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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 II

March 27, 2019

To:

Hon. William Domina
Circuit Court Judge
521 W. Riverview, Rm. JC 103
Waukesha, WI 53188-3636

Hannah Schieber Jurss
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Gina Colletti
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Troy Key, #246174
Redgranite Correctional Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2017AP2349

State of Wisconsin ex rel. Troy Key v. Michael Meisner, Warden
(L.C. #2017CV1944)

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

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).

Troy Key appeals pro se from the circuit court's denial of his petition for a writ of habeas corpus. Key argues that the circuit court erroneously denied a prior WIS. STAT. § 974.06 (2017-18)¹ motion as it lacked subject matter jurisdiction because there was an appeal simultaneously pending and the record was in this court. Accordingly, Key contends that the circuit court's order denying the motion was null and void and that his motion should be "reargued." Based

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

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. We summarily affirm.

In 1994, Key was convicted of first-degree intentional homicide. Key filed a direct appeal, and we affirmed his conviction in a 1996 decision. *State v. Key*, No. 1995AP2624-CR, unpublished slip op. (WI App Oct. 30, 1996). In 2000, Key filed a motion for postconviction discovery, seeking further DNA testing, which the circuit court denied. Key appealed the circuit court's order, and we affirmed the denial of Key's motion for postconviction discovery. *State v. Key*, No. 2001AP66, unpublished slip op. (WI App Jan. 16, 2002).

While Key's appeal of his postconviction discovery motion was pending in this court, Key filed a WIS. STAT. § 974.06 motion in the circuit court. The circuit court granted a four-day evidentiary hearing on some of Key's claims, but ultimately denied Key's § 974.06 motion.² Key appealed the circuit court's decision, which we affirmed. *State v. Key*, No. 2002AP951, unpublished op. and order (WI App July 2, 2003). In 2004, Key filed another postconviction motion, which the circuit court denied, and we affirmed on all claims aside from the restitution order. *State v. Key*, No. 2003AP321-CR, unpublished op. and order (WI App Aug. 18, 2004).

Then, in 2012, Key filed a petition for a writ of habeas corpus in the Wisconsin Supreme Court. Key argued that the circuit court did not have jurisdiction to conduct a hearing and reach

² Key filed his WIS. STAT. § 974.06 motion on August 2, 2001. The circuit court issued its decision denying his motion on February 13 and 25, 2002. As this court had the physical case record, before reaching its decision on the motion, the circuit court had its law clerk come to this court to review the appellate record. The record was remitted to the circuit court on February 26, 2002, when our supreme court dismissed Key's petition for review on the motion for postconviction discovery.

a decision on his WIS. STAT. § 974.06 motion as his appeal was pending in this court at the time and the circuit court did not have the record.³ Our supreme court denied his habeas petition, ex parte.

The subject in this appeal is Key's second petition for a writ of habeas corpus that he brought in the circuit court, where he argues again that the circuit court's order is "null & void" as it lacked subject matter jurisdiction to decide his WIS. STAT. § 974.06 motion. The circuit court denied this habeas petition based on *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Key appeals.

We review a circuit court's order denying a petition for a writ of habeas corpus under a mixed standard of review. *State v. Pozo*, 2002 WI App 279, ¶6, 258 Wis. 2d 796, 654 N.W.2d 12. Factual determinations of the circuit court are reviewed for an erroneous exercise of discretion, while the question of whether the writ is available to Key is a question of law that we review de novo. *Id.* "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." *Id.*, ¶8. Habeas corpus relief is "extraordinary" and is only available if Key is able to demonstrate "(1) restraint of his ... liberty, (2) which restraint was imposed contrary to constitutional protections or by a body lacking jurisdiction and (3) no other adequate remedy available at law." *Id.*

³ WISCONSIN STAT. § 808.075(3) provides that "[i]n a case not appealed under [WIS. STAT. §] 809.30, the circuit court retains the power to act on all issues until the record has been transmitted to the court of appeals. Thereafter, the circuit court may act only as provided in" situations not applicable in this case.

We first note that Key repeatedly argues that the circuit court did not have subject matter jurisdiction to decide his WIS. STAT. § 974.06 motion. Subject matter jurisdiction is established by article VII, section 8 of the Wisconsin Constitution and provides the circuit court the authority to decide certain types of actions. See *City of Eau Claire v. Booth*, 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738. A judgment of the circuit court is void when it lacks subject matter jurisdiction, see *State v. Campbell*, 2006 WI 99, ¶43, 294 Wis. 2d 100, 718 N.W.2d 649, but “no circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever,” *Booth*, 370 Wis. 2d 595, ¶18 (citation omitted). Instead,

[a] circuit court’s ability to exercise its subject matter jurisdiction in individual cases ... may be affected by noncompliance with statutory requirements pertaining to the invocation of that jurisdiction. The failure to comply with these statutory conditions does not negate subject matter jurisdiction but may under certain circumstances affect the circuit court’s competency to proceed to judgment in the particular case before the court. A judgment rendered under these circumstances may be erroneous or invalid because of the circuit court’s loss of competency but is not void for lack of subject matter jurisdiction.

Id., ¶12 (citation omitted). Accordingly, Key has misinterpreted the challenge he brings before this court. Key is actually challenging the circuit court’s competency to decide his § 974.06 motion.

We conclude that Key’s habeas petition is procedurally barred as he both failed to raise his claim that the circuit court lacked competency on appeal of his WIS. STAT. § 974.06 motion and did raise the claim in his prior habeas petition before our supreme court. See *Pozo*, 258 Wis. 2d 796, ¶9. Absent a sufficient reason, a defendant is precluded from bringing a claim under § 974.06 if that claim could have been raised in a prior motion or direct appeal. *Escalona-Naranjo*, 185 Wis. 2d at 185; see also *Pozo*, 258 Wis. 2d 796, ¶9. Key failed to raise this argument in his appeal of his § 974.06 motion, and he now fails to present a sufficient reason for

why he could not have raised this jurisdictional challenge in his appeal of the offending order.⁴ Further, Key did in fact bring this exact same argument in his prior petition for writ of habeas corpus that our supreme court denied.⁵ As Key raised the exact same issue in a previous habeas petition, his current petition is barred. *Pozo*, 258 Wis. 2d 796, ¶9; see also *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Key argues, however, that a challenge to the subject matter jurisdiction of the court should never be procedurally barred as “such null and void judgments can be challenged at any time.” Key has set forth no case law specifically concluding that *Escalona-Naranjo* and *Witkowski* do not apply to a court’s competency. We note, however, that the holdings of both *Escalona-Naranjo* and *Witkowski* have been applied to a petition for writ of habeas corpus where the defendant challenged the circuit court’s “subject matter jurisdiction.” See *Pozo*, 258 Wis. 2d 796, ¶¶7, 9-10. Our supreme court also explained in *Booth* that “[e]ven when a court lacks competency to proceed to judgment, a challenge to court competency can be forfeited if not timely raised.” *Booth*, 370 Wis. 2d 595, ¶21. Despite Key’s arguments, he is not being denied the opportunity to challenge the circuit court’s order on his WIS. STAT. § 974.06 motion. He was provided that opportunity both in his appeal of the circuit court’s decision and on habeas petition

⁴ Key’s only argument on this issue is that “it is rather puzzling to try to understand how Petitioner Key could have raised and challenged the court’s subject matter jurisdiction at a hearing where the hearing itself created the error, that was overlooked by all of the parties.” We do not suggest that Key’s claim is barred because he did not challenge the court’s jurisdiction at the hearing; instead, we suggest that Key was able to challenge the circuit court’s jurisdiction on appeal of the court’s decision before this court. He failed to do so.

⁵ Then-Chief Justice Abrahamson dissented from the majority’s decision denying Key’s habeas petition, explaining that she would order a response from the State as “[t]hese are important (and recurring) questions for litigants and for the operation of the circuit courts and the court of appeals.”

to the Wisconsin Supreme Court. The circuit court properly denied Key's petition for a writ of habeas corpus.

Upon the foregoing reasons,

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

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

Sheila T. Reiff
Clerk of Court of Appeals