OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II/IV

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To:

Hon. S. Michael Wilk
Circuit Court Judge
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Robert D. Zapf
District Attorney
Molinaro Bldg
912 56th Street
Kenosha, WI 53140-3747

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

John L. Henry 535664
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

Anne Christenson Murphy
Assistant Attorney General
P. O. Box 7857
Madison, WI 53707-7857

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

2015AP683 State of Wisconsin v. John L. Henry (L.C. # 2008CF423)

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

John L. Henry appeals the circuit court's order denying his motion for postconviction relief filed pursuant to WIS. STAT. § 974.06 (2013-14).[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See*

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

WIS. STAT. RULE 809.21. We summarily affirm the circuit court's order denying Henry's motion without an evidentiary hearing.

Henry pled guilty to seven counts of repeated sexual assault of the same child who had not yet attained the age of sixteen, contrary to WIS. STAT. § 948.025(1) (2007-08). Twenty-two counts of the same charge were dismissed and read in at sentencing. The crimes straddled the effective date for Truth-in-Sentencing. The circuit court sentenced Henry to 20 years on each of the four pre-TIS counts and to a total of 75 years of initial confinement followed by 35 years of extended supervision on the three post-TIS counts, and ordered all of the sentences to run consecutively.

Represented by counsel, Henry filed a postconviction motion to withdraw his plea and for a new sentencing hearing. Henry alleged that he pled guilty only because his trial attorney had promised him that he would be sentenced to no more than ten to twenty years. An evidentiary hearing was held at which Henry and his trial attorney testified. At the hearing, trial counsel testified that she never makes any promises to her clients regarding sentences, and Henry testified that his attorney told him that he would get only ten to twenty years because he had cooperated with the prosecution. The circuit court denied the motion for plea withdrawal. In denying the motion, the circuit court expressly found trial counsel to be more credible than Henry, who had "every reason to lie." The circuit court also denied Henry's motion for a new sentencing hearing based on the court's alleged failure to consider sentencing guidelines. Henry appealed to this court, and we affirmed. ***State v. Henry***, No. 2009AP2726-CR, unpublished slip op. (WI App Aug. 4, 2010).

Henry filed a pro se WIS. STAT. § 974.06 motion that the circuit court denied without a hearing. Henry's postconviction motion and appellate brief can best be described as disjointed litanies of complaints, many repeated in various contexts, which Henry believes warrant reversal of his conviction or modification of his sentence.[2] For the reasons stated below, we affirm the circuit court's order denying the motion without a hearing.

A hearing on a postconviction motion is required only when the defendant states sufficient facts that, if true, would entitle him to relief. ***State v. Allen***, 2004 WI 106, ¶¶9, 14, 274 Wis. 2d 568, 682 N.W.2d 433. That inquiry is a question of law which we review de novo. ***Id.***, ¶9. If the motion does not raise such facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Id.***; *see also* ***State v. Balliette***, 2011 WI 79, ¶50, 336 Wis. 2d 358, 805 N.W.2d 334 (circuit court has discretion to deny a motion without an evidentiary hearing if the record conclusively demonstrates that the movant is not entitled to relief).

A defendant must raise all grounds for relief in one postconviction motion or direct appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A defendant cannot raise an argument in a second postconviction motion that was not raised in a prior postconviction motion unless there is a "sufficient reason" for the failure to raise the issue in the original motion. ***Id.***; *see also* WIS. STAT. § 974.06(4). A claim of ineffective assistance of postconviction or appellate counsel, however, may overcome the ***Escalona-Naranjo*** bar. *See*

[2] Large portions of Henry's appellate brief are identical to his postconviction motion.

State ex rel. Rothering v. McCaughtry, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996).

A. The Phone Call

Henry was arrested after the victim telephoned him and asked him about the nearly ten-year course of assaults. Henry incriminated himself repeatedly during the call. The phone call was placed at the request of the police, was recorded by an officer, and a transcript of excerpts was included in the criminal complaint. Henry asserts that the tape recording of the call was illegal and contends that his trial and postconviction counsel were ineffective for not seeking suppression of the recording.

When one party to a telephone call consents, recording of the call is not illegal. *See* WIS. STAT. § 968.31(2)(b) (creating an exception to the general prohibition of the interception and disclosure of wire, electronic, or oral communications). Henry does not allege that the victim did not consent to the tape recording. Therefore, the recording was not illegally obtained and his attorneys cannot be faulted for not seeking its suppression. Henry is not entitled to relief and, therefore, the circuit court properly denied this claim without a hearing. *See* ***Balliette***, 336 Wis. 2d 358, ¶50.

B. Post-***Miranda*** Statements

The criminal complaint recounted statements made by Henry after he invoked his ***Miranda***[3] rights and asked for a lawyer. The complaint stated that the interview "concluded" but

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

that, as the detective was "fill[ing] out paperwork" for taking Henry into custody, Henry "became tearful" and said "[the victim's] the only girl I ever touched" and he "didn't know why he'd done it." Henry went on to say that his conduct had been "eating him up for years" and that he "was brought up to learn if you do the crime, you do the time."

On appeal, Henry asserts in a conclusory fashion that "Fifth Amendment and ***Miranda*** violations occurred" during the custodial interrogation. Henry acknowledges, however, that, when he asked for a lawyer, the interrogation "stopped." As for the subsequent comments, Henry asserts that the detective "elicited the questioning to get a[n] incriminating response."

This court has reviewed the entirety of Henry's postconviction motion. Henry asserted in a conclusory fashion a claimed ***Miranda*** violation. He also cited to ***State v. Davis***, 2011 WI App 147, 337 Wis. 2d 688, 808 N.W.2d 130, as a case where this court reversed "because counsel didn't challenge [the defendant's] statements in the trial court and was ineffective." Henry offered no further argument. At best, Henry "assert[ed] a mere conclusory allegation that his counsel was ineffective"—an assertion that does not constitute a sufficient reason for failing to raise the claim on direct appeal. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. Therefore, this claim is procedurally barred.

C. Circuit Court Misconduct

Henry contends that the judge who accepted his plea and sentenced him was guilty of judicial misconduct. Henry faults the judge for allowing the recorded phone call to be used in the case, for calling Henry a liar "without proof," and for not allowing Henry's niece to testify at sentencing. As additional support for his position, Henry inexplicably relies on the judge's subsequent suicide as proof of judicial misconduct in this case.

The circuit court correctly denied relief without a hearing. Henry's assertions are wholly conclusory and are refuted by the record. As noted above, the State's use of the recorded phone call was proper. The judge's comments arguably calling Henry a liar were part of the credibility assessment at the postconviction motion hearing. Henry's niece did speak in support of Henry at sentencing. Finally, the circumstances of the judge's death are irrelevant. Because Henry is not entitled to relief, the circuit court properly denied this claim without a hearing. *See* ***Balliette***, 336 Wis. 2d 358, ¶50.

D. Sentencing Error

Henry next raises several complaints about his sentence—the sentencing court ignored various mitigating factors, did not consider two psychological reports, and put too much weight on the nature of the offense. Henry does not, however, offer any reason why his complaints could not have been raised on his direct appeal. Therefore, they are procedurally barred. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185; WIS. STAT. § 974.06(4).

E. Other Matters

Scattered throughout Henry's motion and appellate brief are conclusory allegations that the victim went to the police only after Henry refused to pay her money, that he is not competent, and other matters too muddled to interpret. As with his other complaints, Henry does not offer any reason why those complaints could not have been raised on his direct appeal and, therefore, they are procedurally barred. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185; WIS. STAT. § 974.06(4).

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals