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FILED

08-06-2020

John Barrett

Clerk of Circuit Court

2004CF006133

BY THE COURT:

DATE SIGNED: August 5, 2020

Electronically signed by T. Christopher Dee
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

Branch 37

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 04CF006133

CORY M. WELCH,

Defendant.

**DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION (HABEAS) RELIEF**

On July 15, 2020, the defendant filed a *pro se* motion for postconviction relief alleging that a pre-charging delay and failure to give constitutional notice of new charges violated his due process rights. He requests reversal of his convictions and dismissal of the complaint. Although the defendant denominates his motion as a "Petition for Writ of Habeas Corpus" and names Michael Meisner, Warden, as the defendant, the defendant's claims are properly brought in a postconviction motion under section 974.06, Stats.

Section 974.06 was adopted to replace habeas corpus as the primary method by which a defendant could attack his or her conviction after the time for appeal has expired. *State v. Pozo*, 258 Wis. 2d 796, 802 n. 5 (Ct. App. 2002). 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. *Pozo* at 803. See *State v. Witkowski*, 163 Wis. 2d 985, 990 (Ct. App. 1991) (a defendant may not relitigate or reformulate claims decided in a previous postconviction challenge.)

The court construes the defendant's petition as a postconviction motion under section 974.06 because the issues he raises could have been previously litigated in prior postconviction litigation. Habeas relief does not lie under these circumstances. Rather, the court finds that the defendant's motion is procedurally barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 169, 178 (1994). *Escalona-Naranjo*, as it interprets section 974.06(4) requires a defendant to raise all grounds for postconviction relief in his original motion or appeal. Failure to do so precludes a defendant from raising additional issues, including claims of constitutional or jurisdictional violations, in a subsequent motion or appeal where those issues could have been raised previously. *Id.* The court takes judicial notice of the extensive postconviction history in this case, and to the extent that the defendant failed to raise his current due process claims previously, they are procedurally barred under *Escalona-Naranjo*.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief (denominated as a petition for writ of habeas corpus) is **DENIED**.

FILED

09-02-2020

John Barrett

Clerk of Circuit Court

2004CF006133

BY THE COURT:

DATE SIGNED: September 1, 2020

Electronically signed by David A. Feiss
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
Branch 46

MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 04CF006133

CORY WELCH,

Defendant.

**DECISION AND ORDER
DENYING MOTION TO SUPPLEMENT THE RECORD**

On August 31, 2020, the defendant filed a *pro se* motion to supplement the record pursuant to § 809.14(3)(b), Wis. Stats. A motion to supplement the record is properly brought under § 809.15(4)(c), Wis. Stats. In this instance, the defendant is appealing the decision and order entered by Judge T. Christopher Dee on August 6, 2020, denying his motion for postconviction relief (denominated as a petition for writ of *habeas corpus*).¹ The defendant alleged in that motion that his due process rights were violated when the State dismissed the charges filed in 04CF004120 and filed new charges in 04CF006133. Judge Dee did not address the merits of the defendant's claim because he found that the motion was procedurally barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 169 (1994). The defendant seeks to add the record in 04CF004120 to the record in this case "so that he may have a fair and just review on appeal." The issue for appeal is whether the court properly applied the procedural bar of *Escalona-Naranjo*, not the underlying merits of the defendant's due process claim, and therefore, the court is not persuaded that supplementing the record of this case with the record of the prior case is necessary to have "a fair and just review on appeal."

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion to supplement the record is **DENIED**.

¹ The case is assigned to this court as the successor to Judge Dee's former felony calendar.



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August 17, 2021

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

2020AP1397

State of Wisconsin v. Corey Mendrell Welch (L.C. # 2004CF6133)

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).

Corey Mendrell Welch, *pro se*, appeals an order denying what he contends was a petition for *habeas corpus*. Welch contends that the circuit court erroneously determined that his claims were procedurally barred because it misconstrued his petition as a motion for postconviction relief pursuant to WIS. STAT. § 974.06 (2019-20).¹ Upon our review of the briefs and record, we

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

conclude at conference that this matter is appropriate for summary disposition. See WIS. STAT. RULE 809.21. We summarily affirm.

In 2004, the State filed sixteen charges against Welch, all related to a string of armed robberies. The trial court² granted the State's motion to sever the charges and the matter proceeded to two separate trials; where juries ultimately convicted Welch of twelve charges. Welch, through counsel, filed a postconviction motion seeking a new trial on the grounds that the trial court erred by severing the charges and by admitting certain other-acts evidence. The postconviction court denied the motion and this court affirmed.

Since then, Welch has filed numerous *pro se* postconviction motions and appeals. The motion underlying this appeal, titled, "Petition for Writ of Habeas Corpus Pursuant to Wis. Stats. 782.04 and 782.22," alleged that a pre-charging delay and the State's failure to give constitutional notice of new charges violated Welch's due process rights. (Capitalization and bolding omitted.) The petition also stated that Welch had no other adequate remedies available and that he was unable to previously raise his due process argument because of the unavailability of alibi witnesses who, as of the time Welch filed his petition, were available to testify.

The circuit court construed Welch's petition as a postconviction motion brought pursuant to WIS. STAT. § 974.06, noting that the "issues [Welch] raises could have been previously litigated," and were therefore procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d

² We refer to the court that presided over Welch's trial as the "trial court," the court that denied Welch's first postconviction motion as the "postconviction court," and the court that denied the motion underlying this appeal as the "circuit court."

163, 517 N.W.2d 157 (1994). The circuit court determined that “[h]abeas relief does not lie under these circumstances.” Welch now appeals.

On appeal, Welch contends that: (1) the circuit court erroneously exercised its discretion when it construed his *habeas corpus* petition as a WIS. STAT. § 974.06 postconviction motion and subsequently determined that his claims were procedurally barred; (2) he was prejudiced by the circuit court’s decision; (3) the circuit court is liable for damages; and (4) the previous unavailability of alibi witnesses constitutes a sufficient reason for failing to raise his constitutional claim in his direct appeal.

We agree with the postconviction court that Welch 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.* (italics added). 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.* (italics added).

Habeas corpus relief 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. (italics added). “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 (internal citation omitted).

Here, Welch had an adequate remedy in the form of his direct appeal. Welch’s supposed inability to locate alibi witnesses prior to his most recent filing does not constitute a sufficient reason for failing to raise his constitutional claims in a prior proceeding. Welch’s concerns would have been known to him at the time of his direct appeal and could have been raised then. Accordingly, we agree with the circuit court that habeas relief is not available as to Welch’s claims.

Moreover, we agree with the State that Welch cannot circumvent the *Escalona-Naranjo* bar by disguising a WIS. STAT. § 974.06 postconviction motion as a *habeas corpus* petition. WISCONSIN STAT. § 974.06 is the mechanism by which a prisoner may raise constitutional and jurisdictional claims after the time for a direct appeal has passed. See *State v. Henley*, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. Since his conviction, Welch has filed numerous appeals and postconviction motions, yet Welch fails to provide a sufficient reason as to why his grievance with an alleged pre-charging delay and the State’s alleged failure to notify him of new charges could not have been raised sooner. Because Welch had multiple opportunities to raise

his claims in prior proceedings, Welch's current motion does not provide a sufficient reason for permitting his instant litigation.³

Because the circuit court did not err, we need not consider Welch's claim for damages.

For the foregoing reasons, we affirm the circuit court.

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

³ The State contends that Welch effectively attempts to relitigate the claim he raised in his direct appeal wherein he challenged the trial court's decision to sever the charges against him. While it is unclear from Welch's brief to this court whether his arguments indeed relate back to the severance issue, we note that such a challenge would also be procedurally barred because it was previously litigated. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").



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November 17, 2021

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

No. 2020AP1397

State v. Welch L.C. #2004CF6133

A petition for review pursuant to Wis. Stat. § 808.10 having been filed by defendant-appellant-petitioner, Corey Mendrell Welch, pro se, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court