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DISTRICT III

March 18, 2025

To:

Hon. Sarah M. Harless
Circuit Court Judge
Electronic Notice

John D. Flynn
Electronic Notice

Cherie Norberg
Clerk of Circuit Court
Eau Claire County Courthouse
Electronic Notice

Richard Johnson 670858
Dodge Correctional Inst.
P.O. Box 800
Waupun, WI 53963

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

2023AP2220

Richard Johnson v. State of Wisconsin (L. C. No. 2023CV550)

Before Stark, P.J., Hruz and Gill, 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).

Richard Johnson appeals a circuit court order that denied his petition for waiver of fees and costs. 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 (2021-22).¹ For the reasons explained below, we dismiss the appeal.

In 2018, following a jury trial, Johnson was convicted of sexual assault of a child under sixteen years of age, child enticement, and manufacture or delivery of tetrahydrocannabinols.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

We affirmed Johnson’s convictions on direct appeal. *See State v. Johnson*, No. 2018AP1368-CR, unpublished op. and order (WI App Oct. 16, 2019). Johnson later moved for postconviction relief under WIS. STAT. § 974.06. We affirmed the circuit court’s denial of that motion, concluding that Johnson’s claims were procedurally barred. *See State v. Johnson*, No. 2020AP1101, unpublished op. and order (WI App Feb. 15, 2022).

Johnson subsequently filed a petition for a writ of habeas corpus in the circuit court. Johnson also filed a petition for waiver of fees and costs. On October 25, 2023, the circuit court entered an order denying Johnson’s fee waiver petition. As the reason for its denial, the court checked the box on the form order stating that the “requestor has not stated a meritorious claim, defense, or appeal upon which the court may grant relief.” The court included the explanatory comment: “Multiple similar filings by defendant. Writ of Habeas Corpus will not be granted where the Defendant could have addressed the issues at appeal.” Johnson then filed a notice of appeal from the court’s October 25, 2023 order.

Johnson has not followed the correct procedure to obtain review of the circuit court’s order denying his fee waiver petition. Because the denial of a petition to proceed on an action without payment of the filing fee means that no action was ever initiated, the proper method to obtain review is by a petition for a supervisory writ, rather than by an appeal. *See State ex rel. Hansen v. Circuit Ct. for Dane Cnty.*, 181 Wis. 2d 993, 997, 513 N.W.2d 139 (Ct. App. 1994).

“[W]hen a notice of appeal is filed under these circumstances, we *may* construe it as a petition for a [supervisory writ].” *State ex rel. Luedtke v. Bertrand*, 220 Wis. 2d 574, 580, 583 N.W.2d 858 (Ct. App. 1998), *aff’d by an equally divided court*, 226 Wis. 2d 271, 594 N.W.2d 370 (1999), *superseded by statute on other grounds* (emphasis added). However, we decline to

do so here. Johnson has not asked this court to treat his appeal as a petition for a supervisory writ.² Moreover, a party seeking the issuance of a supervisory writ must establish: (1) that the circuit court had a plain duty and either acted or intends to act in violation of that duty; (2) that an appeal is an inadequate remedy; (3) that grave hardship or irreparable harm will result; and (4) that the party requested relief promptly and speedily. *State ex rel. CityDeck Landing LLC v. Circuit Ct. for Brown Cnty.*, 2019 WI 15, ¶30, 385 Wis. 2d 516, 922 N.W.2d 832. Johnson’s appellate briefs do not address these factors. In particular, Johnson has not cited a plain duty, explained how the circuit court acted in violation of that duty, or shown that grave hardship or irreparable harm will result absent the issuance of a supervisory writ. *See id.*

Johnson has therefore failed to present a developed argument that this court should grant him a supervisory writ. We need not address undeveloped arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Although we must “liberally construe a pro se litigant’s pleadings to state the correct basis for relief,” that obligation “assumes that the litigant has otherwise made a proper argument for relief, albeit under the wrong label.” *State ex rel. Harris v. Smith*, 220 Wis. 2d 158, 164-65, 582 N.W.2d 131 (Ct. App. 1998). “Our obligation does not extend to creating an issue and making an argument for the litigant. We cannot serve as both advocate and judge.” *Id.* at 165.

² Rather than asking us to treat his appeal as a petition for a supervisory writ, Johnson asks us to treat it as a new petition for a writ of habeas corpus. We decline to do so. Johnson has failed to meet the requirements for a habeas petition set forth in WIS. STAT. § 782.04—namely, that the petition be verified, that it state who has restrained his liberty and name that individual as a party, and that it include the order restraining his liberty.

Therefore,

IT IS ORDERED that the appeal is dismissed.

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

Samuel A. Christensen
Clerk of Court of Appeals