

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 27, 2018**

Sheila T. Reiff  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2017AP39**

**Cir. Ct. No. 2016CV7924**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**STATE OF WISCONSIN EX REL. GREGORY S. GORAK,**

**PETITIONER-APPELLANT,**

**v.**

**MICHAEL MEISNER, WARDEN,**

**RESPONDENT-RESPONDENT.**

---

APPEAL from orders of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed in part, reversed in part, and cause remanded with directions.*

Before Kessler, Brash and Dugan, JJ.

¶1 BRASH, J. Gregory Gorak appeals from a circuit court order denying and dismissing his petition for a writ of *habeas corpus*, an order denying his motion for reconsideration, and an order denying his motion to vacate or

expunge those two orders. Gorak argues that the circuit court lacked jurisdiction to review his petition for a writ of *habeas corpus* because his “entire circuit court record” was before this court on appeal. He also argues that the circuit court erred in finding that his claims were procedurally barred because he contends that they have not all been previously litigated and resolved.

¶2 While we agree with the circuit court that it did not lack jurisdiction over the petition for a writ of *habeas corpus*, we find that not all of Gorak’s claims here are procedurally barred, specifically those that relate to the administration of his sentence by the Department of Corrections (DOC). We therefore affirm in part, reverse in part, and remand to the circuit court for consideration of those arguments.

### BACKGROUND

¶3 In April 2007, Gorak pled guilty to possession of a Molotov cocktail (Count 2), and pled no contest to a burglary charge (Count 4).<sup>1</sup> Gorak was sentenced on June 8, 2007, as follows: (a) for Count 2: six years, evenly bifurcated between three years of initial confinement and three years of extended supervision, to be served consecutively to other sentences; and (b) for Count 4: ten years, evenly bifurcated between five years of initial confinement and five years of extended supervision, to be served concurrently to other sentences.<sup>2</sup>

---

<sup>1</sup> Gorak also pled guilty to carrying a concealed weapon, which was referenced as Count 3; he was sentenced to nine months in jail. This sentence is not relevant to the issue discussed in this appeal.

<sup>2</sup> The sentence for burglary (Count 4) was initially stated in the judgment of conviction as being consecutive to other sentences; however, that was subsequently amended to a concurrent sentence. Gorak was sentenced by the Honorable William Sosnay.

¶4 Additionally, Gorak pled guilty in February 2007 to a federal charge of being a felon in possession of a firearm, a charge that arose from the same incident. For that conviction, Gorak was sentenced to nine years and ten months of initial confinement, to be followed by three years of supervised release. He received his federal sentence on June 7, 2007, the day before being sentenced in state court.

¶5 Since being sentenced, Gorak has pursued multiple postconviction motions and appeals, many of which relate to his sentences, their structure, and sentence credit. We discuss only those motions and appeals that are relevant to or provide background for this appeal.

¶6 In October 2008, Gorak filed a *pro se* motion to correct the judgment of conviction imposed by the State. He pointed out that in the sentencing transcript the circuit court had stated that his sentences were to be either consecutive or concurrent to his *federal sentence*, not to “any other sentence” as it was set forth in the judgment of conviction. The circuit court agreed and amended the judgment of conviction such that Count 2 was to be served consecutive to Gorak’s federal sentence, and Count 4 was to be served concurrent with Counts 2 and 3 and the federal sentence.<sup>3</sup>

¶7 Gorak filed another *pro se* motion for sentence structure clarification and postsentencing confinement credit in February 2010.<sup>4</sup> The circuit court interpreted Gorak’s argument as being an issue with the manner in which the DOC

---

<sup>3</sup> This amendment was ordered by the Honorable Timothy M. Witkowiak.

<sup>4</sup> This motion was heard by the Honorable Dennis R. Cimpl.

had computed his sentence. The court therefore denied Gorak's motion, stating that the circuit court "has no jurisdiction over the [DOC's] sentence computation authority."

