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Supreme Court of Wisconsin

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FILED
12-12-2023
CLERK OF WISCONSIN
SUPREME COURT

December 12, 2023

To:

Hon. Michael A. Schumacher
Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Eau Claire County Courthouse
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Nicholas C. Zales
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Robert E. Earles
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Alex Robledo
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Stephanie Aribinder
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You are hereby notified that the Court has entered the following order:

No. 2020AP1811-W Northern v. Tegels, L.C.#2001CF580

A petition for review and a supplemental petition for review having been filed on behalf of petitioner-petitioner, Lawrence Northern, and a response and a supplemental response having been filed on behalf of respondent Lizzie Tegels, Warden, and all having been considered by this court;

IT IS ORDERED that the petition for review is denied, no costs.

ANN WALSH BRADLEY and REBECCA FRANK DALLET, J.J., dissent.

Samuel A. Christensen
Clerk of Supreme Court



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June 22, 2023

To:

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Zales Law Office
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Milwaukee, WI 53227-4426

*Address List Continued on Page 2.

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

No. 2020AP1811-W

Northern v. Tegels L.C. #2001CF580

A pro se petition for review pursuant to Wis. Stat. § 808.10 was filed on behalf of petitioner-petitioner, Lawrence Northern. To aid in its determination of whether to grant review in this matter, the court desires to receive a supplemental petition for review filed by counsel on behalf of Mr. Northern. Attorneys Robert E. Earles, Stephanie Ainbinder, Alex Robledo, and Nicholas C. Zales have agreed to represent Mr. Northern on a pro bono basis in this matter, and Mr. Northern has consented to their representation. Accordingly,

IT IS ORDERED that Attorneys Robert E. Earles, Stephanie Ainbinder, Alex Robledo, and Nicholas C. Zales shall serve as counsel for petitioner-petitioner, Lawrence Northern. The representation by these counsel shall be on a pro bono basis and not subject to compensation under

Page 2

June 22, 2023
No. 2020AP1811-W

Northern v. Tegels L.C. #2001CF580

Supreme Court Rule (SCR) ch. 81. Attorneys Earles, Ainbinder, and Robledo, who are not licensed to practice law in this state, shall appear and participate in this matter in association with Attorney Zales, who is an active member of the State Bar of Wisconsin, pursuant to SCR 10.03(4)(b); and

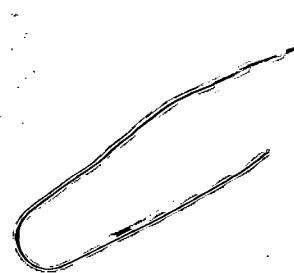
IT IS FURTHER ORDERED that Attorney Robert E. Earles was previously permitted to appear in this matter pro hac vice and shall continue to appear in this matter on that basis; and

IT IS FURTHER ORDERED that, on or before July 10, 2023, Attorney Stephanie Ainbinder and Attorney Alex Robledo shall file a petition to appear in this matter pro hac vice pursuant to SCR 10.03(4)(b). Given the pro bono nature of their representation, the fee normally required for each of their pro hac vice applications by SCR 10.03(4)(b)2. is hereby waived; and

IT IS FURTHER ORDERED that, on or before July 24, 2023, a supplemental petition for review, conforming to the requirements of Wis. Stat. § 809.62, shall be filed and served on behalf of petitioner-petitioner, Lawrence Northern; and

IT IS FURTHER ORDERED that, on or before August 14, 2023, the respondent, Warden Lizzie Tegels, shall file a supplemental response to the supplemental petition for review.

Samuel A. Christensen
Clerk of Supreme Court



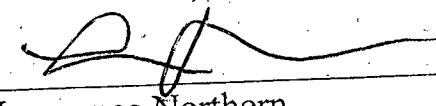
Address list continued:

Lawrence Northern 427813
Jackson Correctional Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

CONSENT TO REPRESENTATION

I, Lawrence Northern, hereby consent to allow Attorneys Robert E. Earles, Stephanie Ainbinder, and Alex Robledo of Cooley LLP and Attorney Nicholas C. Zales of Zales Law Office to represent me in Case No. 2020AP1811-W, State ex rel. Northern v. Tegels, in which a petition for review is currently pending in the Wisconsin Supreme Court. This representation shall be on a pro bono basis and shall not be subject to any compensation. By entering into this consent, I hereby direct Attorneys Earles, Ainbinder, Robledo, and Zales to file a supplemental petition for review on my behalf, and in the event the petition for review would be granted, to file written briefs and to present oral argument on my behalf in the above-referenced case.

