

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 4, 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. 2010AP1575

Cir. Ct. No. 2006CF977

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON CARL MCDUFFIE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
M. JOSEPH DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Brandon Carl McDuffie, *pro se*, appeals from an order that denied his postconviction motion for plea withdrawal pursuant to WIS.

STAT. § 974.06 (2009-10).¹ He also appeals from an order that denied his motion for reconsideration. His claims are barred, and we affirm.

I.

¶2 According to the criminal complaint, in February 2006 McDuffie fired shots at a residence while riding as a passenger in a car. A bullet struck a woman in the head and killed her. The State charged McDuffie with first-degree reckless homicide as a party to a crime. *See* WIS. STAT. §§ 940.02(1), 939.05 (2005-06). To obtain a conviction for this offense at trial, the State must prove that the defendant, either directly or by intentionally aiding and abetting someone else, caused another person's death by criminally reckless conduct under circumstances showing utter disregard for human life. *See* WIS JI—CRIMINAL 1020, WIS JI—CRIMINAL 400. Here, McDuffie pled guilty as charged. The circuit court imposed a thirty-year term of imprisonment.

¶3 The state public defender appointed postconviction and appellate counsel for McDuffie. Appointed counsel pursued a sentence modification motion that the circuit court denied in 2007. Thereafter, appointed counsel moved to withdraw at McDuffie's request. The circuit court granted the motion, and this court extended McDuffie's appellate deadlines.

¶4 In 2008, McDuffie filed a *pro se* motion to withdraw his guilty plea on several grounds. He first claimed that his plea lacked a factual basis. In support of the claim, McDuffie asserted that he fired his gun as an accidental

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

response when the car he was riding in unexpectedly accelerated. He argued that the facts therefore did not support a finding that he acted with utter disregard for human life. The circuit court rejected the claim, explaining that the facts included McDuffie's "admission that he was aiming at the roof of the house.... The facts to which the defendant originally agreed at the time he entered his plea were the basis for the plea." The circuit court held that "those facts satisfy the elements of first-degree reckless homicide."

¶5 The circuit court also rejected McDuffie's claim for plea withdrawal grounded on the allegations that his trial counsel failed to explain the elements of the offense and that McDuffie did not understand them. The circuit court determined that McDuffie "was twice apprised of the elements of the offense by [the circuit court]. Both times [he] stated that he understood what the judge had said." McDuffie did not appeal.

¶6 In 2010, McDuffie filed the motion for plea withdrawal underlying this appeal. He claimed that his guilty plea lacked a factual basis and that the circuit court failed to explain the elements of the offense. The circuit court held that McDuffie's claims are barred by *State v. Escalona-Naranjo*, 185 Wis.2d 168, 181-82, 517 N.W.2d 157 (1994) (criminal defendant may not bring a second or subsequent postconviction motion under WIS. STAT. § 974.06 absent a sufficient reason for failing to raise the claim in the original postconviction motion).

¶7 McDuffie moved to reconsider, claiming that he was not competent to proceed *pro se* in 2008 despite his statements assuring the circuit court that he could represent himself. In support, he asserted that he lacked "an ample amount of common sense and general education." He also pointed to his trial counsel's

sentencing remarks, which briefly noted his diagnosis of depression and the possibility that he was sexually assaulted as a child. He contended that the circuit court improperly permitted his postconviction counsel to withdraw, and he therefore has a sufficient reason to pursue his current claims. The circuit court denied the motion for reconsideration, and he appeals.

II.

¶8 McDuffie argues on appeal that he must be afforded a hearing “to determine the legality of [his] guilty plea.”² We disagree.

¶9 “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). McDuffie claimed in his first *pro se* motion that his plea lacked a factual basis and that he received an inadequate explanation of the elements of the offense. The circuit court found otherwise. McDuffie may not, several years later, “simply rephrase[]—or re-theorize[]—the matters raised” previously. *See id.*

¶10 Moreover, the circuit court addressed the theories that McDuffie presents now when it resolved his first *pro se* motion. McDuffie currently claims that his plea lacked a factual basis because he aimed his gun “at the roof and/or over the house” when he fired a fatal shot, and therefore the facts do not demonstrate that he acted with utter disregard for human life. The circuit court

² McDuffie’s motion to reconsider also included a claim for sentence modification that the circuit court denied. McDuffie does not discuss his claim for sentence modification in his appellate submissions. We deem the issue abandoned. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

rejected his previous postconviction claim that his plea lacked a factual basis precisely because he admitted during the guilty plea colloquy that he “aim[ed] at the roof” when he fired his gun at a house. The circuit court explained that the admission supports rather than undermines the plea. Similarly, McDuffie currently asserts that the circuit court did not explain the elements of the offense. His earlier effort to withdraw his guilty plea grounded on the claim that his trial counsel never explained the elements failed precisely because the circuit court found that it twice explained them during the plea colloquy and that he understood.

¶11 McDuffie seeks to relitigate matters previously considered by the circuit court. He may not do so. “A motion under sec. 974.06, Stats., is not a substitute for a direct appeal.” *Witkowski*, 163 Wis. 2d at 990. His “attempts to rephrase or re-theorize his previously litigated challenge[s] are of no avail.” *See id.* at 992. The claims are barred.

¶12 McDuffie argues, however, that his claims may proceed because he has a “significant reason” for further postconviction litigation. *Cf. Escalona-Naranjo*, 185 Wis. 2d at 184. He contends that he must be allowed to pursue a second *pro se* postconviction motion for plea withdrawal because the circuit court should not have allowed him to proceed *pro se* in his first postconviction motion for plea withdrawal. No case that he cites stands for this illogical proposition. Regardless, our decision that McDuffie’s claims are barred is not predicated on *Escalona-Naranjo*. Rather, we apply the rule that prohibits relitigating claims that were previously adjudicated. *See Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (“[W]e may affirm on grounds different than those relied on by the [circuit] court.”).

By the Court.—Orders affirmed.

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