¶8 In April 2011, the DOC filed a request for clarification relating to the circuit court's order of October 2008, stating that Count 4 was to be served concurrent to Count 2 *and* the federal sentence. The circuit court acknowledged that Count 4 could not run concurrent to Count 2; Count 4 was already running concurrent to the federal sentence. Count 2 was to run consecutive to the federal sentence. The initial confinement period of the federal sentence was longer than the initial confinement for Count 4. Therefore, the initial confinement period of Count 4 would be completed long before the sentence for Count 2 could commence. As a result, the circuit court again amended the judgment of conviction in May 2011, removing the language which made Count 4's sentence concurrent with Count 2. Gorak moved to vacate that order, asserting that Count 2 had already been served. The circuit court denied his motion, noting that his time to appeal the order had passed, and therefore his remedy was to file a petition for a writ of *habeas corpus*.<sup>5</sup>

¶9 Instead, Gorak filed another *pro se* motion for sentence modification in January 2015, citing the May 2011 order as a new factor warranting modification. The circuit court again rejected his motion. The court stated that Gorak's motion was an "attempt[] to manipulate [the circuit court's May 2011] order" to support his argument that his initial confinement time for Count 2 had

---

<sup>5</sup> Judge Cimpl also ordered this amendment to the judgment of conviction and heard Gorak's subsequent motion to vacate.

already been served. The circuit court further noted that “[t]he extended supervision term on [C]ount [4] will continue running despite the consecutive sentence on [C]ount [2], and will expire long before” Gorak’s release to extended supervision on Count 2.

¶10 Gorak then filed a *pro se* motion for reconsideration in February 2015. The circuit court ordered briefing on the matter and scheduled an evidentiary hearing at the State’s request for the limited purpose of taking testimony from the records supervisor at the prison where Gorak was incarcerated. The court found that its conclusion in the January 2015 order was confirmed by the testimony, noting that while Gorak’s sentence structure “is admittedly complex ... it is not illegal.” The circuit court therefore denied Gorak’s motion for reconsideration in July 2015.<sup>6</sup>

¶11 Gorak appealed those orders; we affirmed. *See State v. Gorak*, No. 2015AP1636, unpublished slip op. ¶1 (WI App Oct. 12, 2016). We rejected his argument that the amendment to the judgment of conviction for Count 4 created an illegally split sentence. *Id.*, ¶11. We further found that his other arguments were procedurally barred, either because they had already been raised in previous motions or because Gorak did not explain why they had not been raised in previous motions.<sup>7</sup> *Id.*, ¶¶12, 14. Nevertheless, we noted that “[t]o the extent that Gorak is actually challenging the manner in which the [DOC] is implementing his

---

<sup>6</sup> The motions for sentence modification and reconsideration filed in 2015 were heard by the Honorable William S. Pocan.

<sup>7</sup> Gorak also raised arguments that were rejected because of his failure to follow proper appellate procedure. *State v. Gorak*, No. 2015AP1636, unpublished slip op. ¶¶15-16 (WI App Oct. 12, 2016).

sentences, his remedy is an action against the [DOC], not a motion for sentence modification.” *Id.*, ¶13.

¶12 Gorak then proceeded to file a petition for a writ of *habeas corpus* in October 2016. The circuit court denied and dismissed the petition, finding that the claims were barred because they were previously litigated and resolved. Gorak then filed a motion for reconsideration which was also denied by the circuit court; he followed with a motion to vacate or expunge those orders which, again, was denied.<sup>8</sup> This appeal follows.

### DISCUSSION

¶13 A “[w]rit of *habeas corpus* is an equitable remedy that protects a person’s right to personal liberty by freeing him or her from illegal confinement.” *State v. Pozo*, 2002 WI App 279, ¶8, 258 Wis. 2d 796, 654 N.W.2d 12. Relief in this manner is “available only where the petitioner demonstrates: (1) restraint of his or her liberty, (2) which restraint was imposed contrary to constitutional protections or by a body lacking jurisdiction and (3) no other adequate remedy available at law.” *Id.* However, “[h]*abeas corpus* is not a substitute for appeal”; accordingly, “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.* (citation omitted). Additionally, in the context of postconviction litigation, a petition will not be granted when ““(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

---

<sup>8</sup> These motions were heard by the Honorable Stephanie Rothstein.

previously litigated in a prior appeal or motion after verdict.” *Id.*, ¶9 (citations omitted).

¶14 We review a circuit court’s denial of a petition for a writ of *habeas corpus* under the *de novo* standard as to issues of law. *State ex rel. Woods v. Morgan*, 224 Wis. 2d 534, 537, 591 N.W.2d 922 (Ct. App. 1999). Factual determinations, however, are reviewed under the clearly erroneous standard. *Pozo*, 258 Wis. 2d 796, ¶6.

### 1. Circuit Court’s Jurisdiction Over Petition

¶15 We first address Gorak’s argument that the circuit court lacked jurisdiction to review his petition for *habeas corpus* because his “entire circuit court record,” referencing the record for his criminal case, was up on appeal. In support of his argument, he cites WIS. STAT. § 808.075(3) (2015-16)<sup>9</sup>, which explains that “the circuit court retains the power to act on all issues until the record has been transmitted to the court of appeals.”

¶16 Gorak misconstrues the statute. His “underlying criminal record,” while relevant to his arguments here, is a completely different case from the independent civil case that was opened upon his filing of the petition for a writ of *habeas corpus*. Furthermore, the last appeal relating to his criminal case was decided by this court in 2016, and the record has been remitted back to circuit court. Therefore, WIS. STAT. § 808.075(3) is not applicable. Accordingly, there is

---

<sup>9</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

no jurisdictional issue that would prevent the circuit court from reviewing Gorak's petition for a writ of *habeas corpus*.<sup>10</sup>

## 2. Claims Relating to Sentence Administration

¶17 Gorak also raises six claims relating to the administration of his sentence by the DOC. He acknowledges that he previously conceded in his motion for reconsideration that the claims referenced as “claims three and four” are procedurally barred; those arguments relate to the legality of the sentences, which have already been addressed by this court. *See Gorak*, No. 2015AP1636, ¶¶10-12.

¶18 The remaining four claims are primarily concerned with the administration of Gorak's sentences. Gorak's arguments relate to the commencement of extended supervision of one of his sentences overlapping with the initial confinement period of his next sentence; in short, he challenges whether the sentences are being properly implemented by the DOC.

¶19 These issues seem to have arisen, at least in part, because of the various amendments that have been made to the judgment of conviction regarding the sentences running either consecutively or concurrently. While Gorak has previously raised them, they have not been considered in any postconviction motion or on appeal because of the courts' lack of authority in this area. In fact,

---

<sup>10</sup> We note, as Gorak also points out, that the State did not address this argument in its response. We generally treat such a failure to respond as a concession. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (“Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.”)(citation omitted). However, because Gorak has raised this as a threshold issue in this appeal, we address it and analyze it on its merits. Nevertheless, we caution the State regarding its failure to address this issue.

this court, as well as the circuit court in its substantial and very thorough orders rendered in 2015, indicated that issues relating to the administration of Gorak's sentences would be properly brought in a separate action against the DOC. *Id.*, ¶13.

¶20 Gorak followed that direction, filing the petition for a writ of *habeas corpus* that is the basis of this appeal. However, the circuit court did not consider his arguments on the merits, instead finding them procedurally barred due to their having been previously litigated. As we have just explained, that is not actually the case.

¶21 Therefore, we affirm the circuit court's jurisdiction to hear this matter, but reverse and remand for further proceedings consistent with this opinion. We direct the circuit court to consider Gorak's claims relating to the DOC's administration of his sentences, specifically with regard to the interplay between the initial confinement and extended supervision terms of his various sentences.

*By the Court.*—Orders affirmed in part, reversed in part, and cause remanded with directions.

Not recommended for publication in the official reports.