Dated June 4th, 2023.



Lawrence Northern



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DISTRICT III

May 10, 2022

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Black River Falls, WI 54615-0233

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

2020AP1811-W

State of Wisconsin ex rel. Lawrence Northern v. Lizzie Tegels
(L.C. # 2001CF580)

Before Gill, Fitzpatrick and Nashold, JJ.

Lawrence Northern petitions for a writ of habeas corpus on the ground of ineffective assistance of appellate counsel. *See State v. Knight*, 168 Wis. 2d 509, 485 N.W.2d 540 (1992). He seeks to reinstate his postconviction rights for convictions entered in 2002 on two counts of possession of cocaine with intent to deliver. Northern has filed two prior *Knight* petitions with

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COURT OF APPEALS

this court arising from this case, in addition to a direct appeal and two appeals from the denial of postconviction motions brought under WIS. STAT. § 974.06.¹

We summarize the relevant facts from the lengthy procedural history of this case as follows. In 2003, Northern hired the Mandelman law firm (with Jeffrey Reitz as lead attorney) to represent him in seeking postconviction relief from his drug convictions. Unbeknownst to Northern, Reitz filed a notice of appeal without first filing a postconviction motion, and Mandelman then subcontracted with Timothy Provis to file an appellate brief on Northern's behalf. Provis filed a brief raising several discovery claims without ever contacting Northern. Northern sent this court a pro se request to withdraw his appeal on the grounds that he had not authorized Provis to file it and he had other issues he wanted to raise—including filing a postconviction motion alleging ineffective assistance of trial counsel. We denied the motion on the ground that we would not entertain pro se motions from represented litigants. We then affirmed the conviction on the ground that the discovery issues Provis raised had been waived by the lack of a postconviction motion.

In 2005, Northern filed a pro se motion under WIS. STAT. § 974.06 raising claims of insufficient evidence, erroneously admitted evidence, flawed jury instructions, and ineffective assistance of trial and appellate counsel. The ineffective assistance claims included allegations that Northern's trial counsel, Dana Norgard, should have raised a Double Jeopardy claim, should have challenged the jury instructions, and should have objected to the publication of certain exhibits to the jury; that Mandelman had subcontracted Northern's appeal without Northern's

¹ See Appeal Nos. 2003AP246-CR, 2005AP1215, 2006AP2051-W, 2007AP168, and 2016AP492-W.

consent; and that Provis had filed a an appellate brief without Northern's consent. The circuit court denied the motion and this court affirmed. We held that several of the issues raised were procedurally barred by Northern's prior appeal, but addressed the merits of the ineffective assistance of trial counsel claims relating to jury instructions and multiplicity of charges.

In 2006, Northern filed a pro se *Knight* petition, alleging that he had been denied the right to counsel of choice on his direct appeal and that Provis should have raised ineffective assistance claims challenging Norgard's performance at trial. This court denied the petition on the dual grounds that Northern had failed to serve the State and that Provis could not have raised an ineffective assistance claim related to trial counsel on the direct appeal because the issue of trial counsel's performance had not been preserved with a *Machner* hearing. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). We explained that a *Knight* petition was not the proper mechanism for any ineffective assistance claims relating to Norgard because Northern was really challenging Reitz's failure as postconviction counsel to preserve those issues, rather than Provis's performance as appellate counsel.

Following the denial of his first *Knight* petition, Northern immediately filed a second pro se motion under WIS. STAT. § 974.06, alleging that Reitz provided ineffective assistance as postconviction counsel by failing to file a postconviction motion challenging the amendment of the complaint and duplicity of charges prior to filing an appeal. The circuit court denied the motion without a hearing. This court addressed the merits and affirmed on the ground that the charges were not duplicitous and the amendment of the complaint was not prejudicial. *See State v. Northern*, No. 2007AP168, unpublished slip op. (WI App. Nov. 29, 2007).

In 2009, Northern filed a motion for resentencing or sentence modification in the circuit court, alleging that the circuit court had failed to advise him of the potential “bad time” consequence of violating prison rules, that the amendment of federal sentencing guidelines constituted a new factor, and that his sentence was unduly harsh. The circuit court denied the motion on its merits and Northern did not appeal.

