COURT OF APPEALS DECISION DATED AND FILED

July 10, 2007

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. 2006AP436

Cir. Ct. Nos. 2000CF5071
2001CF1202

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD L. DEBERRY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed*.

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

¶1 PER CURIAM. Following a jury trial, Richard L. DeBerry was convicted of four felonies, including one count of being a felon in possession of a

firearm as a habitual criminal. *See* WIS. STAT. §§ 941.29(2m) and 939.62 (1999-2000).[1] DeBerry now appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2005-06) postconviction motion in which he alleged that other acts evidence was improperly admitted at trial; his postconviction attorney was ineffective for not challenging the effectiveness of his trial attorney; and his sentence violates the double jeopardy clauses of the state and federal constitutions. The circuit court correctly denied DeBerry's postconviction motion, and we affirm.

¶2 DeBerry's current appeal substantially revisits the issues he raised in an earlier direct appeal from the judgments in these cases. *See* ***State v. DeBerry***, No. 02-1482-CR, unpublished slip op. (WI App Oct. 7, 2003) (***DeBerry I***). In that proceeding, he first sought a new trial in the interests of justice pursuant to WIS. STAT. § 752.35, contending that the jury was improperly informed of his prior conviction for being a felon in possession of a firearm. We rejected his argument because the issue is governed by ***State v. Gibson***, 2000 WI App 207, ¶¶7-12, 238 Wis. 2d 547, 618 N.W.2d 248. Pursuant to ***Gibson***, there was no error when the State presented proof and the trial court instructed the jury on DeBerry's prior felon-in-possession conviction. *See* ***DeBerry I***, unpublished slip op. at 3. To the contrary, the state must prove and the jury must find the prior conviction beyond a reasonable doubt. ***Id.***

¶3 DeBerry's first appeal also challenged his sentence on the grounds that it was enhanced twice. That argument failed because the underlying premise,

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted

that WIS. STAT. § 941.29(2m) is a penalty enhancer that cannot be further enhanced with a second habitual criminality statute, was rejected by ***Gibson***. *See* ***DeBerry I***, unpublished slip op. at 3.

¶4 In the instant appeal, DeBerry argues that evidence of his prior conviction for being a felon in possession of a firearm was not relevant at his trial on the charge of being a felon in possession of a firearm under WIS. STAT. § 941.29(2m). The statute provides that "[w]hoever violates this section after being convicted under this section is guilty of a Class D felony." ***Id.*** DeBerry argues that this statute contains two elements: that the defendant is a felon and that the defendant possessed a firearm. He reasons that since he stipulated to his status as a felon, his prior conviction for felon-in-possession ought to have been barred pursuant to WIS. STAT. § 904.04(2) (2001-02) as tending to show evidence of bad character.

¶5 As this court has previously held, the elements of WIS. STAT. § 941.29(2m) are not two, but three: "a prior felony conviction, possession of a firearm and a prior conviction of felon in possession." ***Gibson***, 238 Wis. 2d 547, ¶8. In DeBerry's direct appeal, we therefore held that the evidence of the prior conviction of felon-in-possession was properly admitted. ***DeBerry I***, unpublished slip op. at 3. This issue is concluded. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶6 Nor was DeBerry's postconviction attorney ineffective for failing to allege ineffectiveness of his trial attorney. DeBerry faults his trial attorney for permitting the prior felon-in-possession conviction to be put before the jury

without objection. DeBerry argues that he stipulated to the prior conviction and that his stipulation to an element of the offense could have permitted him to avoid the introduction of other acts evidence pursuant to ***State v. DeKeyser***, 221 Wis. 2d 435, 439, 585 N.W.2d 668 (Ct. App. 1998).

¶7 ***DeKeyser*** is inapplicable here. DeBerry's prior felon-in-possession conviction is not other acts evidence, but rather an element of the charge against him. DeBerry's trial attorney committed no error in permitting introduction of an element of the offense, and his postconviction attorney was not ineffective in failing to make such a claim.

¶8 Next, DeBerry argues that his sentence was enhanced twice. He made the same claim in his earlier appeal. He contends that WIS. STAT § 941.29(2)(a), which criminalizes the act of being a felon in possession of a firearm, carries a five-year maximum. Therefore, he deems § 941.29(2m) an enhancer because it increases to ten years the maximum sentence for those felons in possession who have been previously convicted of the same felon-in-possession offense. Thus, he contends that the general repeater statute, WIS. STAT. § 939.62, may not also be applied. *See* ***State v. Ray***, 166 Wis. 2d 855, 872, 481 N.W.2d 288 (Ct. App. 1992) ("[a]bsent express legislative intent ... the legislature's purpose is fulfilled by applying only one [penalty enhancement]."). We rejected this contention in DeBerry's earlier appeal because this court has expressly held that § 941.29(2m) is not a penalty enhancer. ***Gibson***, 238 Wis. 2d 547, ¶12.

¶9 Although DeBerry now raises the double jeopardy clauses of the Wisconsin and United States Constitutions—U.S. CONST. amend. V and WIS. CONST. art. I, § 8(1)—as bases for his claim, he offers no reason that these constitutional grounds could not have been raised in his earlier appellate

proceeding. Absent a sufficient reason, defendants may not raise claims, even those of constitutional dimension, which could have been raised in the original postconviction proceeding. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184, 517 N.W.2d 157 (1994).

¶10 Moreover, were we to look beyond the procedural bar, the claim would fail. The double jeopardy clauses "embod[y] three protections: 'protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense.'" ***State v. Lechner***, 217 Wis. 2d 392, 401, 576 N.W.2d 912 (1998) (citation omitted). However, "[a]n enhanced sentence imposed on a persistent offender [] 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes' but as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" ***Monge v. California***, 524 U.S. 721, 728 (1998) (citation omitted).[2]

¶11 Finally, DeBerry asserts that WIS. STAT. § 941.29(2m) must be construed with reference to the rule of lenity and in favor of the defendant.[3] Applying this rule, he argues that § 941.29(2m) should be construed as a penalty enhancer that increases the sentence for those convicted under § 941.29(2)(a). He

[2] The Wisconsin and federal double jeopardy provisions are viewed "as identical in scope and purpose." ***State v. Davison***, 2003 WI 89, ¶18, 263 Wis. 2d 145, 666 N.W.2d 1. Therefore, Wisconsin courts "accept[] decisions of the United States Supreme Court as controlling interpretations of the double jeopardy provisions of both constitutions." ***Id.*** (citations omitted).

[3] "When there is doubt as to the meaning of a criminal statute, courts should apply the rule of lenity and interpret the statute in favor of the accused." ***State v. Jackson***, 2004 WI 29, ¶12, 270 Wis. 2d 113, 676 N.W.2d 872 (citations ommited).

offers no reason that this claim was not made in his prior appeal, in which he also argued that § 941.29(2m) is a penalty enhancer. It is therefore barred pursuant to ***Escalona-Naranjo***, 185 Wis. 2d at 188. Moreover, the meaning of § 941.29(2m) is not in doubt; it has been construed in ***Gibson***, 238 Wis. 2d 547, ¶12. The rule of lenity is not applicable in these circumstances.

By the Court.—Order affirmed.

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