COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1053 **Cir. Ct. No. 2000CF663**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY HARDEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Jerry Harden appeals pro se from a circuit court order denying his WIS. STAT. § 974.06 (2015-16)[1] motion without a hearing. We affirm on two grounds: (1) Harden's § 974.06 motion was an attempt to relitigate matters previously addressed by the circuit court and by this court on appeal and (2) the motion does not otherwise establish that Harden was entitled to relief.

¶2 A circuit court must hold an evidentiary hearing if the WIS. STAT. § 974.06 motion alleges "sufficient facts that, if true, show that the defendant is entitled to relief." ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If the motion does not allege such facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the circuit court has the discretion to deny the motion. ***Id.*** (citations omitted).

¶3 An evidentiary hearing is not required if the following principles provide a basis to deny a postconviction motion. A party may not relitigate issues previously decided. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.") Subsequent challenges to a criminal conviction can be barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The ***Escalona-Naranjo*** bar provides:

> [A]ll claims of error that a criminal defendant can bring should be consolidated into one motion *or* appeal, and claims that could have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a

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

> showing of a sufficient reason for why the claims were not raised on direct appeal or in a previous § 974.06 motion.

State v. Lo, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756.

¶4 In ***State v. Harden***, No. 2002AP2305-CR, unpublished slip op. (WI App July 23, 2003) (***Harden I***), we affirmed Harden's conviction for burglary and attempted burglary and the order denying his postconviction motion. In that pro se appeal, Harden attacked fingerprint evidence from a lawn chair upon which he stood to burgle a home.[2] He also alleged ineffective assistance of trial counsel in relation to the lawn chair.

¶5 In 2016, Harden filed the WIS. STAT. § 974.06 motion that is the subject of this appeal. Harden alleged the existence of newly discovered evidence relating to the lawn chair and complained that the lawn chair had not been collected as evidence. He claimed that he was denied a fair trial because the lawn chair was material and apparently exculpatory evidence, the lawn chair from which his fingerprints were obtained is not the lawn chair that was positioned under the window of the burgled residence, and the failure to collect the lawn chair as evidence meant that Harden could not challenge the fingerprint evidence. Harden also argued that weather conditions would have allegedly precluded

[2] As we stated in ***State v. Harden***, No. 2002AP2305-CR, unpublished slip op. ¶2 (WI App July 23, 2003) (footnote omitted) (***Harden I***):

> Harden's fingerprints were found on a lawn chair beneath a window through which Harden allegedly entered to commit the burglary. The chair belonged to a neighbor of the homeowner. The police found the fingerprints the same day the homeowner discovered the burglary. Fingerprints from the chair matched the prints obtained from Harden after his arrest two days later. During his trial to the court, Harden denied that he burglarized the residence or left his fingerprints on the lawn chair.

obtaining fingerprint evidence from the lawn chair. Finally, Harden claimed that his trial counsel was ineffective in relation to matters involving the lawn chair.

¶6 The circuit court declined to hold a hearing on Harden's WIS. STAT. § 974.06 claims because the claims were made, in various forms, and rejected in Harden's direct appeal. In addition, the circuit court found that none of Harden's "newly discovered evidence" satisfied the legal standard for such evidence because the evidence offered by Harden existed at the time of trial or was otherwise addressed in prior proceedings. *See* ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60. The circuit court stated:

> [T]he evidence was that the fingerprint was taken from the white chair beneath [the victim's] window which was used by the burglar to gain entry through the window.
>
> All of the 'newly discovered' evidence Harden presents are items in existence at the time of the [court] trial, argued at the time of trial or in an earlier post-judgment motion or are items such as the weather records, which are not material to the issue at hand. Furthermore, even if it could be asserted that Harden met all four criteria on any of the items claimed to be "newly discovered" evidence, there is no reasonable probability that a jury hearing such evidence would have a reasonable doubt as to Harden's guilt.

¶7 On appeal, Harden argues that the lawn chair evidence was apparently or potentially exculpatory, a claim we rejected in ***Harden I***. Harden also argues that his trial counsel was ineffective in relation to the lawn chair evidence. We rejected this claim in ***Harden I***. Harden cannot relitigate these claims. ***Witkowski***, 163 Wis. 2d at 990.

¶8 We also reject Harden's WIS. STAT. § 974.06 newly discovered evidence claim because that claim is merely an attempt to relitigate matters previously addressed by this court. ***Witkowski***, 163 Wis. 2d at 990. Our decision in ***Harden I*** addressed numerous issues relating to the lawn chair. We noted that

the State never intended to introduce the lawn chair into evidence, and Harden did not make an offer of proof that the chair, from which the State obtained fingerprint evidence introduced at trial, had exculpatory value. ***Harden I***, unpublished slip op. ¶10. We rejected Harden's claim that the absence of the lawn chair meant that the State had destroyed evidence. ***Id.***, unpublished slip op. ¶11. We rejected Harden's claim that his trial counsel was ineffective for not investigating the chair's whereabouts because Harden did not show prejudice arising from counsel's representation. ***Id.***, unpublished slip op. ¶¶13-15. Finally, we rejected Harden's claim that the absence of the chair hindered his ability to inquire regarding the collection of fingerprints from the chair and the procedure used to identify those fingerprints. ***Id.***, unpublished slip op. ¶18.

¶9 We conclude that the circuit court correctly rejected Harden's 2016 WIS. STAT. § 974.06 postconviction claims without a hearing because they were an attempt to relitigate issues previously addressed. ***Witkowski***, 163 Wis. 2d at 990.

¶10 Harden's WIS. STAT. § 974.06 motion alleges that his standby trial counsel's unsolicited participation in the trial violated his right to conduct his own defense. Harden's motion offers no reason—let alone a sufficient reason—for

failing to bring this claim as part of his direct appeal.[3] ***Lo***, 264 Wis. 2d 1, ¶44. This claim is barred under ***Escalona-Naranjo***.[4]

¶11 In a motion asking this court to take judicial notice of new arguments, Harden argues that the circuit court lacked competence to address the claims made in his WIS. STAT. § 974.06 motion and asks this court to construe his § 974.06 motion as a habeas petition. We are bound by the record as it comes to us. Harden cannot recast this appeal or the circuit court proceedings. We will not address the issues Harden raises in this motion.[5]

By the Court.—Order affirmed.

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

[3] In his reply brief, Harden argues that the fact that he proceeded pro se on appeal meant that he could not effectively raise his appellate issues, which amounts to a sufficient reason to avoid imposition of the ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), bar. We disagree. That Harden was pro se in his WIS. STAT. RULE 809.30 (2001-02) postconviction proceedings resulted from his 2002 decision during his direct appeal to discharge his appointed appellate counsel. After being warned of the difficulties and disadvantages of proceeding pro se, Harden confirmed his desire to proceed pro se. ***State v. Harden***, No. 2002AP547-CR (orders dated March 14, 2002 and March 19, 2002). Thereafter Harden litigated a pro se postconviction motion and an appeal, ***State v. Harden***, No. 2002AP2305-CR, unpublished slip op. (WI App July 23, 2003) (***Harden I***).

[4] In his reply brief and in a separate request that we take judicial notice, Harden argues that ***Escalona-Naranjo*** either does not mean what it says or was wrongly decided. We are bound by the decisions of our supreme court. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

[5] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").