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DISTRICT I

September 6, 2023

To:

Hon. T. Christopher Dee
Circuit Court Judge
Electronic Notice

Nicholas DeSantis
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Corey Gilmore
C/O Brittany Echols
4160 N. Port Washington Rd.
Milwaukee, WI 53212

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

2020AP1707

State of Wisconsin v. Corey Gilmore (L.C. # 1995CF954770A)

Before White, C.J., Donald, P.J., and Dugan, J.

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).

Corey Gilmore, *pro se*, appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 motion without a hearing. 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 (2021-22).¹ The order is summarily affirmed.

In October 1995, Gilmore and his nephew were charged with attempted armed robbery, aggravated battery, armed robbery, and substantial battery, stemming from two separate

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

incidents. The first two counts, attempted armed robbery and aggravated battery, involved victim C.C. and a liquor store robbery that occurred on October 27, 1995.² In the narrative portion of the complaint, the State alleged:

[C.C.] said that he had a substantial amount of cash on his person in the struggle, and it went flying throughout the store during the struggle, and *he was not sure whether the defendants were able to take any money with them when they fled.* [C.C.] said that the defendants did take his handgun when they fled. [C.C.] said that he did not give defendants consent or permission to remove any of his property from his person or his store, including any cash or his handgun.

(Emphasis added.) Later, the assistant district attorney explained that he had charged this as attempted armed robbery because when he first reviewed the case, he did not know whether Gilmore had gotten away with any money.

At the preliminary hearing, C.C. testified that an audit revealed that \$1,150 had been taken in the October 27 robbery. At the close of the hearing, the State filed an information with the same charges as the criminal complaint. Shortly thereafter, on November 21, 1995, the State sent an offer letter to Gilmore's attorney in which it advised that in light of C.C.'s testimony about the audit, the State would be filing an amended information that changed the attempted armed robbery to completed armed robbery.

Prior to trial, Gilmore moved to dismiss the armed robbery charge involving C.C. on grounds that it was unsupported by the complaint. The trial court denied the motion, explaining that the amended information was adequately supported by evidence from the preliminary hearing. Following a February 1996 trial, a jury convicted Gilmore on the four counts in the

² The other two counts involved victim J.C. at the same store on October 16, 1995.

amended information. The trial court sentenced Gilmore to an aggregate, indeterminate term of fifty-four years of imprisonment.

Between January 1997 and November 1999, Gilmore pursued two appeals and three writs in this court and one writ in the supreme court.³ The first appeal was voluntarily dismissed and Gilmore was unsuccessful with his other five cases. In May 2001, Gilmore successfully petitioned the Eastern District of Wisconsin for habeas corpus relief, so we reinstated Gilmore's WIS. STAT. RULE 809.30(2) (2001-02) deadline for filing a postconviction motion or notice of appeal. In November 2002, appointed counsel filed a no-merit report in which he discussed eight potential issues, to which Gilmore filed a response raising six potential issues. Upon our review of the record, we agreed with counsel that there was no issue of arguable merit that could be pursued on appeal and affirmed the judgment of conviction.⁴ Gilmore then brought three more appeals and two additional writ petitions in this court; he was also unsuccessful in those matters.⁵

³ See *State v. Gilmore*, No. 1997AP352-CR, unpublished order (WI App Oct. 15, 1998); *State ex rel. Gilmore v. Cir. Ct. for Milwaukee Cnty.*, No. 1997AP1293-W, unpublished op. and order (WI App May 13, 1997); *State ex rel. Gilmore v. Bertrand*, No. 1998AP801-W, unpublished op. and order (WI App Apr. 3, 1998); *State ex rel. Gilmore v. Bertrand*, No. 1998AP1940-W, unpublished order (WI July 24, 1998); *State v. Gilmore*, No. 1999AP2080, unpublished op. and order (WI App Jan. 18, 2001); *State ex rel. Gilmore v. Bertrand*, No. 1999AP2686-W, unpublished op. and order (WI App Nov. 8, 1999).

⁴ See *State v. Gilmore*, No. 2002AP2511-CRNM, unpublished op. and order (WI App Sept. 16, 2003).

