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DISTRICT IV

June 20, 2024

To:

Hon. Bennett J. Brantmeier
Circuit Court Judge
Electronic Notice

Sara Lynn Shaeffer
Electronic Notice

Cindy Hamre Incha
Clerk of Circuit Court
Jefferson County Courthouse
Electronic Notice

Ricardo E. Marinez 358365
Fox Lake Correctional Institution
P.O. Box 147
Fox Lake, WI 53933

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

2023AP361

State of Wisconsin v. Ricardo E. Marinez (L.C. # 2007CF205)

Before Kloppenburg, P.J., Graham, and Taylor, 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).

Ricardo Marinez, 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 the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We also conclude that Marinez's arguments are procedurally barred and, therefore, we affirm.

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

This is Marinez’s third appeal relating to his 2007 conviction for three counts of first-degree sexual assault of a child. As stated in this court’s opinion in Marinez’s first appeal, the jury was presented with evidence that one of the victims tested positive for chlamydia and that Marinez was tested twice for chlamydia, first testing positive but then testing negative when a more accurate test was used. *See State v. Marinez*, No. 2009AP2724-CR, unpublished slip op. ¶3 (WI App Oct. 28, 2010). Marinez argued in his first appeal that trial counsel was ineffective by failing to advance an alternative theory that Marinez’s brother was a possible source of the victim’s chlamydia infection. *Id.*, ¶¶6, 9. This court rejected that argument and upheld Marinez’s conviction. *Id.*, ¶¶1, 9-13.

In 2019, Marinez filed a postconviction motion under WIS. STAT. § 974.06. As relevant here, he alleged in the motion that the admission of the chlamydia evidence violated his due process and confrontation rights because the evidence was testimonial.² He further alleged that postconviction counsel was ineffective by failing to pursue claims relating to this alleged confrontation violation. The circuit court denied the motion, Marinez appealed the resulting order in his second appeal, and this court again upheld his conviction. *See State v. Marinez*, No. 2020AP694-CR, unpublished slip op. ¶¶1-2 (WI App May 13, 2021).

Marinez then brought his current postconviction motion under WIS. STAT. § 974.06, arguing in his motion and on appeal that the State defrauded this court and committed

² We may take judicial notice of the briefs in Marinez’s second appeal. *See Johnson v. Mielke*, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970) (“Generally, a court may take judicial notice of its own records and proceedings for all proper purposes. This is particularly true when the records are part of an interrelated or connected case, especially where the issues, subject matter, or parties are the same or largely the same.”).

prosecutorial misconduct in his second appeal. More specifically, Marinez argues that the State committed misconduct because, although it knew that the chlamydia evidence was testimonial (and thus subject to the Confrontation Clause), the State still argued to this court that Marinez had failed to show that the evidence was testimonial. Marinez argues that the State's misconduct and the violation of his confrontation rights constitute a due process violation, plain error, and a miscarriage of justice that warrant a new trial. The circuit court denied Marinez's motion, concluding that it was procedurally barred.

We agree and conclude that Marinez's arguments in his current postconviction motion and appeal are procedurally barred by *State v. Witkowski*, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991). Under *Witkowski*, “[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *See id.* at 990. Here, Marinez's arguments are an attempt to relitigate the alleged violation of his confrontation rights. He attempts to characterize the State's alleged misconduct as a new issue, but it is not a new issue. His current WIS. STAT. § 974.06 motion seeks only to relitigate matters previously considered, packaged in different language. He had the opportunity to—and did—dispute the State's allegedly misleading argument in his reply brief in his second appeal. Marinez is precluded from attempting to relitigate this issue here.

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Samuel A. Christensen
Clerk of Court of Appeals