

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 08, 2008

David R. Schanker
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. 2007AP1559

Cir. Ct. No. 2007CV6498

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**STATE OF WISCONSIN EX REL.
MARVIN E. BELLINGER,**

PETITIONER-APPELLANT,

v.

**PAMELA J. WALLACE, WARDEN,
STANLEY CORRECTIONAL INSTITUTION,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL GUOLEE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Marvin E. Bellinger appeals *pro se* from a circuit court order that denied both his petition for a writ of *habeas corpus* and his motion for a temporary restraining order to enjoin the State from imprisoning him. The

circuit court concluded that: (1) Bellinger could not challenge the decision binding him over for trial by a petition for writ of *habeas corpus*; and (2) Bellinger failed to make the necessary showing to secure a temporary restraining order. We affirm.

Background

¶2 In 1992, Bellinger was charged with committing multiple felonies in Milwaukee County. A court commissioner conducted the preliminary hearing and ordered Bellinger bound over for trial. A jury found Bellinger guilty of attempted first-degree intentional homicide while armed, two counts of first-degree reckless injury while armed, and possession of a firearm by a felon. Bellinger appealed, and this court affirmed. *See State v. Bellinger*, No. 1993AP1936, unpublished slip op. (Wis. Ct. App. Apr. 12, 1994).

¶3 In June, 2007, Bellinger petitioned the circuit court for a writ of *habeas corpus*, and moved for a temporary restraining order enjoining the State from confining him pending resolution of the writ petition. Bellinger contended that court commissioners are not authorized to conduct preliminary hearings. Building on this proposition, he argued that the 1992 bindover was void, as were all subsequent proceedings in his prosecution. The circuit court rejected Bellinger's contentions, and this appeal followed.

Discussion

¶4 We review a circuit court's order denying a petition for a writ of *habeas corpus* under a mixed standard. *State v. Pozo*, 2002 WI App 279, ¶6, 258 Wis.2d 796, 654 N.W.2d 12. We will uphold the circuit court's factual determinations unless they are clearly erroneous. *Id.* "Whether [a] writ [] is

available to the party seeking relief is a question of the law that we review *de novo*.” *Id.*

¶5 “[R]elief under *habeas corpus* will not be granted where other adequate remedies at law exist.” *State ex rel. Dowe v. Circuit Court*, 184 Wis. 2d 724, 729, 516 N.W.2d 714 (1994). A motion to dismiss is an adequate remedy for challenging a bindover decision, whether that decision is made by a judge or by a court commissioner. *See id.* at 733-34. Accordingly, *habeas corpus* may not be used to challenge a bindover. *See id.* at 734, 736. The circuit court properly denied Bellinger’s petition on this ground.

¶6 We further conclude that Bellinger’s petition is barred by the principle favoring finality in litigation. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A defendant cannot raise an argument in a second postconviction proceeding that was not raised in a prior postconviction proceeding unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. *See id.* at 181-82. This principle applies in the context of *habeas corpus* proceedings. “[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” *See Pozo*, 258 Wis. 2d 796, ¶9.

¶7 Bellinger has offered no valid reason why he failed to raise issues related to the propriety of the bindover during his direct appeal. Accordingly, he is barred from raising those issues in the instant collateral attack on the conviction.

¶8 Moreover, were we to consider the merits of Bellinger’s contentions, we would conclude that his petition does not demonstrate a basis for relief. Bellinger’s position that a court commissioner may not conduct a preliminary

hearing is meritless. “Pursuant to [WIS. STAT.] § 757.69(1)(b), a preliminary hearing may be conducted by a court commissioner.” *State v. Gillespie*, 2005 WI App 35, ¶4, 278 Wis. 2d 630, 693 N.W.2d 320.

¶9 To support his contrary contention, Bellinger relies upon *State ex rel. Perry v. Wolke*, 71 Wis. 2d 100, 237 N.W.2d 678 (1976). *Perry* states that under the 1974 statutory revision “no specific authority [was] granted to a judicial court commissioner to hear or decide the question of probable cause in felony cases.” *Id.* at 104. *Perry* affords Bellinger no relief because *Perry* interpreted a statutory scheme amended long before Bellinger’s prosecution.¹ At the time of Bellinger’s 1992 preliminary examination, court commissioners were specifically and expressly authorized to preside over such proceedings. See WIS. STAT. § 757.69(1)(b) (1991-92) (providing that a full-time court commissioner may conduct a preliminary examination to the same extent as a judge). Nothing in *Perry* barred this statutory grant of authority. *Perry* unequivocally acknowledged the legislature’s power to authorize court commissioners to conduct preliminary examinations. *Perry*, 71 Wis. 2d at 108. For these reasons, Bellinger’s petition would fail on its merits.

¶10 Finally, Bellinger asserts that the circuit court erred by refusing to grant a temporary restraining order releasing him from prison pending resolution of his writ petition. We reject the contention.

¹ Because we do not resolve Bellinger’s contentions on the merits, we do not set out the numerous amendments to the statutory scheme governing the powers and duties of court commissioners that have been enacted since the decision in *State ex rel. Perry v. Wolke*, 71 Wis. 2d 100, 237 N.W.2d 678 (1976).

¶11 A temporary restraining order is a species of injunction. *Laundry, Dry Cleaning, Dye House Workers Union, Local 3008 v. Laundry Workers Int'l Union*, 4 Wis. 2d 542, 553-54, 91 N.W.2d 320 (1958). A decision to grant or deny a temporary injunction lies within the circuit court's sound discretion, and we will not disturb that decision absent an erroneous exercise of the circuit court's discretion. See *School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997). When deciding whether to grant a temporary injunction, a circuit court must consider that "[a] temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits." *Id.* at 370-71 (citation and emphasis omitted). Because we have concluded that the circuit court properly denied Bellinger's petition for *habeas corpus* as meritless, the accompanying request for a temporary restraining order was properly denied as well.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

