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DISTRICT I

September 10, 2024

To:

Hon. Paul R. Van Grunsven
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Daniel J. O'Brien
Electronic Notice

Billy Joe Cannon 168999
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:

2022AP1820 State of Wisconsin v. Billy Joe Cannon (L.C. #2011CF924)

Before White, C.J., Donald, P.J., and Colón, J.

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).

Billy Joe Cannon, *pro se*, appeals from an order of the circuit court that denied his postconviction motion without a hearing. 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 (2021-22).[1] The order is summarily affirmed.

In 2009, based on evidence from an extended John Doe investigation that included multiple wiretaps, the State charged Cannon with conspiracy to deliver more than forty grams of

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

cocaine on November 10, 2005; possession of a firearm by a felon on October 16, 2008; and furnishing a firearm to a convicted felon, as a party to a crime, on October 16, 2008.[2] Cannon went to trial on the conspiracy charge and was acquitted. Cannon then pled guilty to the possession charge, and the furnishing a firearm charge was dismissed and read in.

In 2011, based on the same investigation and wiretaps, the State filed three new charges against Cannon in the case underlying this appeal: conspiracy to deliver more than forty grams of cocaine between approximately March 4, 2008, and March 24, 2008; conspiracy to possess more than 10,000 grams of tetrahydrocannabinols between approximately February 2008 and October 2008; and furnishing a firearm to a felon around April 3, 2008, all as party to a crime. Cannon filed a pretrial motion to suppress any gun-related evidence from the wiretaps, arguing that the supplemental warrant that authorized use of the evidence[3] was signed by the wrong judge, which invalidated the warrant. The motion was denied. A jury convicted Cannon on all three offenses,[4] and he was sentenced to sixteen years of initial confinement and fourteen years of extended supervision.

Cannon filed a postconviction motion for a new trial. He alleged that the conspiracy conviction in the 2011 case violated double jeopardy because there had been one single continuous conspiracy, of which he had been acquitted in the 2009 case. Cannon also argued that his pretrial suppression motion should have been granted. After briefing, the circuit court denied Cannon's postconviction motion without a hearing.

[2] *See* Milwaukee County Circuit Court case No. 2009CF1337.

[3] *See* WIS. STAT. § 968.29(5).

[4] The party-to-a-crime modifier on each conspiracy count was dismissed at the close of trial.

Cannon appealed, but this court affirmed. ***State v. Cannon***, No. 2019AP2296-CR, unpublished slip op., ¶1 (WI App May 25, 2021). We explained that while Cannon believed double jeopardy was implicated because the 2009 and 2011 conspiracy charges arose from a single investigation, the issue was "not whether there was a single investigation, but whether there was a single conspiracy." ***Id.***, ¶9. Because we concluded that there were multiple conspiracies, there was no double jeopardy violation. ***Id.***, ¶27. Our decision also explained why the supplemental warrant was not invalid despite being signed by a judge other than the one who authorized the wiretaps. *See* ***id.***, ¶¶31-32.

In April 2022, Cannon filed the motion underlying this appeal and raised four arguments. The circuit court denied Cannon's motion in part, declining to revisit one of the issues that had already been addressed in Cannon's direct appeal, but it set a briefing schedule for the remaining issues. After briefing, the circuit court denied Cannon's motion without a hearing.[5] Cannon appeals.

Cannon's first argument in the underlying postconviction motion was that the firearm charge in this case violates double jeopardy protections because it and the 2009 firearm charge "derived from the same 'one' wiretap operation, investigation, and conversation." He further faults postconviction counsel for not "adequately develop[ing] the double jeopardy argument" using various police reports. The circuit court rejected the double jeopardy challenge, noting that this court had concluded in the first appeal that a single investigation did not implicate double jeopardy. The circuit court also concluded that while Cannon relied on reports that his attorneys

[5] The partial denial was entered by the Honorable Stephanie G. Rothstein, who subsequently retired. The Honorable Paul R. Van Grunsven inherited the case and ruled on the remaining issues.

did not, those reports added nothing to the double jeopardy analysis and, in any event, the firearm charges were not identical in fact.

The primary basis for Cannon's double jeopardy argument—that double jeopardy was implicated because similar charges against him came from a single investigation—has already been raised and rejected by this court. To that extent, Cannon's double jeopardy claim is procedurally barred because "[a] matter once litigated may not be relitigated[.]" *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). The circuit court also correctly noted the firearm charges were not identical in fact—they were separated by over six months—and thus they do not violate double jeopardy. *See* ***State v. Killian***, 2023 WI 52, ¶¶22, 48, 408 Wis. 2d 92, 991 N.W.2d 387.

