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DISTRICT IV

July 14, 2015

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

2014AP1253

State of Wisconsin v. Brian R. Locke (L.C. # 2004CF155)

Before Lundsten, Sherman and Kloppenburg, JJ.

Brian Locke, pro se, appeals a circuit court order denying his second motion for reconsideration of a decision denying Locke's request for plea withdrawal. 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 (2013-14).¹ We summarily affirm.

Locke was convicted of assault by a prisoner, after he entered a no contest plea. Locke moved to withdraw his plea prior to sentencing, and the circuit court denied the motion after a

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

hearing. Locke was sentenced to five years of initial confinement and five years of extended supervision. He pursued a direct appeal in which he argued, among other issues, that the circuit court should have allowed him to withdraw his plea prior to sentencing. This court rejected his plea withdrawal argument and affirmed the conviction.

Locke then moved to withdraw his plea based on newly discovered evidence. On July 24, 2013, the circuit court denied the motion, finding that the asserted “new” evidence existed at the time of sentencing. Locke then filed a “motion to correct manifest injustice error,” which the circuit court denied on November 19, 2013. Locke also filed a “motion to demand release time served,” which was denied on November 18, 2013. He then moved for reconsideration of the decision denying his “motion to correct manifest injustice error,” and the circuit court denied the reconsideration motion on December 11, 2013. On March 5, 2014, Locke filed a “Motion for Reconsideration No. 2” that did not refer to any particular ruling. The circuit court denied that motion in an order entered on April 17, 2014.

Locke filed a notice of appeal on May 29, 2014. The State asserts that, under the rules of appellate procedure, the circuit court order entered April 17, 2014, is the only order properly before this court for review. We agree. A timely notice of appeal is necessary to confer jurisdiction on this court. *City of Sheboygan v. Flores*, 229 Wis. 2d 242, 244, 598 N.W.2d 307 (Ct. App. 1999). The time for filing a notice of appeal in a civil case² is ninety days unless the prevailing party gives notice of entry of judgment, which did not occur here. *See* WIS. STAT. § 808.04(1). The only circuit court order encompassed within the ninety-day period preceding

² Postconviction proceedings under WIS. STAT. § 974.06 are civil in nature. *See* WIS. STAT. § 974.06(6) (“[p]roceedings under this section shall be considered civil in nature”).

Locke's May 29, 2014 notice of appeal is the April 17, 2014 order denying his second motion for reconsideration. Therefore, the scope of our jurisdiction is limited to reviewing that order.

In his appellant's brief, Locke makes a number of arguments as to why his motion for plea withdrawal before sentencing should have been granted. The State correctly points out that this court already adjudicated on direct appeal Locke's claim that the circuit court erred in denying his motion for plea withdrawal prior to sentencing. Under *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." Therefore, Locke is precluded from relitigating his claims regarding plea withdrawal prior to sentencing.

Locke also asserts on appeal that his "Motion for Reconsideration No. 2" identified an issue, regarding the presentence investigation report (PSI) prepared in his case, that he could not have raised previously. He argues that the PSI displays a filing date of November 1, 2005, when the correct filing date should have been December 9, 2005. Locke alleges that the PSI was "fraudulently altered" and that he did not know about the date discrepancy on the PSI until after he was sentenced. We conclude that Locke is procedurally barred from litigating the PSI issue. See *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Under *Escalona-Naranjo*, an issue that could have been raised on direct appeal or in a motion under WIS. STAT. § 974.02 cannot be the basis for a subsequent postconviction motion, absent a sufficient reason for failing to raise the issue earlier. No sufficient reason is alleged here. The record reflects that, regardless of what filing date appeared on the PSI, the circuit court did not receive it until December 9, 2005. Locke was sentenced on July 6, 2007, and he filed the notice of appeal in his direct appeal on July 31, 2009. The record on appeal contained the PSI. Locke

could have raised the issue of the date discrepancy in a prior postconviction motion or in his direct appeal, but failed to do so. In sum, Locke fails to raise any issue that was not already decided by this court or that could not have been raised on direct appeal or a prior postconviction motion. Therefore, his claims are barred under *Witkowski*, 163 Wis. 2d at 990, and *Escalona-Naranjo*, 185 Wis. 2d at 185.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals