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**DISTRICT IV**

July 10, 2015

To:

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

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2014AP1507

Kenneth A. Roberts v. Deb McCulloch (L.C. # 2014CV139)

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

Kenneth Roberts appeals the circuit court's order dismissing his petition for writ of habeas corpus. 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 (2013-14).<sup>1</sup> We summarily affirm.

Roberts was committed in 2005, after a jury trial, as a sexually violent person under WIS. STAT. ch. 980. Roberts appealed, and this court affirmed the judgment and order for commitment in an opinion issued March 13, 2007. *State v. Roberts*, No. 2005AP2259,

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

unpublished slip op. (WI App Mar. 13, 2007). In November 2012, Roberts filed a petition for writ of habeas corpus in the Oneida County Circuit Court, requesting that the court vacate his commitment. The Oneida County judge recused himself due to a conflict of interest, and the case was transferred to Judge Leon Stenz of Forest County. Judge Stenz eventually transferred the case to Juneau County. Roberts is confined at Sand Ridge Secure Treatment Center located in Juneau County.

The circuit court dismissed Roberts' petition with prejudice on the basis that Roberts had failed to demonstrate that he had no other adequate remedy at law. Roberts now appeals. He challenges the circuit court's transfer of venue to Juneau County, argues that WIS. STAT. ch. 980 is unconstitutional on various grounds, and asserts that his due process rights were violated in the proceedings on the writ petition.

We turn first to the issue of venue. The granting of a change of venue is discretionary with the circuit court and generally will not be disturbed on appeal unless it appears that the circuit court misused its discretion. *State ex rel. West v. Bartow*, 2002 WI App 42, ¶4, 250 Wis. 2d 740, 642 N.W.2d 233. The order transferring venue to Juneau County states that Oneida County was not the appropriate venue "for the reasons stated on the record." No transcript of the referenced hearing is included in the record. As the appellant, it is Roberts who is obligated to arrange to have in the record on appeal the transcripts and other records necessary to review the issues he raises on appeal. *See Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). Because Roberts has failed to arrange to have the transcript with the circuit court's reasons included in the record on appeal, we must assume that the transcript supports the circuit court's exercise of discretion. *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979).

Even if we looked beyond Roberts' failure to ensure the inclusion of the necessary transcript, we would likely affirm the circuit court. WISCONSIN STAT. § 801.50(4)(b), which governs venue in civil habeas actions, provides that venue shall be where the liberty of the plaintiff is restrained which, in this case, is Juneau County. Accordingly, we would likely agree with the respondent's position that the venue transfer was a proper exercise of the court's discretion.

Next, we address Roberts' argument that the circuit court erred in dismissing his writ petition. In the petition, Roberts challenges WIS. STAT. ch. 980 on constitutional grounds. However, as the respondent points out in her brief, Roberts previously argued the unconstitutionality of ch. 980 in his direct appeal, and we rejected that argument. *See Roberts*, No. 2005AP2259, slip op. at 10. Roberts now raises different constitutional arguments, but fails to present a sufficient reason to justify his failure to raise those arguments in his prior appeal. *See State v. Bush*, 2004 WI App 193, ¶13, 276 Wis. 2d 806, 688 N.W.2d 752, *aff'd*, 2005 WI 103, 283 Wis. 2d 90, 699 N.W.2d 80. In the ch. 980 context, "[a]ny constitutional challenge to the statutory commitment scheme should be raised in appeal of the initial commitment." *Bush*, 276 Wis. 2d 806, ¶13. Given the need for finality in litigation, it is undesirable for individuals to "raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later." *Id.*, ¶18 (quoting *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994)). So far as we can tell, Roberts' constitutional challenges to ch. 980 could have been raised in his prior appeal, along with his previous constitutional argument. Therefore, we decline to address those challenges now.

Finally, we address Roberts' argument that the circuit court failed to provide him with an opportunity to be heard regarding his writ petition, in violation of his due process rights. Roberts

argues that he was not afforded the opportunity to be heard “at a meaningful time and in a meaningful manner” after venue was transferred to Juneau County. *See State v. Beyer*, 2006 WI 2, ¶25, 287 Wis. 2d 1, 707 N.W.2d 509. Given our conclusion, however, that Roberts is precluded from raising constitutional issues in his petition that could have been raised on direct appeal, under the circumstances we are satisfied that the court’s failure to hold a hearing on the petition was not an unlawful infringement of Roberts’ due process rights.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*