This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).

STATE OF MINNESOTA
IN COURT OF APPEALS
A10-960

William Jeffrey McDonough, petitioner,
Appellant,

vs.

Bruce Reiser, Warden, et al.,
Respondents.

Filed January 25, 2011
Affirmed
Shumaker, Judge

Chisago County District Court
File No. 13-CV-10-895

William Jeffrey McDonough, Rush City, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Gina D. Jensen, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Johnson, Chief Judge; Shumaker, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

Appellant William Jeffrey McDonough challenges the district court's denial of his application to proceed in forma pauperis (IFP). Because the district court did not abuse its discretion in denying IFP relief to appellant, we affirm.

FACTS

Appellant was convicted of one count of first-degree murder and one count of attempted first-degree murder, for a 1999 incident in which he shot one man to death and wounded another man as they attempted to drive away from him. Appellant has brought a direct appeal and two postconviction appeals to the supreme court. *See McDonough v. State*, 707 N.W.2d 384 (Minn. 2006)[1]; *McDonough v. State*, 675 N.W.2d 53 (Minn. 2004); *State v. McDonough*, 631 N.W.2d 373 (Minn. 2001). In March 2010, appellant filed an IFP application in district court to allow him to bring a habeas corpus petition without paying the filing fees. The district court denied the IFP application, ruling that the underlying habeas petition was frivolous. This appeal followed.

D E C I S I O N

An inmate may proceed IFP in a civil action if he satisfies specific statutory criteria. Minn. Stat. § 563.02, subd. 2 (2010). But the district court must dismiss the

[1] The supreme court has jurisdiction over direct and postconviction appeals in first-degree murder cases. Minn. Stat. § 632.14 (2010); Minn. R. Crim. P. 29.02. But this court has jurisdiction over habeas appeals involving first-degree murder defendants. Minn. Stat. § 589.29 (2010).

action with prejudice if it is frivolous or malicious. Minn. Stat. § 563.02, subd. 3(a) (2010).

> In determining whether an action is frivolous or malicious, the court may consider whether: (1) the claim has no arguable basis in law or fact; or (2) the claim is substantially similar to a previous claim that was brought against the same party, arises from the same operative facts, and in which there was an action that operated as an adjudication on the merits.

Id., subd. 3(b) (2010). A district court has broad discretion to grant IFP relief and will not be reversed absent an abuse of discretion. *Maddox v. Dep't of Human Servs.*, 400 N.W.2d 136, 139 (Minn. App. 1987).

Appellant argues that the district court should have granted his IFP application because his habeas petition and the claims raised in it are not frivolous. He explains that he is entitled to immediate release from prison by writ of habeas corpus because the charges contained in the complaint and indictment were inconsistent with statutes under which he was convicted. He claims that the complaint only charged him with two counts of second-degree murder under Minn. Stat. § 609.19, subds. 1(2), 2(1) (1998), and that the indictment only charged him with first-degree intentional felony murder under Minn. Stat. § 609.185(3) (1998). He further claims that he was never arraigned on or charged with any attempted murder or with drive-by shooting under Minn. Stat. § 609.66, subd. 1e (1998).

But the indictment, which is included in appellant's appendix, shows that appellant was indicted on four counts: counts I and III (first- and second-degree murder for causing the death of one of the victims with intent while committing a drive-by

shooting), and counts II and IV (attempted first- and second-degree murder for attempting to cause the death of the other victim while committing a drive-by shooting).[2] The jury found appellant guilty of counts I, II, and IV; he was sentenced to life in prison on the first-degree murder conviction and to a consecutive term of 180 months in prison on the attempted first-degree murder conviction. The crimes were committed in Ramsey County, and appellant was indicted, tried, and convicted in Ramsey County. Appellant was validly charged and convicted, and the district court had jurisdiction over him.

Appellant further claims that the evidence was insufficient to convict him of first-degree murder by drive-by shooting because the witnesses did not testify that shots were fired from a vehicle. But the definition of drive-by shooting clearly covered appellant's conduct. Minn. Stat. § 609.66, subd. 1e(a), provides that "[w]hoever, while in or having just exited from a motor vehicle, recklessly discharges a firearm at or toward another motor vehicle or a building is guilty of a felony." Subdivision 1e(b) provides for an enhanced penalty if the person fires "at or toward a person, or an occupied building or motor vehicle." *Id.* at subd. 1e(b). The evidence in this case established that appellant exited his vehicle, walked toward the vehicle occupied by the two victims, fired multiple shots at it, and ran alongside it firing several more shots. Appellant's conduct clearly met the definition of drive-by shooting.

[2] In addition, the crime of first-degree murder includes felony murder by drive-by shooting. Minn. Stat. § 609.185(3) (1998). Thus, it is unimportant that the indictment did not specifically cite Minn. Stat. § 609.66, subd. 1e (1998).

A writ of habeas corpus "may not be used as a cover for a collateral attack upon a judgment of a competent tribunal which had jurisdiction of the subject matter and of the person of the defendant." *Breeding v. Utecht*, 239 Minn. 137, 139, 59 N.W.2d 314, 316 (1953). Appellant's petition for a writ of habeas corpus is an improper collateral attack on his underlying criminal conviction. His jurisdictional challenge also has been raised, albeit in slightly different forms, in his prior unsuccessful postconviction petitions. *See McDonough*, 707 N.W.2d at 387 (recognizing that appellant's postconviction challenge to court's lack of jurisdiction is merely recharacterization of previously rejected claims).

Because the claims raised in appellant's habeas petition lack a legal basis, we conclude that the district court did not abuse its discretion in finding that the petition was frivolous and in denying his IFP application.

Affirmed.