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DISTRICT II

August 30, 2023

To:

Hon. Wynne P. Laufenberg
Circuit Court Judge
Electronic Notice

Amy Vanderhoef
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

Kara Lynn Janson
Electronic Notice

Freeman Earl Bell Jr. #408567
Columbia Correctional Center
2925 Columbia Drive
Portage, WI 53901-0950

You are hereby notified that the Court has entered the following opinion and order:

2021AP2089 State of Wisconsin v. Freeman Earl Bell, Jr. (L.C. #2003CF1016)

Before Neubauer, Grogan and Lazar, JJ

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Freeman Earl Bell Jr., appeals pro se from an order denying his third motion for postconviction relief under WIS. STAT. § 974.06 (2021-22).[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Bell's claims are precluded by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because he fails to provide a sufficient reason for not raising, in his previous postconviction motions, the new arguments he now makes. Thus, we affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Bell pled guilty to armed robbery with use of force as a party to a crime in 2004. The circuit court sentenced Bell to twenty-five years' initial confinement and eight years' extended supervision. Postconviction counsel was appointed and Bell sought sentence modification in a WIS. STAT. § 974.02 motion, which was denied in March 2006. Bell did not pursue a direct appeal as allowed under § 974.02.

In 2008, Bell filed another pro se postconviction motion—this time under WIS. STAT. § 974.06. Bell argued that his trial counsel was ineffective for failing to meet with and interview him, for not investigating and challenging the traffic stop that led to his arrest, for not objecting at sentencing, and for inducing his plea by promising him a particular sentence. Bell also claimed ineffective assistance of postconviction counsel for not raising trial counsel's ineffectiveness and for allegedly abandoning Bell. The circuit court held a ***Machner***[2] hearing and denied Bell's motion. Bell appealed, and we affirmed. ***State v. Bell***, No. 2009AP2281, unpublished slip op. (WI App Feb. 9, 2011).

In 2017, Bell filed his second pro se WIS. STAT. § 974.06 postconviction motion. Again, he asserted claims of ineffective assistance of counsel, arguing that trial counsel and postconviction counsel were ineffective, and suggesting that he had newly discovered evidence. The circuit court denied Bell's motion without an evidentiary hearing.[3] Bell again appealed, and we affirmed. ***State v. Bell***, No. 2018AP687, unpublished slip op. (WI App Apr. 3, 2019).

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[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] The Honorable Gerald Ptacek presided over Bell's plea and sentencing hearing, entered the judgment of conviction, imposed sentence, and entered the orders denying Bell's WIS. STAT. § 974.02 motion and his first WIS. STAT. § 974.06 postconviction motion. The Honorable Wynne Laufenberg entered the orders denying Bell's second sentence-modification motion and his second and third § 974.06 postconviction motions.

In 2020, Bell filed another pro se postconviction motion. Bell sought sentence modification based on the "new factor" that the sentencing court failed "to consider [his] youth as a mitigating factor." The circuit court denied the motion. Bell appealed, but he subsequently voluntarily dismissed his appeal.

In 2021, Bell filed his third WIS. STAT. § 974.06 postconviction motion. Bell argued, pro se, that his judgment of conviction is "void" because it is "based on a Criminal Complaint that is a legal nullity." Bell admitted that the State served him with an amended complaint before trial; however, the State never filed the amended complaint with the circuit court. Thus, Bell contended, the amended complaint "superseded the original complaint [and] became the only live, operative complaint" on which a judgment could be entered. The circuit court denied Bell's motion without a hearing. The court concluded that Bell was procedurally barred from bringing another § 974.06 motion. In support of its decision, the court cited ***Escalona-Naranjo***: "Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation." 185 Wis. 2d at 185. Bell appeals.

WISCONSIN STAT. § 974.06(1) provides an avenue for prisoners to collaterally attack their sentences based on constitutional violations. Any grounds for relief under this section, however, are barred under § 974.06(4) if they were not raised in the prisoner's original postconviction motion "or in any other proceeding the person has taken to secure relief ... unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised" in those earlier proceedings. In ***Escalona-Naranjo***, our supreme court explained that "the purpose of [§] 974.06(4) is ... to require criminal defendants to consolidate all their postconviction claims into one motion or appeal." 185 Wis. 2d at 178. The procedural bar excludes all issues that were or could have been raised in a WIS. STAT.§ 974.02 motion or direct appeal unless the defendant

provides "sufficient reason" for not raising the issues in that earlier proceeding. ***Escalona-Naranjo***, 185 Wis. 2d at 173, 185 ("constitutional claims which could have been raised on direct appeal or in a [§] 974.02 motion cannot later be the basis for a [§] 974.06 motion"). Whether a claim under § 974.06 is procedurally barred is a question of law that we review de novo. ***State v. Allen***, 2010 WI 89, ¶15, 328 Wis. 2d 1, 786 N.W.2d 124.

