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**DISTRICT II**

December 2, 2015

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

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2015AP382

State of Wisconsin ex rel. Larry George v. Judy Smith  
(L.C. # 2014CV1073)

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

Larry George appeals pro se from an order denying his petitions for writs of habeas corpus and mandamus. He contends that he is being held in prison unlawfully and that the respondents have a duty to release him. 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 affirm the order of the circuit court.<sup>2</sup>

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

<sup>2</sup> After the completion of briefing, George filed a motion to remand the case to the circuit court. That motion is denied.

George is a Wisconsin prisoner currently incarcerated at the Oshkosh Correctional Institution. He has filed numerous appeals relating to the computation of his prison sentences. As this court noted in one of those appeals, his case has a “lengthy and knotty history.” *State ex rel. George v. Schwarz*, Nos. 2012AP2320, 2013AP969, unpublished slip op. ¶17 (WI App Feb. 19, 2014). We discuss that history only as necessary in this opinion.

In October 1986, George was convicted in Winnebago county case No. 1986CF175 of second-degree sexual assault of a child. The circuit court sentenced him to a sixteen-year prison term. George was released on discretionary parole in 1995 and absconded in early 1996. During his nearly three years on the lam, he picked up sexual assault and false imprisonment charges in Brown county. His parole was revoked, and he returned to prison.<sup>3</sup>

In August 2001, George was convicted in Brown county case No. 1996CF163 of second-degree sexual assault and false imprisonment. The circuit court sentenced him to a consecutive fifteen-year prison term on the sexual assault charge and a concurrent two-year term on the false imprisonment charge.

In September 2012, George filed a motion in the Brown county circuit court seeking release from prison. The circuit court denied the request because it was based upon the incorrect premise that George’s sentence in the Brown county case was concurrent to his sentence in the Winnebago county case. The court clarified that its sexual assault sentence was imposed to run

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<sup>3</sup> On March 25, 1999, an administrative law judge ordered George reincarcerated for the remainder of his Winnebago County sentence (eight years and eighteen days). George challenged that determination in the circuit court and got his sentence significantly reduced. However, in an opinion released February 28, 2001, this court reversed and remanded with directions to reinstate the full reincarceration sentence. *See George v. Schwarz*, 2001 WI App 72, 242 Wis. 2d 450, 626 N.W.2d 57.

consecutively to the Winnebago county case. The court further clarified that George only began serving the sexual assault sentence on October 16, 2005, the day after his sentence in the Winnebago county case expired. George did not appeal that decision.

In September 2014, George commenced this action in the Winnebago county circuit court. Again, he sought release from prison. The respondents moved to dismiss the action on the ground that George was lawfully imprisoned. Following a hearing on the matter, the circuit court granted the motion to dismiss. This appeal follows.

Whether a writ of habeas corpus or a writ of mandamus is available to the party seeking relief is a question of law that this court reviews de novo. *State v. Pozo*, 2002 WI App 279, ¶6, 258 Wis. 2d 796, 654 N.W.2d 12 (habeas corpus); *Griffin v. Litscher*, 2003 WI App 60, ¶6, 261 Wis. 2d 694, 659 N.W.2d 455 (mandamus).

A “[w]rit of habeas corpus is an equitable remedy that protects a person’s right to personal liberty by freeing him or her from illegal confinement.” *Pozo*, 258 Wis. 2d 796, ¶8. Habeas corpus is not a substitute for an appeal. *Id.* A writ will not be issued where, “the petitioner asserts a claim that he or she could have raised during a prior appeal, but failed to do so, and offers no valid reason to excuse such failure.” *Id.*, ¶9.

A writ of mandamus, meanwhile, is an extraordinary writ which may be used to compel a public officer to perform a duty which he or she is legally bound to perform. *Griffin*, 261 Wis. 2d 694, ¶5. There are four prerequisites for issuance of such a writ: “(1) a clear legal right; (2) a positive and plain duty; (3) substantial damages; and (4) no other adequate remedy at law.” *Id.*

On appeal, George contends that he is being held in prison unlawfully and that the respondents have a duty to release him. He bases his argument on an agreement by the parties to start his reincarceration time in the Winnebago county case on October 22, 2001. Because this postdates his August 2001 conviction in Brown county, George submits that his Brown county sentence must be treated as concurrent, not consecutive.

There are at least two problems with George's argument. First, at the time of sentencing in the Brown county case, this court had already ordered the full reincarceration sentence reinstated in the Winnebago county case. George was in prison on that case and received sentence credit for that custody. Thus, regardless of any agreement by the parties, George was serving a sentence in August 2001, and the Brown county circuit court could order its sexual assault sentence to run consecutive to it.

Second, as noted, the Brown county circuit court has subsequently clarified that its sexual assault sentence was imposed to run consecutively to the Winnebago county case. It further clarified that George only began serving the sexual assault sentence on October 16, 2005, the day after his sentence in the Winnebago county case expired. George did not appeal that decision. He cannot use this action now to do so. *See Pozo*, 258 Wis. 2d 796, ¶¶8-9.

For these reasons, we are not persuaded that George is in prison unlawfully or that the respondents have a positive and plain duty to release him. Accordingly, we affirm the order of the circuit court.

Upon the foregoing reasons,

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

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