Cannon's second argument is that trial counsel was ineffective for failing to present certain material as impeachment evidence. The circuit court rejected that argument, concluding that Cannon's deficient performance argument against trial counsel was speculative and that there was no reasonable probability of a different verdict even with the supposed impeachment evidence. We conclude that this argument is procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

An issue that could have been raised on direct appeal or in a previous motion is barred absent a sufficient reason for not raising the issue in the earlier proceedings. *See* WIS. STAT. § 974.06(4); *see also* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. "In some instances, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal." ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. Thus, Cannon also faults postconviction counsel for not

raising an issue with trial counsel's performance. "[A] defendant who alleges in a § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought[.]" ***Romero-Georgana***, 360 Wis. 2d 522, ¶73.

Cannon makes no comparison between the issues postconviction counsel actually raised in the original postconviction motion and on appeal and the impeachment issue he claims postconviction counsel should have raised instead. Consequently, Cannon has not alleged a sufficient reason to avoid application of the ***Escalona*** procedural bar. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶58.

We also agree with the circuit court that Cannon's claims regarding impeachment evidence are speculative. Cannon claimed that witnesses had testified they carried drugs out of Cannon's house in a red toolbox and that there was surveillance video footage that should have been obtained and used to show the witnesses did *not* exit his home with a toolbox. However, Cannon offers no evidentiary support for his claim; indeed, the circuit court found that the witnesses did not testify they carried drugs out of his house in a red toolbox, and Cannon makes no attempt to refute this factual determination. Thus, Cannon has not sufficiently alleged or shown ineffective assistance of trial counsel, and postconviction counsel is not ineffective for failing to pursue a meritless issue. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

Cannon's third issue is his belief that his attorneys were ineffective for failing to challenge the John Doe investigation. In denying the postconviction motion, the circuit court

stated only that it "perceive[d] no merit to the defendant's claim regarding the John Doe investigation."

On appeal, Cannon has two related arguments about the John Doe proceeding. First, Cannon appears to be arguing that the State could have issued the 2011 charges in the 2009 complaint, so the charges should be barred. However, Wisconsin is not a mandatory joinder state. *See* ***State v. Ramirez***, 83 Wis. 2d 150, 157, 265 N.W.2d 274 (1978) (declining to adopt procedural rule of mandatory joinder). "A prosecutor has great discretion in deciding whether to prosecute in a particular case." ***State v. Kramer***, 2001 WI 132, ¶14, 248 Wis. 2d 1009, 637 N.W.2d 35 (citation omitted). In criminal actions, the primary limit on when the State can bring charges is the statute of limitations. *See* ***State v. Chrysler Outboard Corp.***, 219 Wis. 2d 130, 154, 580 N.W.2d 203 (1998).

To the extent that Cannon is attempting to invoke some version of issue preclusion, that doctrine does not apply here. Issue preclusion is a subset of double jeopardy claims, and its application simply means "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." ***Killian***, 408 Wis. 2d 92, ¶52 (citation omitted). None of the ultimate facts resolved in the 2009 case overlap with the ultimate facts in the 2011 case, so there is no basis for an issue preclusion claim.

Second, Cannon contends that the John Doe investigation had to end when the first complaint was issued because "a John Doe proceeding cannot be used to obtain evidence against a defendant for a crime with which the defendant has already been charged." ***State v. Cummings***, 199 Wis. 2d 721, 745, 546 N.W.2d 406 (1996); *see* ***State v. Washington***, 83 Wis. 2d

808, 824, 266 N.W.2d 597 (1978) (discussing that a John Doe proceeding cannot be continued "as an aid to the district attorney in preparing the prosecution" (citation omitted)).

However, there is also no support for Cannon's claim that the John Doe proceeding was improperly used or continued. Although in his motion, Cannon claims the investigation continued until 2010, elsewhere he says that it ended in 2008. In any event, even if the investigation continued until 2010, improperly or not, the charges in the 2011 case are for events that occurred in 2008, so the evidence for the 2011 case predates the filing of the 2009 case. As noted, Wisconsin is not a mandatory joinder state, so the State was not required to bring all charges in a single complaint.

Finally, Cannon renews his complaint that the supplemental search warrant was invalid because the judge who signed it was not the judge who issued the initial warrant. This was the claim the circuit court denied before briefing because it had been addressed in the first appeal. We agree with the circuit court that this issue has already been litigated, and we likewise decline to revisit it. *See* ***Witkowski***, 163 Wis. 2d at 990.

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. *See* 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