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DISTRICT I

July 6, 2022

To:

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Circuit Court Judge
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Johnnie Lawrence Burns Jr. 156480
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John D. Flynn
Electronic Notice

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

2020AP755

State of Wisconsin v. Johnnie Lawrence Burns, Jr.
(L.C. # 1988CF880536)

Before Donald, P.J., Dugan and White, 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).

Johnnie Lawrence Burns, Jr., *pro se*, appeals an order denying his petition for a writ of habeas corpus. In addition to challenging the circuit court's denial of his writ petition, he requests that we exercise our discretionary reversal authority under WIS. STAT. § 752.35 (2019-20).¹ Based upon our review of the briefs and the record, we conclude at conference that this

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm.

In 1989, a jury convicted Burns of numerous crimes stemming from a string of robberies. The trial court sentenced him to sixty-five years of imprisonment. Burns filed a direct appeal, and this court affirmed. *See State v. Burns (Burns I)*, No. 1990AP821-CR, unpublished slip op. (WI App Feb. 5, 1991). The Wisconsin Supreme Court denied Burns’s petition for review.

In 2012, Burns filed a WIS. STAT. § 974.06 motion, which the postconviction court denied as procedurally barred. We affirmed. *See State v. Burns (Burns II)*, No. 2012AP457, unpublished op. and order (WI App Jan. 7, 2013).

In 2018, Burns filed a motion for sentence modification. Based on the nature of the claims that Burns asserted, the postconviction court treated the filing as a WIS. STAT. § 974.06 motion and denied it. We affirmed. *See State v. Burns (Burns III)*, No. 2019AP365-CR, unpublished op. and order (WI App Dec. 4, 2019).

In 2020, Burns filed the underlying petition for a writ of habeas corpus alleging that defects in the criminal complaint against him resulted in a loss of jurisdiction and a void judgment of conviction. The postconviction court denied the petition on grounds that it was procedurally barred, and this appeal follows.

We agree with the postconviction court that Burns was not entitled to habeas corpus relief. Such relief “is available to a petitioner only under limited circumstances.” *State ex rel. Krieger v. Borgen*, 2004 WI App 163, ¶5, 276 Wis. 2d 96, 687 N.W.2d 79. First, “a person seeking habeas corpus relief must be restrained of his or her liberty[.]” *Id.* Second, “the person

must show that the restraint was imposed by a body without jurisdiction or that the restraint was imposed contrary to constitutional protections[.]” *Id.* Finally, “the person must show that there is no other adequate remedy available in the law.” *Id.* “Unless these criteria are met, the writ of habeas corpus is not available to the petitioner.” *Id.*

Habeas corpus relief in the postconviction setting is subject to the terms of WIS. STAT. § 974.06(8), which states:

A petition for a writ of habeas corpus or an action seeking that remedy [on] behalf of a person who is authorized to apply for relief by motion under this section 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.

Id.

Additionally, in a postconviction setting, a petition for 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, or (2) the petitioner asserts a claim that was previously litigated in a prior appeal or motion after verdict.

State v. Pozo, 2002 WI App 279, ¶9, 258 Wis. 2d 796, 654 N.W.2d 12 (citations and italics omitted).

The underlying petition for habeas corpus is Burns’s fourth postconviction challenge. Burns acknowledges that he has not previously challenged the sufficiency of the criminal complaint. We need not reach the merits of Burns’s claim because we conclude that a writ of habeas corpus is not available to him.

Prior to filing his habeas petition, Burns “failed to apply for relief,” *see* WIS. STAT. § 974.06(8), on the ground that the complaint had jurisdictional defects. While a petitioner may skip over this step if he can show that a non-habeas “remedy” would be “inadequate or ineffective to test the legality of his or her detention,” *see id.*, Burns has not made such a showing.

Burns incorrectly argues that habeas is the only adequate or effective remedy he has to challenge the alleged deficiencies in the complaint.² He claims that the complaint was erroneously issued prior to the preliminary hearing and was unauthenticated, which resulted in a lack of subject matter jurisdiction. First, the deficiencies he alleges do not defeat subject matter jurisdiction. “The circuit court lacks criminal subject-matter jurisdiction only where the complaint does not charge an offense known to law.” *See State v. Aniton*, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). Burns does not argue that the complaint charged crimes unknown to law. In any event, like the circuit court, we conclude that Burns had an adequate remedy available to pursue his current claims when he challenged his conviction on direct appeal and again in his WIS. STAT. § 974.06 motion. *See Pozo*, 258 Wis. 2d 796, ¶10; *see also State v. Henley*, 2010 WI 97, ¶50, 328 Wis. 2d 544, 787 N.W.2d 350 (explaining that § 974.06 is the mechanism by which a prisoner may raise constitutional and jurisdictional claims after the time

² Burns relies on *State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 369 N.W.2d 743 (Ct. App. 1985). In that case, we held that habeas relief was available “to review the sufficiency of a criminal complaint and the sufficiency of the evidence for a bindover following a preliminary examination.” *See id.* at 219. That procedural context is different than what is before us and the holding is inapposite.

for a direct appeal has passed). Burns has not provided this court with a valid reason to excuse his failure to raise his current claims earlier.³

Burns additionally argues that this court should exercise its discretionary reversal power. *See* WIS. STAT. § 752.35 (allowing this court to reverse in its discretion “if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried”). We deny the request. Burns has not persuaded us that there was any error, let alone an error of sufficient magnitude to justify this extraordinary relief. *See State v. Schutte*, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469 (recognizing this court exercises its discretionary reversal power sparingly, and in only the most exceptional cases).

³ Because the circuit court did not err when it denied Burns’s petition, we need not consider Burns’s claim for \$1,000 pursuant to WIS. STAT. § 782.09.

Therefore,

IT IS ORDERED that the order is summarily affirmed. *See* 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