COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3186-CR **Cir. Ct. No. 2003CF1623**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SARAH D. BURRELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Sarah D. Burrell, *pro se*, appeals from an order denying her sentence modification motion. Because we conclude that her claims are procedurally barred, we affirm.

I.

¶2 The State charged Burrell in 2003 with five offenses stemming from her involvement in a large and sophisticated forgery enterprise. Pursuant to a plea bargain, Burrell pled guilty to one count of forgery (uttering) committed on November 14, 2002, and one count of forgery (uttering) committed on February 8, 2003. The circuit court imposed an eight-year sentence for the 2002 forgery and a six-year sentence for the 2003 forgery. The circuit court ordered that Burrell serve the two sentences concurrently with each other but consecutively to sentences previously imposed in other matters.

¶3 Burrell appealed, and her appellate lawyer filed a no-merit report under WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Burrell did not file a response. We concluded that the Record disclosed no arguably meritorious issues, and we summarily affirmed the convictions. ***State v. Burrell***, No. 2004AP2875-CRNM, unpublished slip op. (WI App Mar. 14, 2005).

¶4 Burrell, proceeding *pro se*, filed two postconviction motions in 2006 and one in 2008 seeking relief from her sentences. The circuit court denied those motions. The circuit court granted Burrell's fourth postconviction motion and entered an order correcting a clerical error in the judgment of conviction. Burrell's fifth postconviction motion, filed in November 2009, underlies this appeal. She contended that the statutory felony classification scheme governing the 2002 forgery should be disregarded and that the statutory felony classification scheme governing the 2003 forgery should be deemed applicable to both offenses. The circuit court denied her motion, and this appeal followed.

II.

¶5 At the time that Burrell committed forgery (uttering) in November 2002, the legislature classified the crime as a Class C felony, which carried a statutory maximum prison term of fifteen years. *See* Notes, WIS. STAT. §§ 943.38(2), 939.50(3)(c) (2001-02). Effective February 1, 2003, the legislature reclassified the crime as a Class H felony. *See* 2001 Wis. Act 109, §§ 773, 9359, 9459. Thus, the forgery that Burrell committed on February 8, 2003, carried a statutory maximum prison term of only six years. *See* §§ 943.38(2), 939.50(3)(c) (2001-02).

¶6 Burrell first argues that her 2002 forgery should be reclassified as a Class H felony because the circuit court "sentenced the defendant to eight years' imprisonment [without] acknowledging that [under 2001 Wis.] Act 109 ... [the] [c]lassification of [f]elonies had changed." Burrell previously presented this argument to the circuit court in 2006. In her first postconviction motion, she moved "for an [o]rder to reclassify above [f]elony Class C under [2001 Wis.] Act 109 ... to a [l]esser [f]elony [c]lass." The circuit court denied the claim, explaining that the reclassification of forgery implemented by 2001 Wis. Act 109 did not apply to offenses committed before February 1, 2003. *See* ***State v. Cole***, 2003 WI 59, ¶4 & n.7, 262 Wis. 2d 167, 170 & n.7, 663 N.W.2d 700, 701 & n.7.

¶7 "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, 514 (Ct. App. 1991). Burrell has simply restated the argument for reclassifying the Class C felony that she previously presented in 2006. She may not do so.

¶8 Burrell next asserts that the two different classifications assigned to forgery violate her constitutional right to equal protection of the law. Convicted defendants pursuing constitutional challenges to their sentences after the time for an appeal has passed generally must raise such challenges within the parameters defined by WIS. STAT. § 974.06. *See* ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 568, 787 N.W.2d 350, 362. Although Burrell did not cite § 974.06 as the authority for her equal protection challenge, we look beyond the label that a prisoner applies to a *pro se* submission to determine whether the pleading states a claim for relief. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384, 388 (1983). Here, Burrell raises a claim that is cognizable under § 974.06, but the claim is procedurally barred.

