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**DISTRICT I/IV**

February 3, 2015

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

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2013AP2543

State of Wisconsin v. Frank Burt (L.C. # 1996CF964954)

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

Frank Burt, pro se, appeals an order denying his WIS. STAT. § 974.06 motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Burt's arguments, and summarily affirm the order. *See* WIS. STAT. RULE 809.21. (2011-12)<sup>1</sup>

In 1997, Burt was convicted upon his guilty pleas of first-degree reckless homicide; attempted armed robbery by the use of force; and armed robbery by threat of force, all as party to

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version.

a crime. In exchange for Burt's guilty pleas, another count of attempted armed robbery was dismissed, but read-in for sentencing. Burt's convictions were based on three robberies or attempted robberies of taxi cab drivers committed by Burt and Anthony Sandifer in September 1996. One of the robbery attempts resulted in the fatal shooting of one of the drivers.

On the morning of March 6, 1997, the court sentenced Burt as follows:

As to count one [first-degree reckless homicide], Mr. Burt, you're sentenced to the Wisconsin state prison system for a period of forty years.

As to count three, you're sentenced to the Wisconsin state prison system for—Let me correct that.

As to count four [attempted armed robbery], you're sentenced to the Wisconsin state prison system for a *concurrent* term of twenty years.

As to count three [armed robbery], you're sentenced to a term of consecutive probation consecutive to both counts one and four for a term of seven years and a sentence of forty years is imposed and stayed.

(Emphasis added.)

The same judge sentenced Sandifer after sentencing Burt. When Sandifer's attorney objected that Sandifer's sentence was longer than Burt's sentence, the court realized it had erred when pronouncing Burt's sentence. The court consequently called Burt back to the courtroom for another hearing that afternoon and explained:

I'm going to place my original notes in a sealed envelope in the file for appellate purposes, but my notes are clear, and I did misspeak, and the court is fully aware—very little time having passed in this matter—as to what its original intent was, and quite honestly, based on what the court thought it imposed—this sentence was somewhat less than the sentence that this defendant was to receive, the court believing that this defendant was a more aggressive actor in the matter, quite candidly.

So I understand whenever there is a change of this kind, it's bound to raise eyebrows and raise concerns, but the court intends

to impose the sentence that it had in mind and meant to say at the time of the sentencing ....

The court then repeated the sentence it imposed on Burt in the morning hearing, except that it changed the twenty-year sentence for attempted armed robbery to run consecutive to, rather than concurrent with, the forty-year homicide sentence.

Burt filed a postconviction motion asking the circuit court to modify the sentence to correspond with the original pronouncement. That motion was denied and, on direct appeal, we affirmed the judgment and order, rejecting Burt's claim that the sentencing court's action violated the double jeopardy clauses of the state and federal constitutions. *See State v. Burt*, 2000 WI App 126, ¶1, 237 Wis. 2d 610, 614 N.W.2d 42. We also acknowledged that the sentencing court did not impermissibly increase Burt's sentence after "reflection," but rather "misspoke at the original sentencing," and took steps to correct the error as soon as the court realized it. *Id.*, ¶15.

In 2003, Burt filed a pro se "Motion for Concurrence of Sentencing," that the circuit court construed as a motion for sentence modification. The court denied the motion, concluding that Burt had failed to establish the existence of a new factor justifying sentence modification. Burt did not appeal. In 2012, Burt filed a second pro se postconviction motion, renewing his double jeopardy claims and again seeking reinstatement of the sentence originally imposed. The circuit court denied Burt's motion, noting that it raised the same issues addressed by this court on direct appeal and therefore Burt was precluded from relitigating the matter. Burt appealed, but subsequently filed a notice of voluntary dismissal.

In 2013, Burt filed the underlying WIS. STAT. § 974.06 motion for postconviction relief, seeking to vacate his sentence and reinstate the sentence from the court's original

pronouncement. Burt's motion indicates "the issues surrounding this case do not, nor did they ever constitute a double jeopardy violation." Thus, according to Burt, postconviction/appellate counsel was ineffective by failing to pursue alternative arguments. The circuit court denied Burt's motion and this appeal follows.

We conclude that Burt's claims are procedurally barred pursuant to *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Successive motions and appeals are procedurally barred unless the defendant can show a sufficient reason why the newly alleged errors were not previously raised. *Id.* at 185. Whether a successive postconviction claim is procedurally barred is a question of law that we review independently. *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

In the underlying WIS. STAT. § 974.06 motion, Burt sought to reinstate the sentence imposed in the court's original pronouncement—this time claiming that the court "lack[ed] authority to revisit a valid sentence" and that the court's decision to correct its sentencing error violated Burt's due process rights. Burt cites the ineffectiveness of his postconviction/appellate counsel as a "sufficient reason" for failing to raise these arguments in his initial postconviction motion and on direct appeal. Even assuming his present arguments are distinguishable from those raised by counsel, Burt cannot circumvent the procedural bar, as he fails to provide a sufficient reason for not raising the arguments in his earlier pro se motions. To the extent Burt is attempting to reframe issues from previous motions, those issues cannot be relitigated no matter how artfully they are rephrased. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*