OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

November 16, 2017

To:

Hon. Rebecca F. Dallet
Circuit Court Judge
Branch 40
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room G-8
901 N. 9th Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Colin Thomas Roth
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Tyrone Davis Smith 297130
Fox Lake Corr. Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

Special Litigation & Appeals Unit
P.O. Box 7857
Madison, WI 53707-7857

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

2016AP2272 State of Wisconsin ex rel. Tyrone Davis Smith v. State of Wisconsin (L.C. # 2016CV5103)

Before Brennan, P.J., Brash and Dugan, 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).

Tyrone Davis Smith, *pro se*, appeals from a September 26, 2016 order of the circuit court that denied his "motion on refusal of writ." 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] The order is summarily affirmed.

In Milwaukee County Circuit Court case No. 1993CF931935, Smith was charged with one count of attempted first-degree intentional homicide while armed. He filed a speedy trial demand. The State was unable to meet the ninety-day statutory time period for a speedy trial, and Smith was released from custody on the ninetieth day under the terms of a $15,000 recognizance bond.

When Smith failed to appear for trial, he was charged with bail jumping in Milwaukee County Circuit Court case No. 1995CF950830. He pled guilty, but, on appeal, we reversed the conviction and remanded the matter to the circuit court with directions to vacate the bail jumping conviction. *See* ***State v. Smith***, No. 1996AP1257, unpublished slip op. and order (WI App May 1, 1997). Smith had been released prior to expiration of the ninety-day deadline; thus, based on the statute in effect at the time, when the deadline actually lapsed, he "was 'released from the obligations of his bond' by operation of law." *See* ***id.***; *see also* WIS. STAT. § 971.10(4) (1991-92).[2] If Smith was not under a bond obligation, an element of bail jumping, his plea should not have been accepted.

Both of those cases, however, are merely background for the action underlying this appeal. In this matter, Smith filed a petition for a writ of *habeas corpus* in the circuit court in which he asked the circuit court to make factual findings that "can support an exoneration or

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

[2] The statute was later amended so that conditions of bond continue during release from custody.

dismissal of record that continues to label petition[er] a felon in case-at-bar; the record should be expunged from existence and public-eye."[3] On July 8, 2016, the circuit court denied the writ and dismissed the petition with prejudice because the petition was not appropriately verified under WIS. STAT. § 782.04 and ***State ex rel. Santana v. Endicott***, 2006 WI App 13, ¶11, 288 Wis. 2d 707, 709 N.W.2d 515.

Davis then filed what he called a "motion on refusal of writ." He stated that the writ had been submitted "to challenge the existing record in this criminal case number that characterizes Smith as a felon within the public-eye and domain" after completion of his sentence.[4] He further requested $1000 from the circuit court under WIS. STAT. § 782.09 for its refusal to issue the writ. By order dated September 26, 2016, the circuit court denied the motion, noting that § 782.09 on its face applies to only those writs legally applied for, and, because Smith's petition had not been properly verified, the writ was not legally applied for. Smith appeals from the September 26 order denying his "motion on refusal of writ."[5]

[3] It is not entirely clear what record Smith seeks to expunge, although it appears he is likely seeking to expunge the attempted homicide record. While the petition briefly mentions the recognizance bond, it also bears the attempted homicide case number and references completion of the sentence imposed therein. Additionally, we note that Smith's 2007 attempt to expunge the bail jumping record was denied.

[4] We observe that Smith is presently serving a fifteen-year sentence for a felony conviction in Milwaukee County Circuit Court case No. 2006CF6287.

[5] Smith's notice of appeal stated he was appealing "the (presumed) denial of Motion To Set Aside Decision And Order Denying Motion On Refusal Of Writ," which his appellate brief indicates was "Entered Around November 7, 2016." There is no record of the circuit court either receiving or ruling on such a motion, and appeal cannot be had from a non-existent order. Further, the notice of appeal was filed on November 17, 2016, making it untimely as to the July 8, 2016 order. *See* WIS. STAT. § 808.04(1). Therefore, only the September 26, 2016 order is properly before this court in this appeal.

Smith's primary argument is that his writ was properly verified because he declared "under the penalty of perjury and pursuant to 28 U.S.C. § 1746, [that] everything alleged within the writ is true and accurate to the best of my personal knowledge and understanding." Thus, his petition was "legally applied for." Smith is mistaken.

The pleading rule on which Smith relies, 28 U.S.C. § 1746, is a rule of *federal* procedure. *See* ***Carter v. Clark***, 616 F.2d 228, 229 (5th Cir. 1980) (Section 1746 "provides that in all *federal* governmental proceedings, written declarations made under 'penalty of perjury' were permissible in lieu of sworn affidavits subscribed to before notary publics." (Emphasis added.)). Wisconsin has a different procedure applicable to *habeas corpus* petitions.[6] *See generally* WIS. STAT. ch. 782.

In Wisconsin, a petition for a writ of *habeas corpus* "must be verified[.]" *See* WIS. STAT. § 782.04. "Verification entails signing the document in the presence of a notary public." ***Santana***, 288 Wis. 2d 707, ¶11; *see also* ***Nielsen v. Waukesha Cnty. Bd. of Supervisors***, 178 Wis. 2d 498, 512-13, 504 N.W.2d 621 (Ct. App. 1993) ("[T]he ordinary meaning of 'verify' … is 'to confirm or substantiate in law by oath.'"). "The verification requirement assures 'that the statements contained therein are presented with some regard to considerations of truthfulness, accuracy and good faith,' and petitions not properly verified do not meet the requirements for a valid application." ***Santana***, 288 Wis. 2d 707, ¶11 (citation omitted). It is undisputed that Smith did not verify his petition in accordance with Wisconsin requirements.

[6] Indeed, the penalty for false "swearing" under 28 U.S.C. § 1746 is a perjury charge under 18 U.S.C. § 1651, but the State would not be able to issue the federal charge.

With respect to the monetary penalty Smith sought, "[a]ny judge who refuses to grant a writ of habeas corpus, when legally applied for, is liable to the prisoner in the sum of $1,000." WIS. STAT. § 782.09. However, a petition that is not properly verified is not legally applied for. ***Maier v. Byrnes***, 121 Wis. 2d 258, 262-63, 358 N.W.2d 833 (Ct. App. 1984). Thus, the circuit court correctly denied Smith's "motion on refusal of writ."

Upon the foregoing, therefore,

IT IS ORDERED that the order appealed from is summarily affirmed.

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

Diane M. Fremgen
Clerk of Court of Appeals