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July 6, 2016

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

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2015AP70 State of Wisconsin v. Steven L. Collins (L. C. No. 2005CF211)

Before Stark, P.J., Hruz and Seidl, JJ.

Steven Collins appeals from an order denying postconviction relief. Collins argues the circuit court erroneously exercised its discretion[1] by vacating a February 5, 2010 judgment of conviction and reinstating a December 6, 2005 judgment of conviction. Collins also seeks

[1] Collins uses the phrase "abuse of discretion." We have not used that phrase since 1992, when our supreme court changed the terminology used in reviewing a circuit court's discretionary act from "abuse of discretion" to "erroneous exercise of discretion." *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992).

sentence credit. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition and we summarily affirm.

On March 1, 2005, Collins was charged with one count of false imprisonment, two counts of second-degree sexual assault, and one count of misdemeanor battery. Following a trial to the court, he was found guilty of false imprisonment, one count of second-degree sexual assault, and misdemeanor battery. The court dismissed the second count of second-degree sexual assault after finding that charge duplicitous.

The circuit court sentenced Collins as follows: (1) a four-year sentence on the false imprisonment charge consisting of two years' initial confinement and two years' extended supervision; (2) a sixteen-year sentence on the second-degree sexual assault charge consisting of eight years' initial confinement and eight years' extended supervision, consecutive to the false imprisonment charge; and (3) nine months on the battery charge concurrently.

Collins' attorney filed a postconviction motion to which Collins filed a pro se supplemental motion. The circuit court denied postconviction relief. Collins' attorney filed a no-merit report, and we discovered a potential issue regarding whether the circuit court considered the sentencing guidelines for second-degree sexual assault. *See* ***State v. Grady***, 2007 WI 81, ¶¶33-35, 302 Wis. 2d 80, 734 N.W.2d 364. We ultimately rejected the no-merit report because the court did not personally confirm Collins' understanding of the right to testify during his trial to the court. We therefore dismissed the appeal and remanded the matter for an evidentiary hearing regarding whether Collins understood his right to testify, consistent with ***State v. Weed***, 2003 WI 85, ¶¶39-40, 263 Wis. 2d 434, 666 N.W.2d 485.

Collins, with new counsel, filed a new postconviction motion on July 16, 2009. At the hearing on that motion, the parties stipulated to a settlement of the case. The State agreed to resentencing and a joint resentencing recommendation based on Collins' claim that the circuit court violated ***Grady***. In exchange, Collins agreed to waive his right to postconviction relief on all issues other than those issues that may arise directly from the resentencing itself.

On February 10, 2010, the circuit court resentenced Collins. On the false imprisonment count, the court imposed a four-year sentence consisting of one year initial confinement and three years' extended supervision; seventeen years on the sexual assault count consisting of five years' initial confinement and twelve years' extended supervision consecutively; and nine months on the battery concurrently. The court also awarded Collins 1806 days of sentence credit. Collins did not appeal the 2010 judgment of conviction within the statutory time allowed in WIS. STAT. RULE 809.30(2).[2]

On January 20, 2011, shortly before Collins' scheduled release to extended supervision, the State filed a petition to civilly commit Collins as a sexually violent person. After a finding of probable cause, the State transferred Collins to the Sand Ridge Secure Treatment Facility.

On December 7, 2012, Collins moved for postconviction relief. He requested a new trial on the grounds that he had not personally waived his right to testify at his court trial. At the hearing on the motion, the circuit court warned Collins during a colloquy of the likely consequences of pursuing postconviction relief in light of his stipulated settlement agreement. Collins' attorney advised the court that Collins understood if there were a motion alleging a

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

breach of the agreement, "he wouldn't really be able to defend against it because he realizes he did breach the agreement, … but he is willing to do that in order to exercise his 809.30 rights." The following exchange then occurred:

> THE COURT: And your worst case scenario there, assuming for the sake of argument that the state makes such a motion, is that the original sentence would be reinstated.
>
> MR. JENSEN: That's what I've told Mr. Collins. He understands that, and he wants to proceed nonetheless.
>
> THE COURT: Sure. Mr. Collins, is that all accurate? You've had a chance to have that discussion with your attorney and you understand that there may be other—those kinds of consequences that could come about here at some point, if the state were to allege that if you actively go through with this, that they may move the court to vacate the amended sentence and go back to the original sentence, do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And knowing that you bear that risk, is it your desire to go forward today with offering of testimony with respect to your perspective on what happened at the time of the trial?
>
> THE DEFENDANT: Yes.

During the hearing, the State manifested its intent to move to reinstate the 2005 judgment of conviction if Collins pressed his claim. Collins again indicated his desire to proceed with his postconviction motion. On direct examination, Collins testified as follows:

> Q: And I discussed with you the possibility that if that motion were filed, the state might move to set aside the agreement to modify your sentence, correct?
>
> A: Yes.
>
> Q: And did you tell me to proceed with the motion nonetheless?
>
> A: Yes.
>
> Q: And you understand that if we do proceed with the motion, there is a possibility, maybe even now a probability, that the court

> will set aside your modified sentence and reimpose the original sentence?
>
> A: Yes.
>
> Q: Do you still want to proceed?
>
> A: Yes.

The court denied Collins' postconviction motion and granted the State's motion to reinstate the 2005 judgment of conviction.

Collins appealed the circuit court's determination. He argued he had not personally waived his right to testify at his court trial. We affirmed the circuit court's denial of postconviction relief. A petition for review to the Wisconsin supreme court was denied.

Meanwhile, on June 4, 2014, Collins, pro se, filed a motion for sentence credit. He claimed sentence credit for the time he spent at Sand Ridge. The circuit court denied the motion. Collins filed two additional motions seeking sentence credit.

On October 1, 2014, prior to any ruling on his pending sentence credit motions, Collins filed a pro se WIS. STAT. § 974.06 postconviction motion. He claimed newly discovered DNA evidence, purportedly showing "the DNA presence of a third party other than the defendant," entitled him to a new trial. He also claimed the State failed to timely provide potentially exculpatory evidence. In addition, he argued ineffective assistance of his trial counsel.

On December 15, 2014, the circuit court held Collins' postconviction claims were barred by WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The court also denied sentence credit for the time Collins spent at Sand Ridge. Collins now appeals from the circuit court's December 15, 2014 decision.

Collins challenges the circuit court's exercise of discretion in reinstating the 2005 judgment of conviction. He acknowledges he raises this claim "for the first time on appeal." However, he claims his failure to raise the issue "is an administrative rule and does not deprive the court of the authority to address [the] issue."

For this court to have jurisdiction to review an issue, the order or judgment deciding the issue must be the subject of a timely notice of appeal. ***Werner v. Hendree***, 2009 WI App 103, ¶10, 320 Wis. 2d 592, 770 N.W.2d 782, *reversed on other grounds by* 2011 WI 10, 331 Wis. 2d 511, 795 N.W.2d 423. Although Collins' notice of appeal does not refer to the date of the circuit court's order from which he appeals, it is clear Collins intended to appeal from the circuit court's December 15, 2014 order. In that order, the circuit court decided the issues presented in Collins' October 1, 2014 WIS. STAT. § 974.06 postconviction motion and his third sentence credit motion.

The December 15, 2014 order constituted a final order. Collins filed his notice of appeal twenty days after the circuit court's December 15 decision denying three claims contained in Collins' October 1 WIS. STAT. § 974.06 motion and his September 18 motion for sentence credit. We have jurisdiction to review the three claims and sentence credit. An appeal from a final order brings up all prior nonfinal orders. WIS. STAT. RULE 809.10(4). But an appeal does not bring up other final orders. *See* ***State v. LaBine***, 198 Wis. 2d 291, 300 n.6, 542 N.W.2d 797 (Ct. App. 1995). Thus, no other circuit court orders are properly before this court, including Collins' arguments regarding the propriety of the circuit court's order reinstating the 2005 judgment of conviction. That issue had to be argued in Collins' appeal from the December 6, 2005 judgment reinstated by written order dated May 29, 2013. The October 1, 2014 postconviction motion did not raise any claim regarding the propriety of the circuit court's order reinstating the 2005 judgment of conviction. Therefore, this court lacks jurisdiction to address that claim.

Collins next argues he is entitled to sentence credit for the time he spent at Sand Ridge. However, the circuit court twice denied sentence credit for this same period of time prior to its December 15, 2014 order. As the court properly stated during its July 7, 2014 written denial of sentence credit:

> On June 4, 2014, the Court received a motion from Collins asking that the Court award him additional sentence credit. The motion specifically stated: "I'm under the impression that any time I'm being held when it have to do with the case that I'm under I should get credit for that time. I was sent to Sandridge [sic] '980' but this court re-instated my original sentence."
>
> WISCONSIN STAT. § 973.155 mandates:
>
> A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed.
>
> WIS. STAT. § 973.115 (2011-12). Generally, detention "under Chapter 980 satisfies neither the 'in custody' nor 'in connection with' requirements of WIS. STAT. § 973.155." ***State ex rel. Thorson v. Schwarz***, 2004 WI 96, ¶38, 274 Wis. 2d 1, 681 N.W.2d 914. This is because commitment pursuant to Chapter 980 is a civil proceeding, whereas sentence credit is awarded for time spent in connection with the defendant's criminal case. ***Id.***
>
> In this case, Collins does not elaborate as to the reason for his detention at Sand Ridge in his motion other than the statement that he was there pursuant to Chapter 980. Because detention for a Chapter 980 civil proceeding cannot be "in connection" with Collins' underlying criminal case, his request for sentence credit is **DENIED**.[3]

Collins should have timely appealed the circuit court's July 7, 2014 denial of sentence credit. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding

[3] We note that Collins' release to extended supervision did not constitute "custody" under WIS. STAT. § 973.155. *See* WIS. STAT. § 946.42(1)(a)2.; ***State v. Magnuson***, 2000 WI 19, ¶¶13-15, 233 Wis. 2d 40, 606 N.W.2d 536. Just as Collins' extended supervision did not constitute "custody," so too was his extended supervision not the cause of his confinement at Sand Ridge. Quite simply, his detention was not "in connection with" his specific acts that resulted in the "sentence imposed."

no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Finally, although Collins' October 1, 2014 WIS. STAT. § 974.06 postconviction motion presented issues regarding DNA tests, misconduct by the State, and ineffective assistance of trial counsel, Collins failed to raise these issues in his initial brief on appeal to this court. In his reply brief, Collins argues the circuit court erred by denying him a new trial based on DNA evidence. WISCONSIN STAT. RULE 809.19 of the Rules of Appellate Procedure contemplates that an appellant's initial brief to this court will state and argue each issue presented for review. We will not, as a general rule, consider issues raised by the appellant for the first time in a reply brief, and we will not do so here. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). In any event, Collins' argument concerning DNA evidence is undeveloped, and we will not consider undeveloped arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

Upon the foregoing, therefore,

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

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*Diane M. Fremgen*
*Clerk of Court of Appeals*