¶9 "[WISCONSIN STAT. §]974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 163–164 (1994). A litigant who wishes to pursue a second or subsequent postconviction motion under § 974.06 may not do so without first demonstrating a sufficient reason for failing to raise or adequately address the issue in the original postconviction proceeding. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 184, 517 N.W.2d at 163.

¶10 "A no-merit appeal clearly qualifies as a previous motion under [WIS. STAT.] § 974.06(4)." ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 19–20, 786 N.W.2d 124, 133. Therefore, a direct appeal pursuant to WIS. STAT. RULE 809.32 may bar a later proceeding under § 974.06 presenting issues that could have been previously raised. ***State v. Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 171–172, 696 N.W.2d 574, 581. Before we apply the rule of ***Escalona-Naranjo*** to a § 974.06 motion filed after a no-merit appeal, however, we

"consider whether the no-merit procedures (1) were followed; and (2) warrant sufficient confidence to apply the procedural bar." ***Allen***, 2010 WI 89, ¶62, 328 Wis. 2d at 26, 786 N.W.2d at 136.

¶11 In keeping with ***Allen***, we have examined the no-merit proceedings in ***Burrell***. Our examination discloses that Burrell's appellate lawyer filed a no-merit report discussing the possible issues that might be pursued on appeal. Our opinion in ***Burrell*** reflects that we considered the no-merit report, we conducted an independent review of the Record, and we thoroughly discussed the potential issues that Burrell might reasonably believe she could pursue on appeal. In our discussion, we took into account that "due to the reclassification of crimes enacted as part of truth-in-sentencing legislation, the two [forgeries] carried different penalties. The 2002 forgery was a Class C felony while the 2003 forgery was a class H felony." ***Burrell***, No. 2004AP2875-CRNM, unpublished slip op. at 1. After review, we determined that "a postconviction challenge to the sentence[s] would lack arguable merit" and that "there is no basis for reversing the judgment of conviction." ***Id.***, unpublished slip op. at 4, 6.

¶12 We are satisfied that Burrell's appellate lawyer and this court scrupulously followed the no-merit procedures and that the outcome of ***Burrell*** is reliable.[1] Thus Burrell may not pursue additional constitutional challenges to her

[1] Our confidence in the outcome of Burrell's appeal under WIS. STAT. RULE 809.32 is in no way undermined by the circuit court's order granting Burrell's fourth postconviction motion. The order vacated a DNA surcharge that the circuit court did not impose but that the clerk of circuit court erroneously entered on the judgment of conviction. "A difference between the sentence portion of the written judgment of conviction and the circuit court's unambiguous oral pronouncement of the sentence is a clerical error." ***State v. Prihoda***, 2000 WI 123, ¶15, 239 Wis. 2d 244, 252, 618 N.W.2d 857, 862. Corrections of clerical errors do not address the merits of an action. *See* ***id.***, 2000 WI 123, ¶47, 239 Wis. 2d at 266, 618 N.W.2d at 868.

sentences absent a sufficient reason for failing to raise those challenges in a response to the no-merit report. *See* ***Allen***, 2010 WI 89, ¶91, 328 Wis. 2d at 33–34, 786 N.W.2d at 140.

¶13 Burrell attempts to use her reply brief as a platform for developing a reason that would justify her serial litigation, but we determine the sufficiency of Burrell's reason by examining the four corners of her postconviction motion. *See* ***ibid.*** Because Burrell offered the circuit court no reason, much less a sufficient reason, to justify her fifth postconviction claim for relief, she is procedurally barred from pursuing constitutional challenges to her sentences.

¶14 Burrell concludes her appellate brief with a request for concurrent sentences. Burrell's postconviction motion contained no complaint about the consecutive nature of her sentences. We do not consider issues raised for the first time on appeal. ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 492, 611 N.W.2d 727, 730.

By the Court.—Order affirmed.

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