COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2577-CR **Cir. Ct. No. 2001CF4308**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARIUS A. BATTLE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Marius A. Battle, *pro se*, appeals from an order that denied his motion to vacate a deoxyribonucleic acid surcharge imposed at his sentencing. He contends that he is entitled to relief because his trial lawyer was

constitutionally ineffective by failing to challenge the surcharge earlier in the proceedings. The claim is procedurally barred, and we affirm.

I.

¶2 A jury found Battle guilty of first-degree reckless injury while armed with a dangerous weapon, as a party to a crime and as a habitual criminal. At his sentencing in July 2002, the circuit court imposed, among other penalties, a $250 deoxyribonucleic acid surcharge. *See* WIS. STAT. § 973.046(1g). Battle pursued both a postconviction motion and an appeal to this court. He argued that the evidence at trial was insufficient to support the jury's verdict, the circuit court erred by denying a suppression motion, and his trial lawyer was ineffective when litigating that suppression motion. We rejected his arguments and affirmed. *See* ***State v. Battle***, No. 2007AP1059-CR, unpublished slip op. (WI App Apr. 22, 2008).

¶3 In April 2010, Battle moved to vacate the deoxyribonucleic acid surcharge. He argued that the circuit court erroneously exercised its sentencing discretion by failing to explain the reason for imposing a surcharge, in violation of ***State v. Cherry***, 2008 WI App 80, ¶9, 312 Wis. 2d 203, 207–208, 752 N.W.2d 393, 395. He asked the circuit court to exercise its inherent power to relieve him of the surcharge. A motion to vacate a deoxyribonucleic acid surcharge, however, is a sentence modification motion. *See* ***State v. Nickel***, 2010 WI App 161, ¶5, 330 Wis. 2d 750, 755, 794 N.W.2d 765, 767. Such motions must be brought within the time limits for direct appeal under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30, or within ninety days of sentencing under WIS. STAT. § 973.19. *See* ***Nickel***, 2010 WI App 161, ¶5, 330 Wis. 2d at 756, 794 N.W.2d at 767. The circuit

court therefore determined that Battle's motion, brought approximately six years after his sentencing, was untimely under those statutes.

¶4 The circuit court also considered the viability of Battle's postconviction motion under WIS. STAT. § 974.06. A motion under that statute is not subject to the deadlines governing a direct appeal. *See* ***Nickel***, 2010 WI App 161, ¶7, 330 Wis. 2d at 757, 794 N.W.2d at 768. Nonetheless, § 974.06 did not afford Battle any relief because, as the circuit court explained, prisoners may not use that statute to pursue challenges to the exercise of sentencing discretion. *See* ***Nickel***, 2010 WI App 161, ¶7, 330 Wis. 2d at 757, 794 N.W.2d at 768. The circuit court therefore denied Battle's claim.

¶5 In October 2010, Battle filed the postconviction motion underlying the instant appeal. He argued that his trial lawyer performed ineffectively at sentencing by "allowing" the circuit court to exercise its discretion erroneously when imposing the deoxyribonucleic acid surcharge and that his lawyer performed ineffectively again by not pursuing an appeal to challenge the surcharge. The circuit court determined that its earlier order correctly resolved Battle's challenge to the exercise of sentencing discretion. Further, the circuit court determined that Battle's trial lawyer was not ineffective by failing to pursue a challenge in any forum based on the holding in ***Cherry*** because that case had not yet been decided at the time of Battle's sentencing. Battle appeals.

II.

¶6 In this court, Battle begins by asserting that his claim for relief should be viewed as a proceeding under WIS. STAT. § 974.06, although he did not cite that statute in his postconviction motion. We agree. Section 974.06 is the vehicle by which defendants may raise constitutional challenges after the time for

a direct appeal has expired. *See* ***id.*** Battle's claim that his trial lawyer performed ineffectively alleges a violation of the constitutional right to counsel. *See* ***State v. Ludwig***, 124 Wis. 2d 600, 606, 369 N.W.2d 722, 725 (1985) (constitutional right to counsel is right to effective assistance of counsel). Nonetheless, our agreement that Battle brought his claim under § 974.06 does not assist him.

¶7 "[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 the issue in the original postconviction proceeding. ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 22, 665 N.W.2d 756, 766. A sufficient reason for a second or subsequent postconviction motion must be more than a conclusory allegation. *See* ***State v. Allen***, 2010 WI 89, ¶¶90–91, 328 Wis. 2d 1, 33–34, 786 N.W.2d 124, 140. Whether a prisoner has presented a sufficient reason to avoid the procedural bar to serial litigation is a question of law that we review *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175, 176 (Ct. App. 1997).

¶8 We determine the sufficiency of a prisoner's reason for bringing a second or subsequent postconviction motion by examining the contents of the motion. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 576, 588, 682 N.W.2d 433, 437, 443. Here, our examination is quickly completed. Battle offered the circuit court no explanation for why he did not pursue his current complaints about the effectiveness of his trial lawyer in his first postconviction motion, his direct appeal, or the *pro se* motion he filed in April 2010. This alone

requires affirming the circuit court's order denying his claim. *See* ***Tolefree***, 209 Wis. 2d at 426–427, 563 N.W.2d at 177.

¶9 Because we affirm the order denying Battle's claim for reasons other than those relied upon by the circuit court, we need not discuss its reasoning. *See* ***State v. Bembenek***, 2006 WI App 198, ¶10, 296 Wis. 2d 422, 430, 724 N.W.2d 685, 688–689 (noting that "when an appellate court affirms on other grounds, it need not discuss the [circuit] court's chosen grounds of reliance"). We see no reason to undertake such a discussion here, and we decline to do so.

By the Court.—Order affirmed.

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