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DISTRICT IV

February 1, 2024

To:

Hon. Brian A. Pfitzinger
Circuit Court Judge
Electronic Notice

Nicholas DeSantis
Electronic Notice

Kelly Enright
Clerk of Circuit Court
Dodge County Justice Facility
Electronic Notice

Wayne A. Eauslin, 547372
Fox Lake Correctional Inst.
P.O. Box 147
Fox Lake, WI 53933

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

2022AP2091

State of Wisconsin v. Wayne A. Eauslin (L.C. # 2008CF267)

Before Kloppenburg, P.J., Blanchard, and Nashold, 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).

Wayne Eauslin, pro se, appeals a circuit court order denying his 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. We summarily affirm.

Eauslin was convicted in 2009 of first degree sexual assault of a child, following a jury trial. In 2011, this court affirmed his conviction in a no-merit appeal filed pursuant to *Anders v. California*, 386 U.S. 738 (1967). In February 2015, Eauslin filed a WIS. STAT. § 974.06

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

postconviction motion in which he argued that his postconviction counsel rendered ineffective assistance and that the circuit court erred by not reading an adequate jury instruction on unanimity. The circuit court denied the motion as procedurally barred under § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Eauslin then filed a *Knight* petition in this court, alleging ineffective assistance of appellate counsel. See *State v. Knight*, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992). This court denied the petition in August 2017.

In October 2022, Eauslin filed the WIS. STAT. § 974.06 motion at issue here, raising numerous grounds for relief, including allegations that his statement to police and other evidence were improperly admitted. Eauslin also raised a double jeopardy claim, a jury instruction claim, an ineffective assistance of trial counsel claim, and a claim that the circuit court lacked jurisdiction to impose his sentence. The circuit court denied the motion without a hearing, concluding that Eauslin's claims are barred under *Escalona-Naranjo*, 185 Wis. 2d 168, and § 974.06(4). Eauslin now appeals.

This appeal requires us to determine whether Eauslin's most recent WIS. STAT. § 974.06 motion is procedurally barred. This presents "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. Any claim that could have been raised on direct appeal or in a previous § 974.06 postconviction motion is barred from being raised in a subsequent § 974.06 postconviction motion, absent a sufficient reason. *Escalona-Naranjo*, 185 Wis. 2d at 184-85. Further, "[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).

Here, Eauslin offers four reasons for failing to raise the claims asserted in his most recent WIS. STAT. § 974.06 motion in his no-merit appeal or his initial § 974.06 motion. Eauslin argues that he was unaware of the claims at the time of his no-merit appeal, that he was not required to respond to the no-merit report, that his trial and appellate counsel were ineffective, and that he was not present in the courtroom when the circuit court read the jury instructions that he claims were insufficient. As discussed in further detail below, we conclude that none of these reasons constitute a sufficient reason for avoiding the procedural bar of *Escalona-Naranjo* and § 974.06(4).

Eauslin asserts that he failed to raise his current claims for postconviction relief in the no-merit appeal because he was unaware of those claims at the time of the no-merit proceedings. In his most recent WIS. STAT. § 974.06 motion, Eauslin does not specify whether he was unaware of the factual or the legal basis for the claims, nor does he develop the argument in any meaningful way beyond conclusory assertions. The circuit court has the discretion to grant or deny a hearing when a “motion does not raise facts sufficient to entitle the defendant to relief, or if it presents only conclusory allegations[.]” See *State v. Ruffin*, 2022 WI 34, ¶28, 401 Wis. 2d 619, ¶28, 974 N.W.2d 432. In Eauslin’s most recent § 974.06 motion, he fails to support the conclusory allegation that he was unaware of his current claims at the time of the no-merit appeal. Therefore, we are satisfied that the circuit court acted within its discretion when it denied the motion without a hearing.

Separately, Eauslin argues that he was not required to respond to the no-merit report on direct appeal. The mere fact that Eauslin was not required to file a response to the no-merit report does not constitute a sufficient reason for failing to raise his current claims on direct appeal. Eauslin did, in fact, file a response to his counsel’s no-merit report on direct appeal.

Eauslin asserted several claims, including claims of ineffective assistance of trial counsel. This court has concluded that a no-merit opinion procedurally bars a defendant from filing future postconviction motions so long as “the no-merit procedures were in fact followed” and the record demonstrates “a sufficient degree of confidence” in the result. *State v. Tillman*, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 168, 696 N.W.2d 574. This court previously determined, in our 2017 order denying Eauslin’s *Knight* petition, that “the proper no-merit procedures were followed on Eauslin’s prior appeal” and that nothing in the record undermined our confidence in the conclusion that there were no arguably meritorious grounds for an appeal. Accordingly, we conclude now that Eauslin’s current claims are procedurally barred under *Escalona-Naranjo* and WIS. STAT. § 974.06(4).

Turning to Eauslin’s argument that his claims of ineffective assistance of trial counsel and appellate counsel should be deemed sufficient reasons for avoiding the procedural bar, we reject this argument because the record demonstrates that Eauslin’s ineffective assistance of counsel claims were previously litigated and decided. *See Witkowski*, 163 Wis. 2d at 990. On direct appeal, this court rejected Eauslin’s argument that his trial counsel was constitutionally deficient, and we concluded that there was no basis for a claim of ineffective assistance of trial counsel. Further, in denying Eauslin’s *Knight* petition, we concluded that Eauslin could not meet the prejudice element necessary for establishing his claims of ineffective assistance of appellate counsel. In his most recent WIS. STAT. § 974.06 motion, Eauslin seeks to relitigate matters that this court has already decided, albeit using different phrasing.

Eauslin asserts that he was not present in the courtroom when the jury instructions were read at his trial on May 13, 2009, and that this absence should be considered a sufficient reason for avoiding the procedural bar of *Escalona-Naranjo*, 185 Wis. 2d at 185, as to claims that he

now seeks to raise with respect the jury instructions. The State accurately points out that the record does not reflect that Eauslin was removed from the courtroom before the instructions were read. There is no indication in the trial transcript from May 13, 2009, that Eauslin was absent at the time the jury instructions were read. Further, even if we take Eauslin's assertion at face value and assume, without deciding the issue, that he was absent from the courtroom when the jury instructions were read, this would not constitute a sufficient reason for failing to raise his current claims on direct appeal. After reviewing the trial transcripts, either Eauslin or his counsel could have raised any issues related to the jury instructions on direct appeal in the no-merit proceedings. Eauslin provides no reason, let alone a sufficient one, that would explain why he failed to bring his current claims in his no-merit response, or later within his first WIS. STAT. § 974.06 motion or his ***Knight*** petition.

In sum, Eauslin has failed to demonstrate a sufficient reason for not raising the claims asserted in his most recent WIS. STAT. § 974.06 motion on direct appeal, in his first § 974.06 motion, or in his ***Knight*** petition. All of the claims in Eauslin's current § 974.06 motion are barred under ***Escalona-Naranjo***, 185 Wis. 2d at 185, § 974.06(4), and ***Witkowski***, 163 Wis. 2d at 990.

Therefore,

IT IS ORDERED that the order is summarily affirmed under 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