COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2521-CR **Cir. Ct. No. 2008CF1295**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL L. BURROUGHS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Paul Burroughs, pro se, appeals a judgment of conviction and an order denying his motion for postconviction relief. The issues Burroughs raises on appeal, however, generally do not relate to the circuit court's determinations as to any matters raised in his postconviction motion. Rather, Burroughs largely seeks relief based on issues raised in a "supplemental" postconviction motion, filed after the circuit court had orally denied relief on Burroughs' original claims but before a written order to that effect had been entered. Applying the procedural bar articulated in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), we conclude Burroughs is not entitled to relief, and we affirm.

BACKGROUND

¶2 Burroughs was charged with, and pled no contest to, two counts of burglary, with both counts containing the repeater enhancer and one of the counts subject to an elevated penalty due to Burroughs' arming himself with firearms from the residence during the crime. Another two burglary counts were dismissed and read in. The probable cause section of the complaint described how Burroughs had been implicated in a series of daytime burglaries in Green Bay. Police found stolen items in Burroughs' car, which he had given police consent to search. Police also searched Burroughs' residence with his wife's consent, where they found additional stolen articles.

¶3 Burroughs' judgment of conviction was entered in 2010. He was appointed postconviction counsel, who filed a notice of intent to file a no-merit appeal. Burroughs, pro se, subsequently filed what this court construed as a motion to strike the no-merit report, discharge counsel, and extend the time for filing a pro se postconviction motion. By order dated May 31, 2012, this court

stated that before we would consider granting the motion, Burroughs would need to confirm that he understood the consequences of asking his counsel to withdraw so that he could proceed pro se. This court ultimately granted Burroughs' motion, discharged his postconviction counsel, dismissed the no-merit appeal, and extended the time for Burroughs to file a pro se postconviction motion.

¶4 Burroughs filed a pro se postconviction motion on September 5, 2012. The motion sought relief based on three alleged instances of ineffective assistance of counsel that occurred prior to his entering pleas: (1) counsel's failure to challenge, on speedy trial grounds, the delay between the offense dates and the filing of charges; (2) counsel's failure to challenge the validity of the consent search of Burroughs' apartment; and (3) counsel's alleged unpreparedness to go to trial, which Burroughs asserted resulted in his unintelligent and pressured decision to plead no contest. Shortly after filing his postconviction motion, Burroughs also filed a pro se motion for sentence credit.

¶5 Burroughs' motions were scheduled to be heard on December 7, 2012. Burroughs was eventually appointed another postconviction attorney, who requested that the hearing be adjourned to February 19, 2013. Burroughs, his second postconviction attorney, and his attorney of record at the time of his plea ("trial counsel") were present at the adjourned hearing.

¶6 At the inception of the hearing, the circuit court asked Burroughs to clarify the nature of his desired relief and whether he wanted to withdraw his plea. Burroughs stated, "[I]t serves me no purpose to withdraw my plea at this point." Burroughs stated he was not sure he wanted another day in court; rather, he said he "want[ed] the errors corrected and the only remedy at this point in time is through

appeals." The circuit court responded that granting any sort of relief would leave Burroughs "back at square one" with pending charges against him.

¶7 The court invited Burroughs to ask questions of his trial counsel and told Burroughs his second postconviction attorney was there to help him.[1] However, the court stated to the extent that Burroughs had been handling his motions and wished to advocate for himself, it was not going to stop him from doing so.

¶8 Burroughs then expressed his dissatisfaction with his attorneys' communications and performances, but he did not call any witnesses, including his trial counsel. The circuit court responded generally to Burroughs' procedural concerns.[2] Burroughs' second postconviction counsel stated he had been working under the impression that Burroughs wished to withdraw his plea. That not being the case, counsel offered to draft an order denying Burroughs' postconviction motion. Counsel stated he would work with Burroughs on his motion for sentence credit.

¶9 On February 8, 2014, the circuit court received a pro se letter from Burroughs in which he stated he had not heard from his second postconviction counsel regarding the sentence credit issue. On March 27, 2014, the circuit court

[1] Because Burroughs had filed the motions pro se, the circuit court understood postconviction counsel to be functioning as "standby counsel" in case Burroughs had questions or wanted to consult with an attorney.

