**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 14, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP829** **Cir. Ct. No. 2014CV2086**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN EX REL. SEAN F. ROWELL,**

**PETITIONER-APPELLANT,**

**V.**

**JEFFREY PUGH, WARDEN, STANLEY CORRECTIONAL INSTITUTION,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Sean F. Rowell, *pro se*, appeals an order of the circuit court denying his petition for a writ of *habeas corpus*. Rowell argues that he should be released from custody because court commissioners who presided over early proceedings in his criminal cases were "unempowered" by their failure

"to perform the Official Oath of Office" or to "receive authorization through an appointment order." We agree with the circuit court's conclusion that Rowell has not shown he is entitled to the writ. We therefore affirm the order.

## BACKGROUND

¶2 In September 1992, Rowell was charged with one count of armed robbery as party to a crime, and he came before Court Commissioner Audrey Brooks for an initial appearance. Rowell was ultimately convicted upon his guilty plea and sentenced to fifty-six months' imprisonment. Requests for sentence reduction were denied in December 1993 and April 1994. In July 1994, a group of additional postconviction motions, which included a petition for a writ of *habeas corpus*, was denied.

¶3 In August 1996, Commissioner Brooks signed an arrest warrant for Rowell, who was charged with one count of first-degree intentional homicide while armed with a dangerous weapon as a habitual criminal. On October 8, 1996, Rowell's initial appearance was conducted by Court Commissioner Marshall B. Murray. On October 17, 1996, Commissioner Brooks conducted Rowell's preliminary hearing and arraignment. A jury convicted Rowell in February 1997, and he was sentenced to life imprisonment with parole eligibility beginning in April 2022. Rowell filed a postconviction motion, which was denied. He appealed, but this court affirmed the conviction. *See* ***State v. Rowell***, No. 1998AP1354-CR, unpublished slip op. at 4 (WI App Sept. 28, 1999).

¶4 In February 2010, Rowell filed a *pro se* postconviction motion in the homicide case, alleging that the trial court had lost jurisdiction because the district attorney filed the information at the close of the preliminary hearing without first obtaining and reviewing a transcript of that hearing. *See* ***State v. Rowell***,

No. 2010AP767, unpublished slip op. at ¶4 (WI App Dec. 14, 2010). The circuit court denied the motion, and we affirmed. *See* ***id.***, ¶¶1, 4.

¶5 In March 2014, Rowell filed the underlying petition for a writ of *habeas corpus*. He alleges that he was improperly imprisoned "due to the Circuit Court Commissioners' Non-Compliance with Wisconsin Statutes §757.68(1) (a), (2) and §757.69[.]" More specifically, he contends that Commissioner Brooks was not authorized to act because neither her oath of office, *see* WIS. STAT. § 757.68(1)(a) (1991-92),[1] nor an appointment order, *see* WIS. STAT. § 757.69(1), were on file with the clerk of court, and he contends that Commissioner Murray's appointment order was not on file.

¶6 The circuit court denied the writ without a response from the warden. It explained that while Rowell was correct to note that the oath of office must be on file, there is no similar requirement for any appointment order. Further, oaths of office need only be retained by rule for seven years past the expiration of the official's term. Commissioner Brooks retired in 2004, and Rowell made inquiries about her oaths in 2013. Although other, older oaths could be found on file for Commissioner Brooks, her oaths covering 1992 and 1996 were not located. The circuit court noted, however, that the absence of oaths for those time periods does not prove that they were never filed, only that they are no longer on file. The circuit court further explained that Rowell had the opportunity to raise his concerns previously, in his postconviction motions and appeals.

[1] The 1991-92 and 1995-96 statutes are identical in all relevant parts. The current 2011-12 versions of WIS. STAT. §§ 757.68 and 757.69 are significantly revised from their earlier counterparts; however, it is the older versions that apply here, and we refer to the 1991-92 version of the statutes unless otherwise noted.

Accordingly, the circuit court also noted that Rowell had failed to show he had no other adequate remedies. Rowell appeals.

## DISCUSSION

¶7 The writ of *habeas corpus* is a constitutionally guaranteed civil process, the purpose of which "is to protect and vindicate the petitioner's right of personal liberty by releasing the petitioner from illegal restraint." *See* ***State ex rel. Hager v. Marten***, 226 Wis. 2d 687, 692, 594 N.W.2d 791 (1999). It is an extraordinary writ, available only under limited circumstances. *See* ***State ex rel. Haas v. McReynolds***, 2002 WI 43, ¶12, 252 Wis. 2d 133, 643 N.W.2d 771. A petitioner seeking relief by *habeas corpus* must: (1) "be restrained of his or her liberty"; (2) "show that the restraint was imposed by a body without jurisdiction or that the restraint was imposed contrary to constitutional protections"; and (3) "show that there was no other adequate remedy available in the law." *See* ***id.*** The petitioner has the burden of showing, by a preponderance of the evidence, that his restraint is illegal. *See* ***Hager***, 226 Wis. 2d at 694. "A circuit court's order denying a petition for writ of *habeas corpus* presents a mixed question of fact and law." ***State v. Pozo***, 2002 WI App 279, ¶6, 258 Wis. 2d 796, 654 N.W.2d 12.

¶8 WISCONSIN STAT. § 757.68(1)(a) allows counties with a specific population threshold to "create the office of full-time court commissioners." "Each court commissioner shall take and file the official oath in the office of the clerk of the circuit court of the county for which appointed before performing any duty of the office." ***Id.*** Under WIS. STAT. § 757.69(3), court commissioners have certain inherent powers. Certain other powers, however, can only be exercised "[o]n authority delegated by a judge, which may be by a standard order, and with the approval of the chief judge of the judicial administrative district[.]" *See*

§ 757.69(1). It is this delegation that Rowell is referring to as an "appointment order." The powers that may be delegated include the ability to issue warrants and to conduct initial appearances, preliminary hearings, and arraignments. *See* § 757.69(1)(b).

¶9 Rowell made inquiries with the circuit court clerk and was able to obtain copies of Commissioner Brooks' oaths of office for 1977, 1978, 1982, and 1999; Commissioner Murray's oaths for 1996 and 1999; and appointment orders for both commissioners for 1999. The clerk had no copies of, or index records for, either commissioner for the years 1990-98. From the absence of historical records, Rowell infers that the oaths and orders never existed in the first place. He contends that without the oaths and appointment orders on file, the commissioners could not issue warrants or conduct any initial appearance, preliminary hearing, or arraignment, so his armed robbery and intentional homicide convictions must be vacated. We do not agree.

¶10 First, we decline to infer, from the lack of records, that Commissioner Brooks' oaths were never filed[2] as required by WIS. STAT. § 757.68(1). As the circuit court noted, the oaths were only required to be maintained for seven years past the expiration of the term. *See* SCR 72.01(58). That the oaths are not on file in 2013 or 2014 does not mean that they were not on file in 1992 or 1996. Second, as the circuit court noted, WIS. STAT. § 757.69(1) on its face has no filing requirement for any appointment orders that delegate authority to a commissioner.

[2] Rowell acknowledges, as he must, that Commissioner Murray's oath was on file for the applicable time period.

¶11 In response to both points, Rowell relies on a letter from the circuit court clerk. The letter explains that it is "the general practice" of the office to keep an index of records that are destroyed after their retention period has lapsed. The letter also says that although the clerk is not required to maintain appointment orders, the general practice in Milwaukee is for the oath and the order to be filed together. If the order is filed, it is maintained in the same manner as the oath. Rowell points out that not only are there no copies of the oaths or orders between 1990-98 for the commissioners, but there are also no index records to suggest that the items were previously filed but later destroyed.

¶12 First, we note that Rowell's letter from the circuit court clerk is dated December 26, 2013. While it evidently describes current record-keeping policies, it does not establish when those policies began. If the current policies were not the clerk's practice in 1992 or 1996, then they are presently irrelevant. Second, we can ascribe no significance to the absence of documents—that is, the appointment orders—that were never required to be filed in the first place. Third, while one inference from the evidence Rowell presents is that Commissioner Brooks' oaths and appointment orders were never filed,[3] it is also plausible to infer that the documents' current absence is the result of their intentional destruction at the end of the retention period, a disaster like fire or flood, or simple human error. Thus, we cannot say that Rowell has shown by a preponderance of the evidence that Brooks' oaths were not on file in 1992 or 1996.

[3] Again, however, we note that the statute does not require appointment orders to be filed.

¶13 In any event, Rowell also does not establish, even if the commissioners lacked valid delegation of powers or failed to file their oaths, that the result is a jurisdictional defect or constitutional violation.[4] Accordingly, we cannot say that Rowell has met his burden of showing that his restraint was "imposed by a body without jurisdiction or … imposed contrary to constitutional protections," *see* ***Haas***, 252 Wis. 2d 133, ¶12, and we agree with the circuit court that the petition lacks any reference to legal authority upon which a court should grant relief.

¶14 "'Additionally, in a postconviction setting, a petition for writ of *habeas corpus* will not be granted where … 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[.]'" ***Pozo***, 258 Wis. 2d 796, ¶9. As the circuit court observed, "Rowell has had a number of opportunities to raise his concerns about whether the court was authorized to act in his cases."

¶15 Rowell counters that his claims are extraordinary because they are "outside the preview [purview] of normal operations," so to expect him or counsel to have been aware of the "violations" as they were occurring "is simply beyond reason." This argument does not suffice for many reasons, not the least of which is that it fails to explain why the claims have occurred to Rowell now, and not at any point before. Rowell also complains that the circuit court "is attempting to hold [him] to a standard on par with an attorney" by expecting him to articulate a reason why these claims were not addressed previously. However, it has long

[4] Conclusory assertions that "non-compliance" with the statutes caused Rowell's constitutional rights "to be violated" and "prohibited the court from possessing jurisdiction and/or competency" are insufficient.

been the rule that *pro se* litigants are held to the same standards, and are bound by the same rules, as attorneys.[5] *See* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). Accordingly, we also agree with the circuit court that Rowell has not shown that he has or had no other remedy available at law. *See* ***Pozo***, 258 Wis. 2d 796, ¶9; *see also* ***Haas***, 252 Wis. 2d 133, ¶¶14-15.

*By the Court*.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[5] Rowell also expects us to liberally construe his petition. However, "[o]ur obligation to liberally construe a pro se litigant's pleading assumes that the litigant has otherwise made a proper argument for relief, albeit under the wrong label. Our obligation does not extend to creating an issue and making an argument for the litigant." *See* ***State ex rel. Harris v. Smith***, 220 Wis. 2d 158, 164-65, 582 N.W.2d 131 (Ct. App. 1998).