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DISTRICT IV

September 15, 2017

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

2016AP582

State of Wisconsin ex rel. Eric Alston v. Judge William Hanrahan
and Judge Juan Colas (L.C. #2016CV465)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Eric Alston appeals an order denying 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 (2015-16).¹ We affirm denial of the habeas

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

petition, but remand with directions to instruct the clerk of the circuit court to file part of Alston's submission as a motion under WIS. STAT. § 974.06 in his criminal case.

Alston's habeas petition appears to have sought relief regarding two prior circuit court cases. In both cases, Alston alleges that the judge who decided the case was biased by what Alston alleges was ex parte communication with a "Special Investigation Unit" that gave the judges a presentation about certain offenders whom the unit wanted judges to sanction severely in future cases, and that Alston was one of those offenders.

The circuit court denied Alston's claims for the following reason: "As petition is based on claim of new evidence other remedies are available." Because one of the earlier cases was civil and the other criminal, we analyze them separately.

In the earlier civil case, No. 2012CV3289, Alston sought certiorari review of revocation of his probation. The circuit court affirmed that revocation decision. Alston now alleges that the judge who made that decision was biased for the reason stated above.

On appeal, the respondent judge argues that, if Alston's petition is viewed as a habeas petition, it must be dismissed because Alston has not named the correct party as respondent. The respondent judge argues that the proper respondent would have been the warden restraining Alston, not the judge.

In reply, Alston does not dispute that the warden would be the proper respondent. Instead, relying on *bin-Rilla v. Israel*, 113 Wis. 2d 514, 335 N.W.2d 384 (1983), he argues that we should not hold him to the same standards as an attorney and should liberally construe his petition as necessary.

Although it is true that under *bin-Rilla* a court should relabel pleadings as necessary to allege a legal theory that fits the alleged facts, *id.* at 521, Alston has not persuaded us that a court is required to apply liberal construction to go as far as adding a party that was necessary, but omitted. Accordingly, we conclude that to the extent Alston was seeking habeas relief for the civil case involving revocation of his probation, Alston's petition was properly denied because it failed to name the correct party as respondent.

We turn next to the criminal case. In the earlier criminal case, No. 2009CF1694, Alston alleged that the sentencing judge was biased for the same reason as stated above regarding contact with the Special Investigation Unit. If Alston's filing is viewed as a habeas petition, it continues to suffer from the same flaw we discussed for the civil case, namely, that the petition names the incorrect party as respondent.

The respondent judge argues that if Alston's habeas claim is viewed as a challenge to his criminal sentence, it is barred because Alston can file a postconviction motion under WIS. STAT. § 974.06, and therefore he is not permitted to use habeas. *See* WIS. STAT. § 974.06(8). In reply, Alston points out that he did, in fact, submit such a postconviction motion along with his habeas petition.

The record confirms this assertion. It contains a document captioned "Sente[n]ce Modification." It begins: "The Petitioner Eric T. Alston, pro se, hereby submits the following brief in support of his MOTION FOR POSTCONVICTION RELIEF PURSUANT TO SEC. 974.06, STATS." The motion alleges essentially the same claim of judicial bias as is described in the habeas petition. The brief of the respondents does not discuss this document. It is not clear whether the circuit court recognized that this document was in the materials before it.

We do not see an obvious reason why the sentence modification motion should not be reviewed as a motion under WIS. STAT. § 974.06 in Alston’s criminal case. Although Alston miscaptioned that document as himself versus the sentencing judge, the first sentence of the motion seems to make it clear that it is a filing under § 974.06, and the first page of the document refers to the case number for the criminal case. Had this document been received by itself, without being included in a package that also included the habeas petition, our sense is that the clerk of the circuit court would probably have overlooked the erroneous caption and filed it as a motion in the criminal case.

Therefore, although we affirm denial of the habeas petition, we remand with directions for the circuit court to instruct the clerk of the circuit court to file the “Sente[n]ce Modification” document as a motion under WIS. STAT. § 974.06 in the criminal case Alston cites.

IT IS ORDERED that the order appealed from is summarily affirmed in part under WIS. STAT. RULE 809.21, and the cause is remanded with directions.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals