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

**March 10, 2015**

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



**Appeal No. 2014AP1997** **Cir. Ct. No. 2014CV222**

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

**STATE OF WISCONSIN EX REL. WILLIAM FAULKNER,**

**PETITIONER-APPELLANT,**

**V.**

**REED RICHARDSON, WARDEN, STANLEY CORRECTIONAL INSTITUTION,**

**RESPONDENT-RESPONDENT.**

APPEAL from an order of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. William Faulkner, pro se, appeals an order denying his petition for a writ of habeas corpus. Faulkner's petition alleged his constitutional rights were violated by trial testimony concerning a revolver discovered during a warranted search of his residence. We conclude Faulkner's

petition is procedurally barred because he has not provided a valid reason for his failure to raise the issue during his direct appeal of the conviction. Accordingly, we affirm.

## BACKGROUND

¶2 Faulkner was charged in 1991 with being a party to the crime of first-degree intentional homicide while armed with a dangerous weapon. The charge stemmed from the grisly murder of Herbert Dougherty, who was led into the woods and shot five times in the face, head, and torso.

¶3 The charge was filed after a warranted narcotics search of Faulkner's residence in Minneapolis, Minnesota, during which federal and state law enforcement officers discovered a hidden room containing firearms, including a .45 caliber revolver Faulkner was believed to have wielded during the crime. Testimony regarding the revolver's discovery was presented to the jury at trial. Faulkner was ultimately convicted and sentenced to life imprisonment with parole eligibility after eighteen years.

¶4 On direct appeal, Faulkner asserted he was denied his constitutional right to confront two witnesses when, in response to a number of Faulkner's questions, they invoked their Fifth Amendment right against self-incrimination. *See* ***State v. Faulkner***, No. 1993AP1655-CR, unpublished slip op. 1 (WI App Dec. 14, 1993). Faulkner also argued the trial court erred by denying his motion for a new trial in the interest of justice because the issue of an accomplice's credibility was not fully tried. ***Id.*** at 2. We rejected these arguments and affirmed both the conviction and the order denying postconviction relief. ***Id.*** at 11.

¶5 Faulkner filed the petition for habeas corpus in the present case on July 22, 2014, along with a supporting memorandum.[1] Faulkner alleged, as he does now on appeal, that the revolver was outside the scope of the Minnesota search warrant and therefore was seized in violation of the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution.

¶6 The circuit court denied Faulkner's habeas petition. The only documentation of the circuit court's decision in the record on appeal is a hearing memorandum in which the circuit court wrote that the constitutionality of the revolver seizure

> was addressed by the trial court prior to Faulkner's jury trial. In a Memorandum Decision dated and filed on March 20, 1992, former Judge Michael T. Lucci denied Faulkner's motion to suppress the .45 caliber pistol as being illegally seized by law enforcement for the reasons stated therein. The time to appeal that decision is now passed.

The 1992 memorandum decision is not in the record on appeal. The record also does not contain the pretrial suppression motion, pretrial hearing transcripts, or a transcript of any hearing associated with Faulkner's present habeas petition.

[1] In 2009, Faulkner petitioned this court for a writ of habeas corpus, alleging he received ineffective assistance of appellate counsel by virtue of his attorney's failure to argue that trial counsel was ineffective for failing to challenge what Faulkner claimed was an invalid complaint and arrest warrant. The State presents an alternative argument that, under ***State v. Pozo***, 2002 WI App 279, ¶9, 258 Wis. 2d 796, 654 N.W.2d 12, Faulkner's present petition must be denied because his present claim was previously litigated under the prior petition. In light of our conclusion that Faulkner's present claims are barred by his failure to raise them in his direct appeal, we have no need to reach the State's alternative argument.

## DISCUSSION

¶7 "A petition for writ of habeas corpus commences a civil proceeding wherein the petitioner claims an illegal denial of his or her liberty." ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶18, 290 Wis. 2d 352, 714 N.W.2d 900, *opinion clarified on denial of reconsideration*, 2006 WI 121, 297 Wis. 2d 587, 723 N.W.2d 424. It is an equitable remedy available "only when the petitioner is being held in violation of a constitutional right or by a tribunal that lacks jurisdiction, and in either case, only when no other remedy at law is adequate to provide relief." ***Id.***

¶8 We review an order denying a petition for a writ of habeas corpus as a mixed question of fact and law. ***State v. Pozo***, 2002 WI App 279, ¶6, 258 Wis. 2d 796, 654 N.W.2d 12. We will not reverse the circuit court's factual determinations unless they are clearly erroneous. ***Id.*** However, whether the writ is available to the party seeking relief is a question of law that we review de novo. ***Id.***

¶9 Here, ***Pozo*** dictates that Faulkner is not entitled to relief. In ***Pozo***, we stated that habeas corpus is "not a substitute for appeal and therefore, a writ will not be issued where the 'petitioner has an otherwise adequate remedy that he or she may exercise to obtain the same relief.'" ***Id.***, ¶8 (quoting ***State ex rel. Haas v. McReynolds***, 2002 WI 43, ¶14, 252 Wis. 2d 133, 643 N.W.2d 771). In the postconviction context, habeas relief is unavailable "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 ...." ***Id.***, ¶9 (citing ***State ex rel. LeFebre v. Israel***, 109 Wis. 2d 337, 342, 325 N.W.2d 899 (1982)).[2]

¶10 We see no reason why Faulkner could not have raised any issue concerning the constitutionality of the revolver seizure in his direct appeal. The issue was apparently preserved in the trial court. Neither Faulkner's suppression motion nor the court's 1992 decision on that motion is in the case record before us. We therefore must accept the circuit court's characterization of the 1992 decision and presume the court in this case correctly concluded Faulkner seeks to do no more than relitigate the denial of his suppression motion through his petition for habeas relief. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993) (when appellate record is incomplete vis-à-vis an issue raised by the appellant, we presume the missing material supports the circuit court's ruling).[3]

¶11 Faulkner's memorandum in support of his petition asserted his request was "based on new evidence that was not known at the time of trial, direct appeal and all other appeals." However, neither Faulkner's petition nor his appellate briefs describe that "new evidence," why it was previously unavailable or undiscoverable, or why it mattered to his case. Rather, Faulkner's arguments consist only of general and often conclusory statements and are otherwise

[2] In his reply brief, Faulkner argues that ***Pozo*** "does not apply to the United States Constitution" and is inapplicable due to the federal Supremacy Clause. However, Faulkner fails to cite any conflicting federal authority that would render inapplicable ***Pozo***'s rule limiting habeas corpus relief when the claim raised was available to the petitioner on his or her direct appeal of the conviction.

[3] In his appellate brief, Faulkner appears to concede the existence of the pretrial suppression motion, stating, "Even though [his constitutional challenge to the search] was filed as a pretrial motion as Judge Glonk [sic] states in the record and was not appealed ...."

insufficiently developed. Ultimately, Faulkner fails to provide any valid excuse for his failure to appeal the circuit court's denial of his suppression motion in his direct appeal.

*By the Court*.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).