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January 30, 2018

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

2016AP2255

State of Wisconsin v. Joe W. Evans, Jr. (L. C. No. 1990CF82)

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

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).

Joe Evans, Jr., pro se, appeals an order denying his petition for a writ of habeas corpus. Based upon our review of the briefs and record, we conclude at conference that this case is

appropriate for summary disposition. We reject Evans's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21 (2015-16).¹

In May 1990, Evans and his wife were charged as parties to the crimes of two counts of felony food stamp fraud. The State alleged Evans and his wife misstated or concealed facts to obtain food stamp benefits of an amount more than \$100, and they failed to notify an agency providing public assistance after the receipt of income resulting in a fraudulent over-grant in excess of \$500, contrary to WIS. STAT. §§ 49.127(2) and 49.12(6) (1989-90), respectively. Although Evans was unrepresented and initially pleaded no contest to both counts, an attorney was later appointed. With the assistance of counsel, Evans withdrew his pleas based, in part, on his claim that he “was unfamiliar with the difference between Felony and Misdemeanor.” Evans ultimately pleaded no contest to the second count in the complaint. Out of a maximum possible five-year sentence, the circuit court imposed a thirty-day jail sentence and ordered Evans not to participate in any food stamp programs. Evans did not directly appeal his conviction or sentence.

Almost twenty years later, Evans was convicted upon a jury's verdict of the first-degree intentional homicide of his then-estranged wife and sentenced to life in prison without the possibility of extended supervision. Evans was also convicted of criminal damage to property and received a concurrent nine-month sentence. Evans's convictions were affirmed on direct appeal. *See State v. Evans*, No. 2010AP1294-CR, unpublished slip op. (WI App Apr. 26, 2011).

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Several months after the homicide conviction, Evans moved to amend his 1990 judgment of conviction for food stamp fraud to designate it as a misdemeanor instead of a felony. Evans alleged that the charge should have been amended to a misdemeanor as part of his plea agreement; the felony designation was a clerical error; the crime was not properly designated as a felony because of the dollar amount involved and the sentence he received; and he did not know he was being convicted of a felony. After a hearing, the circuit court denied the motion, finding Evans had no evidence to support his claims or to contradict those items in the record showing his plea and conviction were for a felony offense. Evans did not appeal the denial of his motion.

In 2012, Evans filed another postconviction motion to amend his food stamp fraud conviction from a felony to a misdemeanor or, in the alternative, to allow him to withdraw his no-contest plea. His motion made effectively the same arguments as his earlier motion to amend the judgment. That motion was denied, and Evans did not appeal.

Evans then filed the underlying petition for a writ of habeas corpus, seeking to withdraw his plea and vacate the judgment of conviction pertaining to the 1990 charges. The circuit court denied the petition after a hearing, and this appeal follows.

“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. “Factual determinations will not be reversed unless clearly erroneous,” but whether “a writ of habeas corpus is available to the party seeking relief is a question of law that is reviewed de novo.” *Id.*

In his petition, Evans contends his trial counsel was ineffective by failing to memorialize the State's purported offer to permit him to plead no contest to a misdemeanor. He also claims the circuit court's plea colloquy was deficient, thus preventing him from entering a knowing, voluntary and intelligent plea. Evans's petition further asserts, generally, that his defense was prejudiced by these errors. On appeal, Evans specifies that these alleged errors—resulting in what Evans deems to be an erroneous felony conviction—impacted his ability to lawfully possess a firearm and also impacted his credibility at the trial in the homicide case.

Habeas corpus may not, however, substitute for an appeal, and a court will not issue a writ of habeas corpus if a “petitioner has an otherwise adequate remedy that he or she may exercise to obtain the same relief.” *Pozo*, 258 Wis. 2d 796, ¶8. In postconviction proceedings, a writ of habeas corpus is not available when (1) the petitioner raises claims that he or she failed to assert in a prior appeal and he or she does not offer a proper reason for not doing so, or (2) the petitioner attempts to re-litigate claims that were decided in a previous appeal or postconviction motion. *Id.*, ¶9; *see also* WIS. STAT. § 974.06(8).

Here, Evans filed two postconviction motions challenging his felony conviction for food stamp fraud. The circuit court denied both motions, and Evans chose not to appeal either decision. His petition for a writ of habeas corpus is, therefore, an improper attempt to re-litigate a matter already twice decided. In addition, Evans could have raised the challenge to trial counsel's effectiveness in his initial and subsequent motions, but did not do so. He provides no proper reason for that failure. Therefore, a writ of habeas corpus is not available to Evans.

Moreover, Evans does not satisfy the criteria for obtaining habeas relief. A petitioner seeking a writ of habeas corpus must: (1) be restrained of his or her liberty; (2) establish that a

tribunal imposed the restraint in violation of the petitioner's constitutional protections or without jurisdiction; and (3) show that he or she has no other adequate remedy at law. *State ex rel. Fuentes v. Court of Appeals*, 225 Wis. 2d 446, 451, 593 N.W.2d 48 (1999). Evans is serving a life sentence for killing his wife, and he has failed to establish that his 1990 conviction for food stamp fraud serves to restrain his liberty now. The circuit court, therefore, properly denied Evans's petition for a writ of habeas corpus.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals