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

2015AP1421-CR

State of Wisconsin v. Julious King
(L.C. #2001CF004162)

Before Kessler, Brennan and Brash, JJ.

Julious King, *pro se*, appeals from a June 4, 2015 circuit court order denying his "motion to correct sentencing error," which he brought pursuant to WIS. STAT. §§ 974.06 and 809.30 (2013-14).¹ (Capitalization and bolding omitted.) We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm the order.

¹ The Honorable M. Joseph Donald accepted King's guilty plea, sentenced him, and denied the motion at issue in this appeal.

(continued)

This is the second time King has appealed to this court. In our first opinion affirming his conviction, we summarized the facts:

King pled guilty to felony murder, committed during an armed robbery, as party to a crime, contrary to WIS. STAT. §§ 940.03 and 939.05 (2001-02). The court sentenced King to fifty years' imprisonment, comprised of thirty years of initial confinement and twenty years of extended supervision, to run consecutively to any other sentence.

State v. King, No. 2004AP1337-CRNM, unpublished slip op. and order at 1 (WI App Feb. 22, 2005). Our opinion considered whether there would be any arguable merit to challenging the entry of King's guilty plea or the circuit court's exercise of sentencing discretion. *See id.* at 2. We affirmed, concluding that there was "no basis for reversing the judgments of conviction." *Id.* at 7. The Wisconsin Supreme Court subsequently denied King's petition for review.

On January 14, 2015, King filed a *pro se* motion in the circuit court, citing WIS. STAT. §§ 974.02 and 809.30. He asserted that his conviction should be set aside because the circuit court erroneously exercised its discretion by sentencing King to less than the maximum required by statute. He explained: "[T]he [circuit] court was required to impose the maximum penalty of 40 years for armed robbery ... prior to imposing sentence for the resultant murder.... The mandate that sentencing courts impose the maximum penalty for the underlying crime in felony murder cases is non-negotiable." (Bolding, italics, underlining, and some capitalization omitted.) King argued that by accepting a plea agreement with a recommendation for less than the maximum sentence, and by failing to impose the maximum sentence, the circuit court

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

erroneously exercised its sentencing discretion. King asserted that the appropriate remedy was to reduce his thirty-year term of initial confinement to twenty years.

The circuit court denied the motion in a written order on January 22, 2015. First, the circuit court recognized that King's right to proceed under WIS. STAT. §§ 974.02 and 809.30 had expired, and it said that the motion must be filed pursuant to WIS. STAT. § 974.06. Second, it said that because King had failed to raise these issues in response to the no-merit report, "they are deemed waived," and the motion is barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 169, 178, 517 N.W.2d 157 (1994), and *State v. Tillman*, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. Third, the circuit court stated that the erroneous exercise of sentencing discretion is not an issue that can be pursued by a § 974.06 motion because such motions are "limited to jurisdictional or constitutional issues or to errors that go directly to guilt." The circuit court concluded: "Finally, even if the merits of the motion were considered, they are legally flawed and do not set forth a viable claim for relief."

King did not appeal the circuit court's January 22, 2015 order. Instead, on May 21, 2015, he filed the postconviction motion at issue in this appeal and explicitly cited WIS. STAT. § 974.06 and 809.30 in the motion heading. The circuit court in a written order denying the motion recognized that the May 21, 2015 motion was identical to the motion filed on January 14, 2015, except for the motion heading. The circuit court stated: "It is denied for the same reasons set forth in the court's prior order." This appeal follows.

We affirm the circuit court's order because King's May 21, 2015 motion is both procedurally barred and substantively unpersuasive. We begin with the fact the motion is procedurally barred. *Tillman* held that the *Escalona-Naranjo* procedural bar applies to

defendants whose direct appeal was via the no-merit procedure, as long as the no-merit procedures were in fact followed and the record demonstrates a sufficient degree of confidence in the result. See *Tillman*, 281 Wis. 2d 157, ¶¶19-20. Thus, King’s specific challenge to his sentence—a claim that could have been raised in his response to the no-merit report—“[i]s barred from being raised in a subsequent [WIS. STAT.] § 974.06 postconviction motion absent a showing of a sufficient reason for why the claims were not raised on direct appeal or in a previous § 974.06 motion.” *Id.*, ¶25 (quoting *State v. Lo*, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756). In this case, King’s motion did not even allege, must less demonstrate, a sufficient reason for not raising his claims in response to no-merit report. Therefore, his motion is procedurally barred.

King’s May 21, 2015 motion is also procedurally barred to the extent he is attempting to relitigate issues that we decided in his no-merit appeal (including whether the circuit court erroneously exercised its sentencing discretion) and issues that the circuit court decided in its January 22, 2015 order. See *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.”).

Even if King’s motion were not procedurally barred, it would fail on its merits. As best we can understand King’s argument, he believes that the circuit court was required to impose the maximum sentence for armed robbery—forty years of initial confinement and twenty years of extended supervision—before considering whether to impose an additional twenty years of initial confinement for felony murder. He asserts that based on that error, the proper remedy is that he should have his thirty-year term of initial confinement reduced to twenty years. In support, he cites WIS. STAT. § 973.13, which provides: “**Excessive sentence, errors cured.** In

any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.”

King has not demonstrated that he is entitled to relief. King committed the crime on July 29, 2001. The applicable felony-murder statute stated:

Felony murder. Whoever causes the death of another human being while committing or attempting to commit a crime specified in s. 940.225 (1) or (2)(a), 943.02, 943.10(2) or 943.32(2) may be imprisoned for not more than 20 years in excess of the maximum period of imprisonment provided by law for that crime or attempt.

WIS. STAT. § 940.03 NOTE (2001-02).² Accordingly, the maximum bifurcated sentence that could have been imposed on King was eighty years because the underlying crime of armed robbery carried a maximum bifurcated sentence of sixty years, *see* WIS. STAT. § 943.32(2) NOTE (2001-02) and § 939.50(3)(b) NOTE (2001-02), and the felony murder statute specified that the maximum shall be twenty years more, *see* § 940.03 NOTE (2001-02). The maximum period of initial confinement that could have been imposed for felony murder, an unclassified felony, was “75% of the total length of the bifurcated sentence.” *See* 973.01(2)(b)6. NOTE (2001-02). In this case, that was sixty years. *See id.*³

² This language appears in a note in the 2001-02 version of the statutes, after the definition of felony murder that became effective February 1, 2003. The note version of WIS. STAT. § 940.03 applied here because the crime occurred on July 29, 2001.

³ These calculations are consistent with our analysis in *State v. Mason*, 2004 WI App 176, 276 Wis. 2d 434, 687 N.W.2d 526, where we calculated the maximum term of initial confinement for a felony murder in the course of deciding that felony murder was a “stand-alone unclassified crime.” *See id.*, ¶¶8-10, 20. *Mason* calculated the maximum bifurcated sentence and term of initial confinement as follows:

(continued)

King’s motion argued that he was entitled to relief under WIS. STAT. § 973.13 from what he termed an “excessive sentence.” We reject King’s assertion. Whether one considers the “maximum penalty” referenced in § 973.13 to refer to the initial confinement part of the sentence or to the total bifurcated sentence (initial confinement and extended supervision), the maximum was not exceeded in this case.⁴ Specifically, King’s initial confinement of thirty years was half of the maximum that could have been imposed, and his total sentence of fifty years was far less than the eighty years that could have been imposed.

For the foregoing reasons, we agree with the circuit court that King’s motion was procedurally barred and also fails on its merits.

Because attempted armed robbery, under WIS. STAT. §§ 939.32(1), 943.32(2), and 939.50(3)(b), carries a maximum bifurcated sentence of 30 years, and because the felony murder statute specifies that the maximum shall be 20 years more, the maximum bifurcated sentence for felony murder/attempted armed robbery is 50 years.

Under truth-in-sentencing, the term of initial confinement for unclassified felonies is subject to the “75% rule.” WISCONSIN STAT. § 973.01(2)(b)6[.] provides that the maximum term of initial confinement for an unclassified felony is “75% of the total length of the bifurcated sentence.”...

Thus, if felony murder/attempted armed robbery is treated as a stand-alone unclassified crime, Mason’s maximum term of initial confinement is 75% of 50 years, or 37 years and 6 months.

Mason, 276 Wis. 2d 434, ¶¶8-10.

⁴ The State notes in its response brief that “Wisconsin courts have not addressed whether the phrase ‘maximum penalty’ in [WIS. STAT.] § 973.13 refers to the initial confinement portion of a bifurcated sentence or to the total term of the sentence (initial confinement plus extended supervision).”

Therefore,

IT IS ORDERED that the circuit court order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals