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May 20, 2016

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

2015AP1723

State of Wisconsin ex rel. Roger L. Kaufman v. Paul Kemper,
Warden (L.C. # 2015CV116)

Before Higginbotham, Sherman, and Blanchard, JJ.

Roger Kaufman appeals an order dismissing his petition for a writ of habeas corpus. He argues that his sentence violated the ex post facto clause of the U.S. Constitution. 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).¹ We affirm the order.

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

A circuit court's order denying a petition for writ of habeas corpus presents a mixed question of fact and law. *State ex rel. McMillian v. Dickey*, 132 Wis. 2d 266, 276, 392 N.W.2d 453 (Ct. App. 1986), *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900. Factual determinations will not be reversed unless clearly erroneous. *Id.* Whether a writ of habeas corpus is available to the party seeking relief is a question of the law that we review de novo. *See State ex rel. Woods v. Morgan*, 224 Wis. 2d 534, 537, 591 N.W.2d 922 (Ct. App. 1999).

A writ of habeas corpus is an equitable remedy that protects a person's right to personal liberty by freeing him or her from illegal confinement. *State ex rel. Dowe v. Waukesha County Circuit Court*, 184 Wis. 2d 724, 728-29, 516 N.W.2d 714 (1994). It arises in common law and is guaranteed by the state and federal constitutions, as well as by statute.² Because it is an extraordinary writ, habeas corpus relief is available only where the petitioner demonstrates (1) restraint of his or her liberty, (2) which restraint was imposed contrary to constitutional protections or by a body lacking jurisdiction, and (3) no other adequate remedy is available at law. *State ex rel. Haas v. McReynolds*, 2002 WI 43, ¶12, 252 Wis. 2d 133, 643 N.W.2d 771. Habeas corpus is not a substitute for appeal, and, therefore, a writ will not be issued where the "petitioner has an otherwise adequate remedy that he or she may exercise to obtain the same relief." *Id.* at ¶14; *see also State ex rel. Doxtater v. Murphy*, 248 Wis. 593, 602, 22 N.W.2d 685 (1946), *overruled in part by Van Voorhis v. State*, 26 Wis. 2d 217, 131 N.W.2d 833 (1965).

² *See* U.S. Const. art. I, § 9, cl. 2 and Wis. Const. art I, § 8(4); *see also* WIS. STAT. § 974.06(8).

WISCONSIN STAT. § 974.06(8) sets out the statutory provisions which explain the availability of a writ of habeas corpus in postconviction proceedings. Section 974.06(8) provides in relevant part:

A petition for a writ of habeas corpus ... shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced the person, or that the court has denied the person relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his or her detention.

Additionally, in a postconviction setting, a petition for a writ of habeas corpus will not be granted where (1) 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, *State ex rel. LeFebvre v. Israel*, 109 Wis. 2d 337, 342, 325 N.W.2d 899 (1982), or (2) the petitioner asserts a claim that was previously litigated in a prior appeal or motion after verdict. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (“A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.”).

Kaufman argues that, when the sentencing court determined that Kaufman would be eligible for parole after 25 years, it disregarded the minimum parole eligibility date established by the legislature in WIS. STAT. § 57.06(1) (1987-88), and therefore changed the punishment from what it was at the time the crime was committed. To the extent that WIS. STAT. § 973.014(2) (1987-88) permitted the circuit court to set minimum eligibility dates for convicted defendants higher than the statutory minimum, Kaufman argues that the statute, itself, is unconstitutional because it gives a court “the ability to violate the Ex Post Facto Clause illegally.” Accordingly, Kaufman seeks to be released from prison.

The State argues persuasively that Kaufman's underlying claim is entirely without merit, and it appears that it is. However, we need not reach the merits of a barred claim. We conclude for the following reasons that a writ of habeas corpus is not available to Kaufman.

Kaufman had an adequate remedy available to pursue this claim when he challenged his conviction on direct appeal and in a subsequent sentence modification motion. *See State v. Kaufman*, No. 1990AP1267-CR, unpublished slip op. (Ct. App. Nov. 27, 1990) and *State v. Kaufman*, No. 1996AP3110-CR, unpublished slip op. (Ct. App. Dec. 18, 1997). Kaufman has not provided a reason to excuse this failure, nor has he alleged facts that would support the conclusion that the remedy of appeal would have been inadequate or ineffective to test the legality of his detention. Accordingly we affirm the circuit court's order denying his petition.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals