

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 1, 2011

A. John Voelker
Acting 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. 2009AP1585-CR

Cir. Ct. No. 1975CF4484

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HENRY EDWARD SMITH,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JEFFREY A. CONEN, Judge. *Appeal dismissed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. On June 16, 2009, Henry Edward Smith, proceeding *pro se*, filed a notice of appeal. He seeks appellate review of claims raised in his postconviction motions filed on February 10, 2009, May 12, 2009, and June 4, 2009. The circuit court denied his claims in orders entered on

March 4, 2009, May 22, 2009, and June 9, 2009. Smith's notice of appeal is untimely as to the order entered on March 4, 2009, denying his February motion. Accordingly, we lack jurisdiction to review that order. We also lack jurisdiction to review the orders entered on May 22, 2009, and June 9, 2009, because those orders denied the same requests for relief as were denied in the March 2009 order. Therefore, we dismiss the appeal.

¶2 A jury convicted Smith in 1976 of first-degree murder and armed robbery. He did not pursue a direct appeal from the judgment of conviction. With the assistance of counsel, however, he filed a collateral challenge to his conviction pursuant to WIS. STAT. § 974.06 (1979-80), and then an unsuccessful appeal from the order denying his claims. *See State v. Smith*, No. 1982AP1761, unpublished slip op. (Wis. Ct. App. Aug. 4, 1983). He has also sought postconviction relief *pro se* in the circuit court eleven times and filed five *pro se* appeals. Smith's three most recent postconviction motions underlie this appeal.

¶3 Smith filed a motion on February 10, 2009, pursuant to WIS. STAT. § 974.06 (2007-08).¹ He listed five grounds for relief:

- (1) False evidence which is a shotgun.
- (2) False evidence, which is perjured testimony.
- (3) Denial the right to cross-examination witnesses.
- (4) A Biased judge who comment on the evidence, of the weight and effect., denied the right to an-impartial jury.
- (5) A counsel who help the asst.District Attorney put false evidence against me, and frame me in prison.

¹ All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

(Capitalization, spelling, punctuation, and grammar as in original.) The circuit court denied the motion, Smith's tenth effort to obtain postconviction relief, by written order entered on March 4, 2009.

¶4 On May 12, 2009, Smith filed another motion for postconviction relief, stating the same five issues that he raised in his February 2009 motion:

- (1) FALSE EVIDENCE WHICH IS A SHOTGUN.
- (2) FALSE EVIDENCE WHICH IS PERJURED TESTIMONY.
- (3) DENIED THE RIGHT TO CROSS-EXAMINATION WITNESSES.
- (4) A BIASED JUDGE WHO COMMENTR ON THE EVIDENCE OF THE WEIGHT AND EFFECT, DENIED THE RIGHT TO AN-IMPARTIAL JURY.
- (5) A COUNSEL WHO HELP THE ASST.DISTRICT ATTORNEY PUT FALSE EVIDENCE AGAINST ME, TO FRAME ME IN PRISON.

(Capitalization, spelling, punctuation, and grammar as in original.) The circuit court denied the motion by written order entered on May 22, 2009.

¶5 On June 4, 2009, Smith filed his twelfth claim for postconviction relief. He asserted: "this motion has one issue (perjured testimony)." The circuit court denied the motion by written order entered on June 9, 2009. The order included the circuit court's observation that "the same claim was advanced in the defendant's February 10, 2009, and May 12, 2009, motions for postconviction relief."

¶6 On June 16, 2009, Smith filed a notice of appeal. The notice is addressed to the circuit court and states: "I am appealing your decision to the appeal [sic] court." The notice does not state which of the decisions Smith intends

to challenge, but the omission is immaterial because we lack jurisdiction to review any of them.

¶7 A timely notice of appeal is necessary to confer jurisdiction on this court. WIS. STAT. RULE 809.10(1)(e). With exceptions not applicable here, an appeal from an order denying a collateral challenge to a criminal conviction must be filed within ninety days of the date that the circuit court entered a final judgment or order. *See* WIS. STAT. § 808.04(1) (appeal must be initiated within ninety days of the entry of a final judgment or order unless the deadline is shortened by a notice of entry of judgment or order); WIS. STAT. § 974.06(7) (appeal from order denying motion filed under § 974.06 is taken as from a final judgment). In this case, Smith’s deadline for filing a notice of appeal challenging the order of March 4, 2009, fell on June 2, 2009. Smith did not meet the deadline. We lack jurisdiction to review the order of March 4, 2009. *See* RULE 809.10(1)(e).

¶8 Smith did, of course, file his notice of appeal within ninety days of the orders entered on May 22, 2009 and June 9, 2009, but the notice nonetheless fails to confer appellate jurisdiction over those orders. The May and June motions denied by those orders merely raised again issues previously raised in Smith’s February motion, and the circuit court resolved all of those issues by order of March 4, 2009. “[Because] neither the consent of parties nor action of the court can extend the statutory time for the taking of an appeal ... such a result cannot be reached by the indirect method of again moving for the same relief that was refused in the prior order.” *See Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 25, 197 N.W.2d 752 (1972) (citation omitted, ellipsis in *Ver Hagen*). Thus, Smith could not appeal from the orders of May 22, 2009 and June 9, 2009. *See id.* In sum, we cannot review any circuit court order entered in this case.

¶9 The State asks us to remind Smith that his serial postconviction litigation imposes a significant burden on the court system. Further, the State urges us to warn Smith that if he continues to file repetitious litigation, this court will impose conditions restricting the circumstances in which he may file motions in the circuit court or pursue appeals in this court. See *State v. Casteel*, 2001 WI App 188, ¶¶24-26, 247 Wis. 2d 451, 634 N.W.2d 338. The State’s request is appropriate.

¶10 “We need finality in our litigation.” *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, any claim that could have been raised in a prior postconviction motion or direct appeal cannot form the basis for a subsequent motion under WIS. STAT. § 974.06 unless the defendant demonstrates a sufficient reason for failing to raise the claim earlier. *Escalona-Naranjo*, 185 Wis. 2d at 185. Further, a defendant may not relitigate a matter previously litigated, “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).

¶11 Despite the foregoing limitations, Smith has filed a multitude of postconviction motions and other requests for relief since his 1976 conviction. None of his postconviction efforts have succeeded. We have not, of course, considered whether the issues raised in Smith’s current round of litigation might have substantive merit because Smith failed to timely invoke our jurisdiction. Nonetheless, our effort to determine whether we have jurisdiction over this appeal required us to examine the record at length. In doing so, we observed that in 2009 Smith filed three WIS. STAT. § 974.06 motions in quick succession, the latter two of which merely echoed the first. Additionally, we note that in three of Smith’s prior appeals we summarily affirmed orders denying his claims for postconviction

relief with the reminder that “[g]rounds available but not raised in an earlier proceeding may not form the basis of a subsequent § 974.06 motion.” See *State v. Smith*, No. 1988AP1291, unpublished slip op. at 2 (Wis. Ct. App. Dec. 20, 1988); *State v. Smith*, No. 1989AP2166, unpublished slip op. at 3 (Wis. Ct. App. Feb. 7, 1990); *State v. Smith*, No. 1993AP2244, unpublished slip op. at 4 (Wis. Ct. App. Jan. 12, 1994). See also *State ex rel. Smith v. Endicott*, No. 1999AP0917, unpublished slip op. at 3 (Wis. Ct. App. June 7, 2000) (Smith’s litigation barred because rule against successive postconviction motions also applies to petitions for writs of *habeas corpus*).

¶12 The record reflects that Smith is well aware of the limitations that prevent litigants from taxing the limited resources of the court system with repetitive claims. Indeed, when Smith filed a petition in 2002 seeking a writ of *coram nobis* he expressly acknowledged that he could “no longer” appeal as a matter of right and that he faced a bar to “fileing [sic] another [WIS. STAT. §] 974.06 postconviction [motion].” Nonetheless, Smith filed three § 974.06 motions with overlapping issues in 2009 alone.

¶13 Therefore, we caution Smith that we will not countenance squandering judicial resources with repeated presentations of his claims. We are prepared to impose appropriate sanctions should Smith repeat the claims he has previously made and we conclude in the future that Smith’s litigation is frivolous, abusively repetitive, or otherwise improper. See *Casteel*, 247 Wis.2d 451, ¶¶25-26.

By the Court.—Appeal dismissed.

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

