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July 8, 2015

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

2014AP750

State of Wisconsin v. Jody M. Wagner (L.C. # 2010CF554)

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

Jody Wagner, pro se, appeals an order denying his WIS. STAT. § 974.06 (2013-14)¹ postconviction motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Wagner's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21.

The State charged Wagner with aggravated battery and first-degree reckless injury, both as domestic abuse and as a repeater. As recounted in this court's opinion on direct appeal:

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Melissa Holcomb, Wagner's former girlfriend, testified that Wagner found her kissing another man, pulled her to the floor and repeatedly punched and kicked her resulting in a broken arm, a broken finger and a perforated intestine. Those allegations constitute the basis for the aggravated battery charge. Wagner then picked [Holcomb] up and carried her to bed where he left her without medical care for two days until Holcomb's mother interceded and Wagner took Holcomb to the hospital. By that time, Holcomb was within hours of death due to sepsis. Leaving Holcomb in a condition where she was unable to care for herself and where lack of care could result in her death from sepsis constitutes the basis for the reckless injury charge.

A jury found Wagner guilty of the crimes charged and the court imposed consecutive sentences totaling thirty years, consisting of seventeen years of initial confinement and thirteen 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 the sufficiency of the evidence or the sentence imposed. Wagner filed a response arguing: (1) the State failed to meet its burden of proof on the reckless injury charge because it failed to prove utter disregard for life and because the victim was not credible; (2) the court lacked subject matter jurisdiction; (3) the State failed to complete discovery by serving the defense with a copy of an envelope; and (4) Wagner was denied a fair trial due to several incidents that occurred during the trial.

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 summarily affirmed the judgment. Specifically, we concluded there was no merit to a sufficiency of the evidence or witness credibility challenge; the circuit court had subject matter jurisdiction; the defense received all discovery materials and was allowed to cross-examine regarding the envelope containing them; no sequestration violation occurred; nothing improper contributed to the jury's

verdict; and there was no arguable basis for challenging the sentence imposed. Wagner's motion for reconsideration was denied by this court and his petition for review to our supreme court was likewise denied.

Wagner subsequently filed the underlying WIS. STAT. § 974.06 motion for postconviction relief alleging he was denied the effectiveness of trial and postconviction counsel; the prosecutor failed to complete discovery, presented perjured testimony, and engaged in outrageous misconduct; he was denied his speedy trial right; the trial court lacked subject matter jurisdiction, erred by denying a motion to suppress statements Wagner made to police, and erroneously exercised its sentencing discretion; the evidence was insufficient to establish his guilt; the jury was prejudiced by outside influences; and the conviction was "unfair, unjust in nature, and invalid." The circuit court denied the motion without a hearing and this appeal follows.

We conclude Wagner's claims are barred by WIS. STAT. § 974.06(4)² and *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. *Escalona-Naranjo*, 185 Wis. 2d at 185. The bar to serial litigation may also be applied when the direct appeal was conducted pursuant to the no-merit

² WISCONSIN STAT. § 974.06(4) provides:

All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

procedures of WIS. STAT. RULE 809.32. 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. Absent a sufficient reason for doing so, a defendant may not raise issues in later proceedings that could have been raised in the no-merit proceeding if the no-merit procedures were followed and the court has sufficient confidence in the outcome of the no-merit proceeding to warrant application of the procedural bar. *Allen*, 328 Wis. 2d 1, ¶62.

Wagner 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. Although Wagner was not required to file a response to his counsel's no-merit report, he did. The underlying WIS. STAT. § 974.06 motion raises several of the same claims that were rejected in the no-merit appeal. Arguments addressed in that appeal cannot be relitigated now. See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (“A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.”).

With respect to any claims not raised in the context of his no-merit appeal, Wagner does not provide a sufficient reason for failing to raise them on direct appeal. Wagner contends that the ineffectiveness of his postconviction counsel constitutes a sufficient reason for failing to raise his claims earlier.³ However, his conclusory and legally insufficient allegations of postconviction counsel's ineffectiveness are not sufficient to circumvent *Escalona*'s procedural

³ Although Wagner contends he was denied the effective assistance of appellate counsel, a challenge to the effectiveness of appellate counsel is properly raised by a petition for a writ of habeas corpus in this court. See *State v. Knight*, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992). Even on the
(continued)

bar. See *Allen*, 328 Wis. 2d 1, ¶¶84-87. To the extent Wagner intimates that postconviction counsel was ineffective by failing to assert trial counsel's ineffectiveness, he must first establish that trial counsel was ineffective. See *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 (to establish ineffectiveness of postconviction counsel, a defendant bears burden of proving trial counsel's performance was both deficient and prejudicial).

In his WIS. STAT. § 974.06 postconviction motion, Wagner claimed trial counsel "so utterly failed to defend against the charges that the trial itself was the functional equivalent of a guilty plea." Wagner specifically asserted that trial counsel failed to convey to him the concept of lesser-included offense, failed to review discovery with him, and failed to disclose information discussed during a motion in limine hearing. Apart from simply claiming he was prejudiced, Wagner fails to establish that any of the claimed deficiencies were "of such magnitude that there is a reasonable probability that, absent the errors, 'the result of the proceeding would have been different.'" *State v. Cleveland*, 2000 WI App 142, ¶11, 237 Wis. 2d 558, 614 N.W.2d 543 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Ultimately, Wagner's conclusory allegations are insufficient to establish the ineffectiveness of trial counsel. Therefore, Wagner's derivative challenge to the effectiveness of his postconviction counsel fails. Because Wagner has not offered a sufficient reason for failing to raise his new arguments earlier, they are procedurally barred. See *Allen*, 328 Wis. 2d 1, ¶44.

To the extent Wagner intimates that the circuit court erred by denying his motion without a hearing, Wagner was not automatically entitled to an evidentiary hearing on his claims. If the

merits, Wagner's conclusory challenge to the effectiveness of his appellate counsel on direct appeal does not establish a sufficient reason for circumventing the procedural bar to his claims.

factual allegations of 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 shows that Wagner was 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.

Diane M. Fremgen
Clerk of Court of Appeals