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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-248**

Michael Carlton Lowe, Sr., petitioner,
Appellant,

vs.

Warden Administrator/Rush City Correctional Facility, et al.,
Respondents.

**Filed August 15, 2011
Affirmed
Schellhas, Judge**

Chisago County District Court
File No. 13-CV-11-123

Michael C. Lowe, Sr., Rush City, Minnesota (pro se appellant)

Krista J. Guinn Fink, St. Paul, Minnesota; and

Lori Swanson, Attorney General, Kelly S. Kemp, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Schellhas, Presiding Judge; Peterson, Judge; and Minge, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's dismissal of his petition for a writ of habeas corpus with prejudice. Appellant argues that his petition is not frivolous because his arrest was illegal. We affirm.

FACTS

In April 2007, the State of Minnesota charged appellant Michael Lowe with first-degree criminal sexual conduct, third-degree assault, and terroristic threats, alleging that he physically and sexually assaulted his fiancée and threatened to kill her and her children and burn down her house. *State v. Lowe*, No. A07-2321, 2009 WL 437493, at *1 (Minn. App. Feb. 24, 2009), *review denied* (Minn. May 27, 2009). Before trial, the district court found that the warrantless arrest of Lowe in his residence was not supported by exigent circumstances. *Id.* at *4. “But the [district] court determined that it would not dismiss the charges against [Lowe] because there was probable cause for the arrest, and it was inevitable.” *Id.* A jury found Lowe guilty on all three counts and found that aggravating factors existed. *Id.* at *1. The district court sentenced Lowe to 360 months in prison—an upward departure from the presumptive sentence. *Id.*

Lowe appealed, arguing, among other things, that “his convictions should be reversed because his arrest was illegal.” *Id.* at *4. This court addressed and rejected each of Lowe’s arguments and affirmed his convictions and sentence, concluding that “the officers had probable cause to arrest [Lowe],” and “the district court did not abuse its discretion in refusing to dismiss the complaint because the only evidence seized as a result of the unlawful entry was . . . suppressed.” *Id.* at *4–7.

Lowe filed his first petition for postconviction relief in June 2009, arguing, in part, that his arrest was illegal. *Lowe v. State*, No. A09-1449, 2010 WL 1658006, at *1 (Minn. App. Apr. 27, 2010), *review denied* (Minn. July 20, 2010). The district court rejected Lowe’s claim, concluding that it was barred by *State v. Knaffla*, 309 Minn. 246, 252, 243

N.W.2d 737, 741 (1976), because he raised the claim on direct appeal. *Id.* The district court denied the remaining claims in the petition on substantive and *Knaffla* grounds. *Id.* Lowe did not appeal. *Id.*

After two more unsuccessful postconviction petitions, Lowe filed a petition for a writ of habeas corpus and an affidavit for proceeding in forma pauperis in Chisago County district court. Lowe asserted that he is entitled to immediate release from custody because his arrest violated the U.S. and Minnesota constitutions. The district court dismissed Lowe's petition with prejudice under Minn. Stat. § 563.02, subd. 3 (2010), concluding that Lowe's claim "is frivolous and has no arguable basis in law or fact."

This appeal follows.

D E C I S I O N

The district court may dismiss with prejudice an action commenced by an inmate plaintiff who seeks to proceed in forma pauperis, if the court determines that the action is frivolous or malicious. Minn. Stat. § 563.02, subd. 3(a). "In determining whether an action is frivolous or malicious, the court may consider whether . . . the claim has no arguable basis in law or fact . . ." *Id.*, subd. 3(b)(1); *see also Maddox v. Dep't of Human Servs.*, 400 N.W.2d 136, 139 (Minn. App. 1987) ("A frivolous claim is without any reasonable basis in law or equity and could not be supported by a good faith argument for a modification or reversal of existing law." (quotation omitted)). The court may dismiss the action "before or after service of process, and with or without holding a hearing." Minn. Stat. § 563.02, subd. 3(c). The district court has broad discretion in considering

proceedings in forma pauperis and will not be reversed absent an abuse of discretion. *Maddox*, 400 N.W.2d at 139.

Lowe argues that his petition is not frivolous because “exigent circumstances did not exist to justify [his] warrantless arrest” and he should “be released from custody . . . until re-arrested in a manner prescribed by law.” Lowe also argues that DNA evidence obtained from his person was obtained as a result of the illegal arrest.

“[H]abeas corpus may not be used as a substitute for . . . appeal or as a cover for a collateral attack” *State ex rel. Thomas v. Rigg*, 255 Minn. 227, 234, 96 N.W.2d 252, 257 (1959). A habeas petition is properly dismissed where other means are available to raise the claims. *See Kelsey v. State*, 283 N.W.2d 892, 893–94 (Minn. 1979) (affirming dismissal of habeas action where claims could be and were raised in a direct appeal and through postconviction petition). Lowe’s claim challenging the validity of his arrest is an improper attempt to use habeas corpus as a substitute for an appeal. Lowe’s claims could be and were raised and rejected in his direct appeal and postconviction petitions. *See Lowe*, 2010 WL 1658006, at *1 (second and third postconviction petitions); *Lowe*, 2009 WL 437493, at *4, 6 (direct appeal). The claims are frivolous because they have no arguable basis in law or fact. The district court therefore did not abuse its discretion in dismissing the action under Minn. Stat. § 563.02, subd. 3.

Affirmed.