian v. Dickey*, 132 Wis. 2d 266, 279, 392 N.W.2d 453 (Ct. App. 1986). From that premise, Singh argues that this court would not have been able to provide him with an adequate remedy on his prior appeal anyway, so habeas corpus should be available to him now.

Unlike the situation in *McMillian*, however, here the circuit court did not fail to act upon a certiorari action after a certiorari return had already been ordered. *See id.* at 281-82. Rather, the circuit court here dismissed Singh's certiorari action before obtaining jurisdiction over the respondent. *Singh*, No. 2013AP572, at 2. Singh has not presented any legal authority holding that such procedural dismissals cannot be reviewed by means of a direct appeal.

Moreover, even if we were to accept Singh's argument that the proper mechanism for reviewing a circuit court's procedural dismissal of a certiorari action should always be habeas corpus, this court would have had the authority to construe Singh's prior appeal as a habeas corpus writ if the materials presented to us so warranted. *See McMillian*, 132 Wis. 2d at 279-80. Singh failed, however, to provide this court with an adequate record to assess his claim that his

certiorari petition was improperly dismissed. Therefore, regardless of how Singh's prior appeal was characterized, the fact remains that Singh has already litigated his claim regarding the dismissal of his certiorari action. He cannot now raise the same claim under a different legal theory, or by presenting additional materials. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (a matter already litigated cannot be relitigated in subsequent postconviction proceedings "no matter how artfully the defendant may rephrase the issue").

As to Singh's claim for three additional days of sentence credit, he asserts that the statutory language "all days spent in custody" means each calendar day, rather than each 24-hour period, as the Department of Corrections appears to have interpreted it. *See WIS. STAT. § 973.155(1)*. Therefore, Singh contends that he should have been credited with both the first and the last day of each period when he was detained on a probation hold.

The respondent does not dispute the merits of Singh's claim for additional sentence credit, instead arguing that Singh failed to first exhaust his administrative remedies under WIS. STAT. § 973.155(5) by petitioning the Department of Corrections for additional credit. However, Singh points out that the record does contain his administrative request for additional sentence credit, as well as the department's response denying it. Since the respondent has not explained why Singh's request was inadequate to exhaust his administrative remedies, and has not disputed the merits of Singh's claim for additional sentence credit, we deem the issue to have been conceded. We further conclude that the issue is not moot, even though Singh was again released on supervision, because the credit could be applied in the event of a future revocation. Accordingly, we grant Singh's request for three days of additional sentence credit.

IT IS ORDERED that the portion of the circuit court's order denying Singh's request for further review of the dismissal of his prior certiorari action is affirmed, and the portion of the circuit court's order denying Singh's request for three additional days of sentence credit is reversed. We direct the circuit court to issue an order granting the additional credit.

Diane M. Fremgen
Clerk of Court of Appeals