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November 17, 2015

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

2015AP258-CR

State of Wisconsin v. Kelcey X. Nelson
(L.C. #1998CF606)

Before Kessler and Brennan, JJ., and Daniel L. LaRocque, Reserve Judge.

Kelcey X. Nelson, *pro se*, appeals the circuit court's order denying his tenth postconviction motion. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2013-14).¹ Because Nelson's claim is procedurally barred, we affirm.

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

BACKGROUND

In 1998, a jury found Nelson guilty of first-degree sexual assault of a child and repeated sexual assault of the same child. The circuit court sentenced him to a total of sixty years in prison. After the circuit court denied Nelson's motion for postconviction relief, he appealed and we affirmed. *See State v. Nelson*, No. 1999AP2350-CR, unpublished slip op. (WI App Oct. 10, 2000). The Wisconsin Supreme Court denied Nelson's petition for review.

We incorporate additional chronological information as provided by the State, which is supported by the record:

Since this Court's October 2000 decision, Nelson has filed multiple *pro se* motions in the circuit court seeking sentence modification. In 2004, Nelson requested that the circuit court modify his consecutive sentences to concurrent sentences. Nelson alleged that through time and the successful completion of prison programs, he had been rehabilitated and could be a model citizen. The motion was denied. Nelson did not appeal. In 2008 and 2009, Nelson again moved the court for sentence modification requesting concurrent sentences, largely on the same grounds.² The motions were denied. Nelson did not appeal.

Twice in 2011, twice in 2012, and once in 2013, Nelson moved the circuit court for sentence modification. Each motion alleged that Nelson had been rehabilitated and requested that the court modify Nelson's consecutive sentences to concurrent sentences. The motions were denied, in part, on the grounds that

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In 2009, Nelson also filed a WIS. STAT. § 974.06 motion alleging that he was convicted of two crimes that could not be charged for one course of conduct. Nelson's WIS. STAT. § 97[4].06 motion was denied on the grounds that Nelson's claim was meritless and procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 179, 517 N.W.2d 157 (1994). Nelson moved for reconsideration, alleging that the claim had not been brought sooner due to the ineffective assistance of counsel. The motion for reconsideration was denied, again on the grounds that Nelson's underlying claim was meritless. Nelson filed a notice of appeal, but that appeal was voluntarily dismissed by Nelson.

rehabilitation is not a factor warranting modification. Nelson did not appeal any of the orders denying relief.

Then, in late 2014, Nelson moved the circuit court for sentence modification, alleging that the sentencing court considered an inappropriate factor that resulted in an unduly harsh sentence. Nelson alleged that the court rejected a recommendation of probation on one of the counts because Nelson would not admit guilt, and doing so was an improper exercise of discretion. The circuit court concluded that the time for Nelson to challenge the sentencing court's discretion had long since expired, and Nelson was also procedurally barred from raising successive attacks. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 179, 517 N.W.2d 157 (1994). Nelson now appeals.

(Footnote numbering altered, footnote text is as it appears in the State's brief; record citations and some legal citations omitted.)

DISCUSSION

Nelson continues to argue that the circuit court used an improper factor—his refusal to admit guilt—when it sentenced him to a prison term instead of probation. He submits that this violated his constitutional right against self-incrimination and seeks sentence modification.

A court's exercise of sentencing discretion may be challenged only in a first post-conviction motion or appeal as of right under WIS. STAT. § 973.19 or § 974.02. The deadlines for bringing such motions have long since passed, as a challenge not based on a new factor must be filed within ninety days of sentencing. *See* § 973.19. Here, Nelson filed the underlying sentence modification motion more than sixteen years after he was sentenced.

Pursuant to WIS. STAT. § 974.06, however, a defendant may raise constitutional claims after the time for a direct appeal has passed. *See State v. Henley*, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. That said, the goal of § 974.06 is finality. *Henley*, 328 Wis. 2d 544, ¶53. Therefore, successive postconviction motions raising constitutional claims that could have been

raised in a prior postconviction proceeding are barred unless the defendant presents a sufficient reason for why the claim was not asserted or was inadequately raised earlier. *Escalona-Naranjo*, 185 Wis. 2d at 184.

Nelson argues that he should be able to raise his claim now because he has a learning disability that prevented him from being able to effectively research whether the circuit court erroneously exercised its discretion at sentencing. Nelson offers conclusory assertions, such as: “[S]ince it is a proven fact, that people with learning disabilities need professional help, and/or training to accomplish whatever complex task that they are burdened with[,] Nelson was not able to find or deal with this issue on his own.” Beyond such assertions, Nelson has failed to demonstrate how his claimed learning disability prevented him from bringing his current claim in one of his previous *pro se* motions. Consequently, we are not convinced that this is a sufficient reason.

Next, Nelson contends that his attorneys were ineffective for failing to timely raise the issue by way of a motion under WIS. STAT. § 973.19 or on direct appeal. However, he has not developed why this claim was “clearly stronger” than the ones that were actually brought. *See State v. Romero-Georgana*, 2014 WI 83, ¶73, 360 Wis. 2d 522, 849 N.W.2d 668; *see also State v. Balliette*, 2011 WI 79, ¶69, 336 Wis. 2d 358, 805 N.W.2d 334 (explaining that a motion under WIS. STAT. § 974.06 alleging that postconviction counsel was constitutionally ineffective failed to show the issues that were not raised were “obvious and very strong”). To succeed on his motion, Nelson needed to do more than identify a potential issue for appeal. *See Balliette*, 336 Wis. 2d 358, ¶67.

The circuit court properly concluded that Nelson's motion was both untimely and procedurally barred.

Upon the foregoing reasons,

IT IS ORDERED that the circuit court's order is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals