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DISTRICT I

July 22, 2025

To:

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Circuit Court Judge
Electronic Notice

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

2023AP1875

State of Wisconsin ex rel. Howard Grady v. State of Wisconsin
(L.C. # 2023CV6229)

Before White, C.J., Donald, P.J., and Geenen, J.

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).

Howard Grady, pro se, appeals from a circuit court order denying his petition for writ of habeas corpus.¹ Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).² We summarily affirm.

¹ We note that Grady does not appeal from the order of the circuit court denying his motion for reconsideration, entered October 30, 2023. Indeed, Grady's notice of appeal in this matter was filed on October 10, 2023, prior to the entry of that order.

² All references to the Wisconsin Statutes are to the 2023-24 version.

Our records reflect that after a jury trial in April 2015, Grady was convicted of aggravated battery with the use of a dangerous weapon and a domestic abuse assessment, as a repeater. He was sentenced to 12 years of initial confinement followed by 3 years of extended supervision. Grady, through counsel, appealed his conviction. This court affirmed. *See State v. Grady*, No. 2017AP135-CR, unpublished slip op., ¶1 (WI App May 30, 2018).

Grady filed the underlying petition for a writ of habeas corpus with the circuit court in August 2023. In his petition, Grady claimed ineffective assistance of his appellate counsel during his direct appeal, based on a missing trial transcript which contained the reading of the jury instructions by the circuit court and the parties' closing arguments. This omission was referenced in Grady's brief-in-chief for his direct appeal, where it was noted that the transcript had not been transcribed "[f]or reasons not clear."

Grady asserts in his petition that his appellate counsel was ineffective for not seeking to obtain that missing transcript for the direct appeal. Grady argues that as a result of the missing transcript—and counsel's failure to obtain it—he was denied "a meaningful first direct appeal."

In its review of Grady's petition, the circuit court first noted that the petition was deficient because it was not verified, as required under WIS. STAT. § 782.04. Furthermore, the circuit court found that because Grady's claim involved allegations of ineffective assistance by his appellate counsel, a petition for writ in the circuit court was not the proper vehicle by which to seek relief. Rather, the circuit court found that a petition for writ of habeas corpus filed in the court of appeals would be the proper means for Grady to seek relief of his claim of ineffective assistance of appellate counsel, citing *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). The circuit court therefore denied Grady's petition.

Grady now appeals that decision of the circuit court.³ This court independently reviews the determination by the circuit court of the appropriate forum for claims of ineffective assistance of counsel relating to errors that take place after conviction. See *State ex rel. Warren v. Meisner*, 2020 WI 55, ¶14, 392 Wis. 2d 1, 944 N.W.2d 588. In conducting this review, this court “focus[es] the inquiry on ‘where’ the alleged ineffectiveness occurred.” *Id.*, ¶36.

To that end,

If the acts or omissions that constitute alleged ineffective assistance of counsel took place in the circuit court, then the circuit court is the proper forum for such claims to be filed in the first instance. Likewise, alleged errors occurring in an appellate court are best addressed in the appellate court where the alleged error occurred.

Id.

Grady alleges that his appellate counsel was ineffective for failing to obtain the missing transcript during his direct appeal. However, for his direct appeal, Grady filed a postconviction motion with the circuit court prior to appealing his conviction. Therefore, his *postconviction* counsel would have reviewed the record—including transcripts—prior to filing the postconviction motion. The distinction between “appellate counsel” and “postconviction counsel” can be confusing, as they are often the same person, as is the case here. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 678 & n.4, 556 N.W.2d 136 (Ct. App. 1996).

³ We note that Grady’s appellate brief in this matter is entitled “Brief of Writ of Habeas Corpus,” and is notarized. Upon receipt of this submission, this court questioned whether Grady meant for this to be his appellant’s brief, or rather intended it to be a new petition for writ of habeas corpus for filing in this court. We directed Grady to respond; he did so, requesting that we “[d]ocket the submission as the appellant’s brief as writ of habeas corpus.” We further noted that in his response, he referenced a prior deadline extension we had granted for filing his appellant’s brief. We therefore construed the submission as Grady’s brief in this matter, not a new petition for a writ of habeas corpus.

However, it is an important distinction for determining the proper forum for a petition for writ of habeas corpus, because a petition for writ of habeas corpus based on *Knight* “is not the proper vehicle for seeking redress of the alleged deficiencies of postconviction counsel.” *Rothering*, 205 Wis. 2d at 679.

The missing transcript should have been discovered during the postconviction phase of Grady’s direct appeal; that is, by postconviction counsel. *See, e.g., State v. Sutton*, 2012 WI 23, ¶14, 339 Wis. 2d 27, 810 N.W.2d 210 (discussing a missing transcript discovered by *postconviction* counsel); *State ex rel. Ford v. Holm*, 2004 WI App 22, ¶¶3-4, 269 Wis. 2d 810, 676 N.W.2d 500 (discussing *postconviction* counsel’s review of the record, including transcripts). Therefore, we conclude that this issue was properly brought before the circuit court by Grady. *See Warren*, 392 Wis. 2d 1, ¶14; *see also State v. Balliette*, 2011 WI 79, ¶32, 336 Wis. 2d 358, 805 N.W.2d 334 (explaining that when the “conduct alleged to be ineffective is postconviction counsel’s failure to highlight some deficiency ... in a [WIS. STAT.] § 974.02 motion before the [circuit] court, the defendant’s remedy lies with the circuit court under either WIS. STAT. § 974.06 or a petition for habeas corpus”).

Nevertheless, we conclude that the circuit court’s denial of Grady’s petition was the proper disposition. First, Grady does not explain why he believes that the missing transcript was crucial to his direct appeal. Rather, he merely states that when counsel discussed the missing transcript with him at the time of his direct appeal, he “did not know the significate [sic] of the closing arguments and jury instruction.” Courts cannot develop arguments for parties. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Furthermore, we observe that in June 2021, Grady filed a pro se WIS. STAT. § 974.06 motion with the circuit court. In that motion, he raised several ineffective assistance claims relating to both trial and postconviction counsel, but did not raise any claim relating to the missing transcript at issue here. The § 974.06 motion was denied by the circuit court, and this court affirmed. *See State v. Grady*, No. 2021AP1179, unpublished slip op., ¶1 (WI App Jan. 10, 2023).

“[I]n 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[.]” *State v. Pozo*, 2002 WI App 279, ¶9, 258 Wis. 2d 796, 654 N.W.2d 12. Grady suggests in his current appeal that he was not aware of the missing transcript until September 1, 2022; yet, as noted above, he appears to concede that his postconviction counsel informed him of the missing transcript at the time of his direct appeal. These inconsistent statements do not establish a valid reason for Grady’s failure to raise this issue in his previous WIS. STAT. § 974.06 motion. *See Pozo*, 258 Wis. 2d 796, ¶9.

Finally, we observe that the circuit court was correct in finding that Grady’s petition, as filed with that court, was deficient because it was not verified. A habeas corpus petition must be verified. WIS. STAT. § 782.04. This requirement can be met either by “signing the document in the presence of a notary public,” *see State ex rel. Santana v. Endicott*, 2006 WI App 13, ¶11, 288 Wis. 2d 707, 709 N.W.2d 515, or by using an unsworn declaration as provided in WIS. STAT. § 887.015. “The verification requirement assures ‘that the statements contained therein are presented with some regard to considerations of truthfulness, accuracy and good faith,’ and petitions not properly verified do not meet the requirements for a valid application.” *Santana*, 288 Wis. 2d 707, ¶11 (citation omitted).

For these reasons, we affirm the circuit court’s denial of Grady’s petition for writ of habeas corpus. *See State v. Thames*, 2005 WI App 101, ¶10, 281 Wis. 2d 772, 700 N.W.2d 285 (stating that we will affirm the circuit court if it “reached the correct result, even if we employ different reasoning”).

Upon the foregoing,

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.

Samuel A. Christensen
Clerk of Court of Appeals