⁵ See *State v. Gilmore*, No. 2005AP828, unpublished slip op. (WI App July 18, 2006); *State v. Gilmore*, No. 2005AP2671-CR, unpublished slip op. (WI App July 24, 2007); *State ex rel. Gilmore v. Pollard*, No. 2006AP2131-W, unpublished op. and order (WI App Sept. 12, 2006); *State v. Gilmore*, No. 2014AP519, unpublished slip op. (WI App Sept. 9, 2015); *State ex rel. Gilmore v. Redeker*, No. 2015AP957-W, unpublished op. and order (WI App Jan. 28, 2022).

In July 2020, Gilmore filed the WIS. STAT. § 974.06 motion underlying this appeal, claiming he was “denied ... the due process right to notice of the nature and cause of the accusations” against him because the State “asserted inconsistent positions regarding the nature” of the property taken from C.C. to constitute the “taking of property” element of the armed robbery charge. Specifically, Gilmore was originally charged with attempted armed robbery because the State did not know if money had been taken; the charge was amended to completed armed robbery after C.C.’s preliminary hearing testimony about an audit; and after Gilmore testified at trial that he and his nephew fled after disarming C.C. of a gun but swore they took no money, the State argued at closing that Gilmore was guilty of armed robbery for taking C.C.’s gun even if no money had been taken.

In order to avoid procedural bars, Gilmore further asserted that although he had raised the due process/notice issue in his no-merit response, this court “improperly made findings of fact” when it concluded that Gilmore’s trial testimony “exhibit[ed] no confusion regarding the nature of the charge.” Gilmore’s motion also argued that the State’s November 1995 offer letter explaining the change from attempted to completed armed robbery “was not part of the appellate record” in his no-merit appeal, so it was not properly before this court at the time, thus constituting a sufficient reason to address the offer letter now.

The circuit court denied Gilmore’s motion, noting that this court had previously assessed the adequacy of the no-merit process and concluded it had been properly followed. The circuit court also concluded that Gilmore’s allegations regarding the State’s offer letter were conclusory. Gilmore appeals.

A defendant must raise all grounds for relief in his or her original postconviction motion and/or direct appeal unless there is a sufficient reason for not doing so. *See* WIS. STAT. § 974.06; *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Whether procedural bars apply when the original appeal was a no-merit appeal depends on whether the no-merit procedures were in fact followed and whether the procedure carries a sufficient degree of confidence warranting application of the bars. *See State v. Fortier*, 2006 WI App 11, ¶19, 289 Wis. 2d 179, 709 N.W.2d 893; *State v. Tillman*, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574. Further, a § 974.06 motion “must not be used to raise issues disposed of by a previous appeal,” *see State v. Walberg*, 109 Wis. 2d 96, 103, 325 N.W.2d 687 (1982) (citation omitted), and a “matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue,” *see State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

The question of whether Gilmore had proper notice of the nature and the cause of the accusations against him was raised and discussed in his no-merit appeal, where we concluded that Gilmore’s “testimony exhibits no confusion regarding the nature of the charges or cause of the accusations.” *See State v. Gilmore*, No. 2002AP2511-CRNM, unpublished op. and order at 5 (WI App Sept. 16, 2003). This issue cannot be relitigated.

The question of whether the no-merit procedures were properly followed was previously raised and addressed in Gilmore’s first WIS. STAT. § 974.06 appeal, where we concluded that “the no-merit procedures were, in fact, followed in this case and that the record demonstrates a sufficient degree of confidence in the result.” *See State v. Gilmore*, No. 2005AP828, unpublished slip op. ¶7 (WI App July 18, 2006). This issue cannot be relitigated. Indeed, we have already declined to revisit it once. *See State v. Gilmore*, No. 2014AP519, unpublished slip

op. ¶8 (WI App Sept. 9, 2015) (“We previously assessed the adequacy of the no-merit procedures during the proceedings underlying ... [*Gilmore*, No. 2005AP828]. We will not again consider the adequacy of the no-merit proceeding.”).

Finally, in order to be entitled to an evidentiary hearing on a postconviction motion, in addition to alleging a sufficient reason for avoiding the procedural bar, the defendant must also allege sufficient material facts which, if true, would entitle him to relief. *State v. Allen*, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. As the circuit court explained, however, Gilmore’s claims regarding the 1995 letter are conclusory; Gilmore did not “explain why the letter was not in the record, when the letter was made known to him, or why it was not raised in any of his previous [Wis. STAT.] § 974.06 motions.”

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. *See* 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