Bell argues that the original complaint became null and void when the amended complaint was served. However, he asserts, "because the [S]tate *never* filed the amended complaint after they withdrew the original one, the [circuit] court *never* acquired jurisdiction over it." While he acknowledges the ***Escalona-Naranjo*** requirement that a defendant provide a sufficient reason for failing to raise an issue in an earlier postconviction proceeding, *see* 185 Wis. 2d at 185, Bell contends that this requirement does not apply to what he asserts is a "void judgment." He therefore claims that the circuit court had a "mandatory duty" to vacate his judgment of conviction. We disagree.

First, we note that Bell cites to no pertinent authority in support of his assertion that the exception to the ***Escalona-Naranjo*** procedural bar does not apply when the issue that was not raised in his previous postconviction proceedings involves "void judgments." Instead, he cites to two civil cases, which he claims unequivocally support his position. *See* ***Holman v. Fam. Health Plan***, 227 Wis. 2d 478, 596 N.W.2d 358 (1999); ***Neylan v. Vorwald***, 124 Wis. 2d 85, 368 N.W.2d 648 (1985). After reviewing both cases, we conclude that neither support his novel argument. As noted, both cases are civil in nature. *See* ***id.*** Moreover, neither one involved a procedural bar that prevented the aggrieved parties from raising the issue of the validity of the judgment, and neither case mentions ***Escalona-Naranjo*** or the effect that a "sufficient reason" requirement may have had on its holding. *See* ***id.*** In short, Bell has not convinced us that these holdings, which are based

in Wisconsin civil procedure, should be extended to apply in successive criminal postconviction proceedings.

In a related argument, Bell argues that the circuit court erred in failing to apply WIS. STAT. § 806.07(1)(d) to grant "Bell the relief he [is] entitled to as a matter of law." Section 806.07 allows a circuit court to order relief from a civil judgment under specific circumstances, including when a court finds that "[t]he judgment is void." Sec. 806.07(1)(d). However, Bell cites to no case allowing him to utilize a civil procedure statute to attack a criminal conviction. In fact, our supreme court has reached the opposite conclusion. ***State v. Henley***, 2010 WI 97, ¶¶69-71, 328 Wis. 2d 544, 787 N.W.2d 350 (rejecting prisoner's attempt to rely on provisions of § 806.07 to challenge his criminal conviction and noting that if a defendant could use a "civil procedure statute … to challenge their conviction" they would not "ever use [WIS. STAT.] §§ 974.02 and 974.06").

We further note that WIS. STAT. § 967.01 provides that "[c]hapters 967 to 979 shall govern all criminal proceedings." The content, issuance, filing, and withdrawal of criminal complaints are governed by WIS. STAT. §§ 968.01 through 968.03. Judgments of conviction are governed by WIS. STAT. § 972.13. Thus, Bell's challenge to his conviction based on his challenge to the validity of the criminal complaint was required to be brought in a direct appeal or a properly filed WIS. STAT. § 974.06 motion.

Based on the foregoing conclusion, we return to the main issue before us; namely, whether the procedural bar established by ***Escalona-Naranjo*** precludes Bell from raising a challenge to the validity of his criminal conviction for the first time in his third WIS. STAT. § 974.06 postconviction motion. *See* 185 Wis. 2d at 185. On this topic, Bell asserts that "even if ***Escalona-Naranjo*** did apply, a sufficient reason has been supplied." However, he fails to identify what that

sufficient reason is, and instead encourages this court to "simply [review] the record as it exists." Our review of the record does not provide a "sufficient reason" for Bell's failure to raise any challenge to the complaint in any of his previous postconviction proceedings.

The record is clear that the amended complaint at issue here was served on Bell in 2009. Bell argues that had he "known of the legal basis for these claims any time prior to now raising them, he would have raised them then, as opposed to waiting 12 years." However, absent any indication that there has been a relevant change in the law since he filed his previous postconviction motions, Bell's ignorance of "the legal basis for these claims" is not a reason sufficient to overcome the applicable procedural bar. *See* ***State v. Allen***, 2010 WI 89, ¶44, 328 Wis. 2d 1, 786 N.W.2d 124 (concluding that defendant's inability to "point to any change in law that has made him aware of a claim now that he was not aware of" in earlier postconviction filings was not a sufficient reason for his failure to raise issues that could have been brought earlier).

For all these reasons, we conclude that Bell's third postconviction motion fails to entitle him to relief. Bell has failed to provide a sufficient reason why the issues he now raises could not have been raised in any of his prior postconviction motions.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals