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 IV

May 17, 2016

To:

Hon. Richard A. Bates
Circuit Court Judge
Rock Co. Courthouse
51 S. Main Street
Janesville, WI 53545

Jacki Gackstatter
Clerk of Circuit Court
Rock Co. Courthouse
51 S. Main Street
Janesville, WI 53545

Jodi D. Bollendorf
Asst. District Attorney
51 S. Main St.
Janesville, WI 53545

Sarah K. Larson
Assistant Attorney General
P. O. Box 7857
Madison, WI 53707-7857

Jermaine Marcell Andre White 409301
Oakhill Corr. Inst.
P.O. Box 938
Oregon, WI 53575-0938

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

2014AP2349-CR State of Wisconsin v. Jermaine Marcell Andre White
(L.C. # 2003CF2074)

Before Lundsten, Higginbotham and Sherman, JJ.

Jermaine White, *pro se*, appeals a circuit court order denying his postconviction motion. 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 conclude that ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), applies to procedurally bar White's claims. Therefore, we summarily affirm.

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

White was convicted, after entry of a guilty plea, of attempted first-degree intentional homicide. After waiving his right to appellate counsel, White filed a *pro se* postconviction motion seeking plea withdrawal. He alleged, among other claims, that his trial counsel was ineffective for failing to object at sentencing to the court's references to read-in offenses. The circuit court denied White's motion after an evidentiary hearing, and we affirmed on appeal.

Next, White filed a postconviction motion pursuant to WIS. STAT. § 974.06, again seeking plea withdrawal. White argued, among other issues, that his due process rights were violated when his trial counsel failed to advise him of various defenses that could have been raised at trial but were waived by entry of his plea. The court denied all of White's claims for postconviction relief. White then filed a second WIS. STAT. § 974.06 postconviction motion, which is the subject of this appeal. White sought sentence modification or resentencing on the basis of a "new factor."[2] The circuit court denied the motion after a hearing, and this appeal follows.

The State argues that White's current claims are procedurally barred by past proceedings in which he either could have raised them or actually did raise them. *See generally* ***Escalona-Naranjo***, 185 Wis. 2d at 185 (claims that could have been raised on a prior direct appeal or postconviction motion from a criminal judgment of conviction cannot be the basis for a subsequent § 974.06 motion unless the court finds there was sufficient reason for failing to raise the claim in the earlier proceeding); ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512

[2] White also argued in his second WIS. STAT. § 974.06 postconviction motion that he is entitled to resentencing because of progress he has made toward rehabilitation. However, White does not address this issue in his appellate briefs. Issues not briefed or argued on appeal are deemed abandoned. ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993). We conclude that White has abandoned his argument regarding rehabilitation and, as such, we need not consider it. *See* ***id.***

(Ct. App. 1991) (an appellant may not relitigate in subsequent postconviction proceedings matters previously decided on a direct appeal, no matter how artfully rephrased).

White argues that, because he alleged a new factor that he believes justifies modification of his sentence, the procedural bar against successive WIS. STAT. § 974.06 motions should not apply to his most recent motion for postconviction relief. *See* ***State v. Harbor***, 2011 WI 28, ¶¶35, 51, 333 Wis. 2d 53, 797 N.W.2d 828 (despite other procedural bars that may exist, a circuit court may modify a sentence if the defendant shows a new factor that warrants modification). For the reasons discussed below, we agree with the State that White's claims are procedurally barred.

The new factor White identified in his most recent postconviction motion was the circuit court's alleged reliance at sentencing on inaccurate information pertaining to interactions between White and his ex-girlfriend, Tiffany Cobb. Specifically, White argues that he only assaulted Cobb once, whereas the court stated at sentencing that White had beat her up or threatened her "on more than one occasion."

Regardless of how White phrases his argument, the information he presents is not a new factor. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). That is not the case here. At the beginning of the sentencing hearing, White's counsel made clear on the record that White did not agree with the way his past interactions with Cobb were described in the presentence investigation report (PSI). When the court asked whether White had any comments

regarding inaccuracies or omissions in the PSI, White's counsel replied that he had spoken with Cobb regarding her interactions with White. White's counsel stated, "She told me that it was more in the range of an isolated incident."

In addition, White was present when the court stated at sentencing that there had been "more than one" occasion where White beat up or threatened Cobb. Neither White nor his counsel made any objection at that time. In his direct appeal, White made a similar argument that his trial counsel was ineffective for failing to make objections at sentencing to read-in offenses. White does not offer any reason, much less a sufficient one, for his failure to raise the argument regarding his interactions with Cobb either on direct appeal or in his first WIS. STAT. § 974.06 motion. Thus, we conclude that White is subject to the procedural bar of ***Escalona-Naranjo***, 185 Wis. 2d at 184-85, and its progeny. Insofar as some aspects of these same issues have already been raised, they are also barred by ***Witkowski***, 163 Wis. 2d at 990.

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

Diane M. Fremgen
Clerk of Court of Appeals