In 2016, Northern filed a second *Knight* petition with this court, again asserting that he had been denied his right to counsel of choice and the effective assistance of counsel on his direct appeal. We denied the petition on the grounds that Northern had not promptly sought relief when he waited over ten years after the denial of his first habeas petition before filing his second habeas petition.

In 2017, Northern brought another motion for sentence modification, again claiming that his sentence was unduly harsh—this time citing research showing “extreme disparities” between his sentences and those of others convicted of similar offenses. The circuit court denied the motion as procedurally barred and Northern did not appeal.

That brings us to the present *Knight* petition, Northern’s third. Northern now raises the following issues: (1) Reitz provided ineffective assistance of postconviction counsel by failing to file a postconviction motion on Northern’s behalf; (2) Reitz provided ineffective assistance of appellate counsel by filing a notice of appeal without Northern’s knowledge or consent; (3) Mandelman violated Northern’s right to counsel of choice by subcontracting the briefing of Northern’s appeal to Provis without Northern’s knowledge or consent; (4) Provis provided ineffective assistance of appellate counsel by “wasting” Northern’s appeal on unpreserved arguments and failing to raise other preserved issues, such as the length of Northern’s sentence;

and (5) the court of appeals erred when it denied Northern's pro se motion to voluntarily dismiss his first appeal as of right. All of these claims are procedurally barred.

Northern's first issue is outside the scope of a *Knight* petition because it relates to Reitz's performance as postconviction counsel, rather than his performance as appellate counsel. *See State ex rel Rothering v. McCaughtry*, 205 Wis. 2d 675, 676, 556 N.W.2d 136 (Ct. App. 1996) (holding that the remedy for error by postconviction counsel lies with the circuit court). Northern suggests that, to the extent that any of his claims should be heard in the circuit court, this court could construe his *Knight* petition as a WIS. STAT. § 974.06 motion and transfer the claims to the circuit court. *See State ex rel. Warren v. Meisner*, 2020 WI 55, ¶51, 392 Wis. 2d 1, 944 N.W.2d 588, 392 Wis. 2d 1, 944 N.W.2d 588 (remanding writ petition to circuit court after petitioner relied upon a subsequently overturned decision to seek relief from the court of appeals). However, Northern already challenged Reitz's failure to file a postconviction motion in his second § 974.06 motion. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (a matter already litigated cannot be relitigated in subsequent postconviction proceedings "no matter how artfully the defendant may rephrase the issue"). To the extent that Northern may now be asserting that Reitz should have raised different issues in a postconviction motion, that claim would be both outside of a *Knight* petition and barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) because Northern has provided no sufficient reason he could not have consolidated all claims relating to Reitz's failure to file a postconviction motion prior to appeal in Northern's second § 974.06 motion.

Northern's second and third issues relating to violations of his rights to decide whether to appeal and to have counsel of choice are likewise procedurally barred because they were previously litigated in both of his prior *Knight* petitions. *See State v. Pozo*, 2002 WI App 279,

¶9, 258 Wis. 2d 796, 654 N.W.2d 12 (holding that a writ of habeas corpus will not be granted where the petitioner asserts a claim that has already been litigated in a prior postconviction proceeding). The fact that both petitions were dismissed on procedural grounds does not mean that the decisions are not binding on the issues raised. *See* WIS. STAT. § 805.03 (stating that dismissal for failure to prosecute or to comply with procedural statutes operates as an adjudication on the merits unless the dismissal order specifies there is good cause); WIS. STAT. RULE 809.84 (stating that the general rules of civil procedure apply to all matters not covered by the appellate rules unless the circumstances or context require otherwise); and *Marshall-Wisconsin Co., Inc. v. Juneau Square Corp.*, 139 Wis. 2d 112, 128-42, 406 N.W.2d 764 (distinguishing voluntary dismissals without prejudice from the presumption of dismissal with prejudice under § 805.03).

As to Northern's fourth issue, Northern now contends Provis should have raised a preserved challenge to the length of Northern's sentence on Northern's direct appeal. Once again, however, that issue is barred by *Pozo* because Northern challenged the length of his sentence in two sentence modification motions in the circuit court. Northern cannot use a habeas petition to now seek review of decisions he did not timely appeal. *See State ex rel. Fuentes v. Wisconsin Court of Appeals*, 225 Wis. 2d 446, 451, 593 N.W.2d 48 (1999) (holding that habeas corpus is an extraordinary remedy that is not available when an adequate alternate mechanism for seeking relief, such as a direct appeal, could have been taken).

Northern's fifth issue relating to this court's refusal to grant his pro se request for voluntary dismissal of his direct appeal is outside the scope of a *Knight* petition because it does not relate to appellate counsel's performance. Any remedy for an alleged error by this court would have come from direct judicial review of our opinion.

Finally, Northern also asks for reversal in the interest of justice. However, the case is not before us on appeal. Northern provides no precedent for applying WIS. STAT. § 752.35 in the context of a habeas corpus petition. In any event, we are not persuaded that the interest of justice requires reinstatement of Northern's right to a direct appeal when he has already obtained decisions on the merits of his claims regarding jury instructions, Double Jeopardy issues, the amendment of the complaint, and the length of his sentences, and his failure to obtain review of additional issues is attributable to his own failures to consolidate his issues and follow the procedural rules.

Therefore,

IT IS ORDERED that the petition for a writ of habeas corpus is denied *ex parte* pursuant to WIS. STAT. RULE 809.51(2).

*Sheila T. Reiff
Clerk of Court of Appeals*

OFFICE OF THE CLERK



Supreme Court of Wisconsin

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December 15, 2021

To:

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

No. 2020AP1811-W Northern v. Tegels L.C. #2001CF580

Petitioner, Lawrence Northern, has filed a petition for review of the court of appeals' decision of November 24, 2020. The respondent, Warden Lizzie Tegels, has filed a response to the petition. In addition, petitioner has filed two motions for leave to file a reply in support of his petition for review. The court having considered all of the filings;

IT IS ORDERED that the motions for leave to file replies in support of the petition for review are granted, and the replies are accepted for filing; and

IT IS FURTHER ORDERED that the petition for review is granted; the court of appeals' decision in this matter of November 24, 2020, is summarily vacated; and this matter is remanded to the court of appeals for further proceedings. Upon remand, this matter shall be assigned to an



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WISCONSIN COURT OF APPEALS

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DISTRICT III

May 27, 2022

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

2020AP1811-W

State of Wisconsin ex rel. Lawrence Northern v. Lizzie Tegels
(L.C. # 2001CF580)

Before Gill, Fitzpatrick and Nashold, JJ.

Lawrence Northern has filed a pro se motion for reconsideration of the order issued by this court on May 10, 2022, denying Northern's petition for a writ of habeas corpus. However, our file shows that Northern is still represented by counsel, who filed the writ petition on his behalf following a remand from the Wisconsin Supreme Court.

The statutory procedure for appeals in this state "requires that a defendant make an election to proceed with a state public defender, retain counsel or undertake the appeal *pro se*." *State v. Redmond*, 203 Wis.2d 13, 19, 552 N.W.2d 115 (Ct. App. 1996). There is no constitutional right to hybrid representation (meaning by both counsel and the appellant *pro se*)

on appeal. *State v. Debra A.E.*, 188 Wis.2d 111, 138, 523 N.W.2d 727 (1994). Accordingly, it is the practice of this court to not entertain pro se motions from represented litigants.

Additionally, participation in the Court of Appeals electronic filing system is mandatory for attorneys representing parties in the Court of Appeals.¹ See WIS. STAT. RULE 809.801. All such attorneys, including those who participated in circuit court electronic filing for this case and those who are co-counsel on this case, must separately opt in to the appellate court electronic filing system for this case and any consolidated cases. All attorneys who are not already opted in for this case are hereby ordered to do so within **five days of the date of this order**. We remind counsel that failure to comply with an order of this court may be grounds for monetary or other sanctions. See WIS. STAT. RULE 809.83(2).

Therefore,

IT IS ORDERED that the pro se motion for reconsideration is denied.

IT IS FURTHER ORDERED that attorney Steven M. Przesmicki shall opt in to participate in the Court of Appeals electronic filing system for this case within five days of the date of this order. See WIS. STAT. RULE 809.801.

*Sheila T. Reiff
Clerk of Court of Appeals*

¹ For information on the appellate court electronic filing system, including instructions on opting in for individual cases, visit <https://www.wicourts.gov/ecourts/efileappellate/index.jsp>.