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DISTRICT III

August 13, 2024

To:

Hon. James C. Babler
Circuit Court Judge
Electronic Notice

Basil M. Loeb
Electronic Notice

Sharon Millermon
Clerk of Circuit Court
Barron County Justice Center
Electronic Notice

Abigail Potts
Electronic Notice

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

2022AP1520

State of Wisconsin v. Robert B. McBain (L. C. No. 2014CF94)

Before Stark, P.J., Hruz and Gill, 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).

Robert McBain appeals an order denying his WIS. STAT. § 974.06 (2021-22)¹ motion to amend his judgment of conviction and resentence him. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We determine that McBain's claims are procedurally barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Therefore, we summarily affirm the order. See WIS. STAT. RULE 809.21.

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

In 2014, McBain pleaded guilty to second-degree intentional homicide, as party to a crime, and the circuit court imposed a twenty-five-year sentence consisting of fifteen years of initial confinement followed by ten years of extended supervision. On direct appeal, appointed counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32, concluding there was no arguable basis for challenging McBain's conviction. McBain filed a response, and counsel filed a supplemental no-merit report. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we concluded there was no arguable basis for appeal, and we summarily affirmed the judgment. Specifically, we determined that any challenge to the plea, the sentence imposed, or the effectiveness of McBain's trial counsel would lack arguable merit. *State v. McBain*, No. 2015AP1895-CRNM, unpublished op. and order (WI App Oct. 26, 2016).

McBain, pro se, subsequently filed a "Notice/Petition for Redress" in the circuit court, seeking "dismissal of the [c]riminal [c]omplaint" based on an alleged Fourth Amendment violation. The court denied the petition, McBain appealed, and this court summarily affirmed. *State v. McBain*, No. 2017AP2179, unpublished op. and order (WI App May 14, 2019).

McBain subsequently filed the underlying motion, asking the circuit court to amend his judgment of conviction from second-degree intentional homicide, as party to a crime, to first-degree reckless homicide, as party to a crime. McBain relatedly sought resentencing for the lesser offense. McBain argued that the facts did not support an intentional homicide charge and that his conviction should be aligned with the first-degree reckless homicide conviction of his co-defendant. The court denied the motion without a hearing, and this appeal follows.

The State argues that McBain's claims are procedurally barred under *Escalona-Naranjo*. We agree. Successive motions and appeals are procedurally barred unless the defendant can show a sufficient reason why the newly alleged errors were not previously raised. See *Escalona-Naranjo*, 185 Wis. 2d at 185. We determine the sufficiency of a defendant's reason for circumventing *Escalona-Naranjo*'s procedural bar by examining the "four corners" of the subject postconviction motion. See *State v. Allen*, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. The bar to serial litigation may also be applied to a defendant whose direct appeal was processed under the no-merit procedures set forth in WIS. STAT. RULE 809.32, as long as the no-merit procedures were in fact followed and the record demonstrates a sufficient degree of confidence in the result. See *State v. Tillman*, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574; see also *State v. Allen*, 2010 WI 89, ¶¶35-41, 328 Wis. 2d 1, 786 N.W.2d 124.

McBain has not demonstrated that his no-merit appeal was procedurally inadequate, and our resolution of the no-merit proceeding carries a sufficient degree of confidence warranting application of the procedural bar. Furthermore, McBain's motion offered no reason, much less a sufficient reason, for failing to properly raise his claims in his response to his counsel's no-merit report or in his earlier postconviction motion. McBain's present claims are therefore procedurally barred.

To the extent McBain argues that the circuit court erred by denying his motion without a hearing, McBain was not automatically entitled to an evidentiary hearing on his claims. If the factual allegations in the motion are insufficient or conclusory, or if the record irrefutably demonstrates that the defendant is not entitled to relief, the circuit court may, in its discretion, deny the motion without a hearing. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50

(1996). Here, the record definitively shows that McBain is not entitled to relief; therefore, the circuit court properly denied the motion without a hearing.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to 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