[2] The minutes sheet for the February 19, 2013 hearing indicates that Burroughs "withdraws the motion but presents some of his frustrations to the Court. Court replies." Our review of the transcript confirms this is an accurate summary of what occurred at the hearing.

entered an order denying sentence credit.[3] The record does not indicate any further filings until October 21, 2015, when Burroughs filed a motion in this court seeking an enlargement of time to file an appeal, claiming he had not been served with a copy of the order denying postconviction relief nor a transcript of the February 19, 2013 postconviction hearing. By order dated October 22, 2015, this court observed that no written order had been entered denying Burroughs' postconviction motion, and we extended the time for the circuit court to enter such an order.

¶10 Shortly after our order issued, Burroughs filed a supplemental postconviction motion (ostensibly under WIS. STAT. RULE 809.30 (2015-16)[4]) containing new claims. Specifically, Burroughs challenged the validity of his pleas, asserting the circuit court had failed to explain the elements of the crimes, there were insufficient factual bases for his pleas, and he did not have sufficient time to discuss unspecified issues with his trial counsel. Burroughs supported his supplemental motion with his own affidavit.

¶11 On November 16, 2015, the circuit court entered an order in which it clarified that Burroughs' original postconviction motion had been denied. The court also addressed Burroughs' supplemental motion, stating his new arguments were inappropriate in the context of a direct appeal. The court directed Burroughs

[3] The circuit court determined the judgment of conviction contained a clerical error regarding the consecutive nature of the sentences to any other sentence Burroughs was then serving. Based on the corrected sentence, the court deemed sentence credit inappropriate. The circuit court's determination regarding sentence credit is not at issue on appeal.

[4] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

to contact it within thirty days if he desired further consideration of any supplemental arguments on an alternative basis.

¶12 Burroughs wrote to the circuit court on November 15, 2015, alleging the court misunderstood the relevant postconviction procedures, challenging the notion that he had withdrawn his original motion, and asserting this court's October 22, 2015 order allowed consideration of Burroughs' supplemental motion. The circuit court denied Burroughs' motion, which it construed as a motion for reconsideration. The court questioned its jurisdiction to decide the matters Burroughs had raised given his filing of a notice of appeal in the interim, but the court remarked that, even now, it was unclear what Burroughs believed the court should have done at the February 19, 2013 hearing. Burroughs appeals.

DISCUSSION

¶13 On appeal, Burroughs raises four issues. He contends: (1) the circuit court erred by refusing to consider his "supplemental" postconviction motion; (2) a defective plea colloquy failed to establish that his pleas were made knowingly, intelligently and voluntarily; (3) the criminal complaint failed to allege facts that, if true, established factual bases for his pleas; and (4) he received ineffective assistance from his trial counsel at the plea hearing based on his trial counsel's failure to adequately explain and discuss the elements of the offenses and the factual bases for his pleas, and his counsel's failure to adequately prepare a defense.

¶14 Burroughs has largely abandoned the issues he raised in his original postconviction motion that were thus available for review on direct appeal. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the trial court, but not raised on appeal, is

deemed abandoned."). With one exception, no aspect of Burroughs' final three appellate arguments was raised in his original motion for postconviction relief.[5] Nor did Burroughs raise them during his oral airing of grievances at the February 19, 2013 motion hearing. Burroughs appears to concede he did not directly raise any of these arguments in his original postconviction motion. Instead, he argues the circuit court should have considered these new arguments because they were "substantially and substantively related to the original vague arguments contained in his original postconviction motion."

¶15 We disagree with Burroughs' characterization of his arguments. The claims raised in Burroughs' "supplemental" motion and on appeal are substantively different from the ones he raised in his original motion. Burroughs' original motion asserted ineffective assistance of trial counsel based on counsel's failure to raise an alleged speedy trial violation, as well as his counsel's failure to challenge the consent Burroughs' wife gave to search their residence. There was not a hint in Burroughs' original motion that Burroughs believed the plea colloquy was inadequate or that a factual basis for his pleas was lacking.

[5] The lone exception is Burroughs' argument that his trial counsel at the plea hearing was unprepared for trial, a situation that Burroughs claims rendered his pleas involuntary. Even generously construing Burroughs' argument, we conclude he is not entitled to relief. Burroughs, in his words, claims only that his trial counsel said "he had three upcoming trials and did not know which one he would ultimately have to prepare for." However, Burroughs declined to call his attorney to testify at the postconviction hearing, he fails to provide any record support for his assertion that his trial counsel actually made this statement, and his affidavit filed in connection with his supplemental postconviction motion is silent on the matter. Even assuming Burroughs' trial counsel made such a statement, it does not rise to the level of misconduct considered in the lone case Burroughs cites in support of his argument. ***State v. Basley***, 2006 WI App 253, 298 Wis. 2d 232, 726 N.W.2d 671, involved much more egregious circumstances in which it was alleged the attorney threatened to withdraw in the midst of trial unless the defendant agreed to plead guilty. *See* ***id.***, ¶¶6-9.

¶16 Issues that were or could have been raised during a direct appeal may not be brought in a subsequent postconviction motion unless the defendant demonstrates a sufficient reason for their having been previously omitted. ***State v. Evans***, 2004 WI 84, ¶33, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900. This rule exists to compel defendants to raise all grounds for postconviction relief at one time. ***Id.***

¶17 Although we generally make allowances for supplemental motions, this rule does not permit defendants to ambush a circuit court by filing a supplemental motion in the interim between the court's oral denial of relief at a postconviction hearing and the entry of a written order to that effect. Rather, when a defendant is denied relief at the conclusion of a postconviction hearing, our supreme court has tacitly agreed with this court that a subsequent "supplemental" motion is actually a new filing subject to the procedural bar. *See* ***id.***

¶18 In his reply brief, Burroughs posits that "the fact that every attorney and judge involved in this case has overlooked the fundamental miscarriage of justice is sufficient reason for failing to raise it initially." He relies on ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893, in which this court held that a "sufficient reason" for a defendant's failure to raise an issue in response to a no-merit report exists when this court and appellate counsel both erroneously overlook an arguably meritorious issue. *See* ***id.***, ¶27. However, Burroughs ignores the fact that his no-merit appeal was dismissed precisely so he could file a pro se postconviction motion challenging his convictions. Because he failed to include all his desired bases for relief in that motion, he is now barred from litigating those he omitted absent his showing a sufficient reason for his failure to have done so. His apparent ignorance of the law does not qualify as a sufficient

reason; Burroughs was advised by this court of the potential dangers of self-representation. Moreover, Burroughs did not take advantage of the opportunity he was given to question his trial counsel regarding his counsel's tactics, which testimony is a prerequisite to an ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). We therefore will not consider Burroughs' second, third and fourth appellate arguments. *See supra* ¶13.

¶19 Finally, we address Burroughs' argument that the circuit court erred by refusing to consider his supplemental postconviction motion. Our October 22, 2015 order essentially directed the circuit court to enter an order denying Burroughs' original postconviction motion so that he could properly appeal that order if he so desired. We did not extend the time for Burroughs to make any further filings, and our order did not invite, encourage, or in any way sanction Burroughs' filing of another postconviction motion. For any new arguments contained therein, it was necessary for Burroughs to demonstrate a sufficient reason for not having raised them in his initial motion. He failed to do this, and therefore the record conclusively demonstrated Burroughs was not entitled to relief on his supplemental claims. *See* WIS. STAT. § 974.06(3).

¶20 Burroughs also requests that this court exercise its power of discretionary reversal under WIS. STAT. § 752.35 to allow him to withdraw his pleas. At the plea hearing, Burroughs confirmed he had discussed with his trial counsel the elements of both crimes to which he was pleading guilty. Burroughs acknowledged the jury instruction forms were attached to the Plea Questionnaire/Waiver of Rights form that he completed and that trial counsel had used those jury instruction forms when discussing the matter with Burroughs. Burroughs was read, and represented that he understood, the constitutional rights

he waived by pleading guilty, and he agreed that the criminal complaint was adequate to establish a factual basis for his pleas. We conclude this is not an exceptional case warranting the exercise of our power of discretionary reversal. *See* ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456.

By the Court.—Judgment and order affirmed.

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