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DISTRICT I

May 8, 2014

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

2013AP2031 State of Wisconsin v. Andre Wingo
(L.C. # 1997CF970080)

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

Andre Wingo, *pro se*, appeals from a trial court order denying his petition for a writ of *coram nobis*.[1] Upon our review of the briefs, we conclude at conference that this matter is

[1] Wingo referred to his filing as a motion for writ of error *coram nobis*, but we will refer to it as a petition for *coram nobis*. *See* ***State v. Heimermann***, 205 Wis. 2d 376, 379 n.1, 556 N.W.2d 756 (Ct. App. 1996) ("The 'writ of *coram nobis*' is also known as the 'writ of error *coram nobis*.'").

The Honorable David L. Borowski denied the petition. The Honorable David A. Hansher accepted Wingo's pleas and sentenced him in 1997.

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).[2] We summarily affirm the order.

Wingo's petition asserted that his 1997 convictions for one count of substantial battery and one count of third-degree sexual assault—which were based on his ***Alford*** pleas—violated his double jeopardy rights.[3] The trial court denied the petition on two grounds: (1) the crimes were "entirely different" and did not fall within WIS. STAT. § 939.66(2m), which governs included crimes; and (2) this issue cannot be raised in a petition for *coram nobis* because Wingo has alleged an error of law, as opposed to an error of fact.[4] At issue on appeal is whether the trial court erroneously exercised its discretion when it declined to issue a writ of *coram nobis*.

A writ of *coram nobis* "is a discretionary writ ... [which] afford[s] the trial court an opportunity to correct its own record of an error of fact, ***Houston v. State***, 7 Wis. 2d 348, 350, 96 N.W.2d 343 (1959), and it is available only when a person can show no other remedy is available to correct a factual error, ***State v. Heimermann***, 205 Wis. 2d 376, 384, 556 N.W.2d 756 (Ct. App. 1996). ***Heimermann*** outlined what is required for a successful petition:

> A person seeking a writ of *coram nobis* must pass over two hurdles. First, he or she must establish that no other remedy is available. What this means for criminal defendants is that they must not be in custody because if they are, [WIS. STAT. § 974.06],

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[3] When a defendant enters an ***Alford*** plea, the defendant maintains his or her innocence but accepts the consequences of the charged offense. *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[4] The trial court also noted that even if it were to review the filing as a motion under WIS. STAT. § 974.06, it would find that it was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and that Wingo failed to state a valid claim for relief. On appeal, Wingo does not assert that he intended his filing to be a § 974.06 motion, and he explicitly states that his appeal is not being "pursued under [§] 974.06."

> as an example, provides them a remedy.[5] Second, the factual error that the petitioner wishes to correct must be crucial to the ultimate judgment *and* the factual finding to which the alleged factual error is directed must not have been previously visited or "passed on" by the trial court.

Heimermann, 205 Wis. 2d at 384. With respect to the second hurdle, we explained: "If the factfinder has already been directed to an issue and has passed judgment on this issue, then a writ of *coram nobis* may not be used to simply revisit this issue." ***Id.*** at 383-84.

We review a trial court's denial of a writ of *coram nobis* for the erroneous exercise of discretion. ***Id.*** at 386. To conclude the trial court properly exercised its discretion we need not adopt its rationale. Rather, we may "conduct an independent review of [the] petition and determine whether, as a matter of law, there is any legal basis" for the trial court's decision. ***Id.*** at 386-87. Applying those standards, ***Heimermann*** concluded that where the defendant had previously raised a particular issue during his original postconviction challenge, his petition raising the same issue failed because it was "aimed at an issue already 'passed on' by the trial court." ***Id.*** at 387-88.

Applying those legal standards here, we affirm the trial court's order. At the outset, we recognize that there may be numerous reasons why the petition fails; we choose not to discuss every potential deficiency in Wingo's petition or the merits of his double jeopardy claim. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground."). We conclude that Wingo's petition fails because the issue he seeks to address "has been previously visited or 'passed on' by the trial court." *See*

[5] Wingo's petition, which was filed in August 2013, alleged that he had been discharged from his sentences in October 2007.

Heimermann, 205 Wis. 2d at 384, 386-87; *see also* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (On appeal, "we may affirm on grounds different than those relied on by the trial court.").

After Wingo was convicted, his appointed counsel filed a no-merit report and this court affirmed. *See* ***State v. Wingo***, No. 1998AP780-CRNM, unpublished order (WI App June 23, 1998). Subsequently, Wingo, acting *pro se*, sought relief from his convictions on numerous occasions from the trial court, court of appeals, supreme court, and federal court. As relevant to this appeal, Wingo filed a motion to modify sentence/WIS. STAT. § 974.06 motion on November 26, 2001. He argued that he had been subjected to double jeopardy. On November 28, 2001, the trial court denied the motion in a written order, concluding:

> [Wingo] maintains that his two sentences violate the double jeopardy clause. This is based on his belief that two sentences cannot be imposed for one crime. The defendant was convicted of two separate crimes—substantial battery and third degree sexual assault, for which separate penalties existed and for which he could legally receive separate sentences. Wingo's contention is completely without merit.

Wingo did not appeal from that trial court order.

Wingo subsequently filed letters and a second WIS. STAT. § 974.06 motion that alleged a double jeopardy violation. The motion was denied. In August 2002, Wingo filed a third § 974.06 motion in which he raised several issues, including the argument that his convictions violated double jeopardy and WIS. STAT. § 939.66(1). The motion was denied and Wingo appealed. We summarily affirmed the order, concluding that Wingo's motion was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). *See* ***State v. Wingo***, No. 2002AP2575, unpublished order at 2 (WI App July 11, 2003).

In December 2003, Wingo again raised issues related to double jeopardy, this time in a petition for *habeas corpus* that he filed in the trial court; his petition was denied. On appeal, we concluded that Wingo's attempt to litigate whether "his trial counsel had been ineffective for failing 'to object to and preserve for appellate review [Wingo's] rights to be free of Double Jeopardy'" was procedurally barred. *See* ***State ex rel. Wingo v. Hepp***, No. 2004AP451, unpublished slip op., ¶1 (WI App Jan. 31, 2006) (quoting Wingo's brief; bracketing supplied by this court in 2006 opinion).

In short, Wingo has on numerous occasions raised the double jeopardy issue that he seeks to raise in his petition for *coram nobis*. Like the defendant's petition in ***Heimermann***, Wingo's petition "is fatally flawed because it is aimed at an issue already 'passed on' by the trial court." *See* ***id.***, 205 Wis. 2d at 388. Therefore, we affirm the trial court's order.

Finally, we consider the State's request "that this court impose sanctions against Mr. Wingo for his now well-documented repeated abuse of the judicial process." The State does not specify the sanction sought, although it implies that this court could impose the same conditions on Wingo that it imposed on another litigant in ***State v. Casteel***, 2001 WI App 188, ¶¶25-26, 247 Wis. 2d 451, 634 N.W.2d 338. We decline to impose sanctions at this time, but we again caution Wingo that should he attempt to litigate the same issues in the future that have already been rejected, we will consider sanctioning him.

IT IS ORDERED that the trial court's order denying Wingo's petition for a writ of *coram nobis* is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals