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January 11, 2017

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

2015AP311

State of Wisconsin v. John L. Dye, Jr. (L.C. #2000CF1584)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

John L. Dye, Jr., appeals pro se from an order denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).¹ We affirm the order of the circuit court.

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

In 2000, Dye was convicted following a jury trial of kidnapping and first-degree sexual assault while armed. The circuit court imposed an aggregate sentence of thirty-five years of initial confinement followed by ten years of extended supervision.

In 2003, this court affirmed Dye's convictions. *State v. Dye*, No. 2002AP3085-CR, unpublished slip op. (WI App Aug. 26, 2003). In doing so, we rejected several claims including that (1) Dye's attorney was ineffective for failing to stipulate to certain elements of the crime of kidnapping, (2) his attorney was ineffective for failing to call Dye's sister as a witness, and (3) the evidence was insufficient to convict Dye.

Over eleven years later, in December 2014, Dye filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06. In it, he renewed his earlier claims of ineffective assistance of counsel and insufficiency of the evidence. He also complained that (1) his attorney was ineffective for failing to find a document purporting to chronicle the past drug use of a prosecution witness,² (2) a juror failed to honestly answer a question on voir dire, (3) a witness violated a sequestration motion, (4) his attorney was ineffective for failing to investigate every reasonable hypothesis regarding the crimes, and (5) he was denied a fair trial. The circuit court denied Dye's motion without a hearing. This appeal follows.

On appeal, Dye contends that the circuit court erred in denying his motion for postconviction relief. He renews the claims made in his motion and seeks a new trial.

² This argument is related to another claim that we rejected on direct appeal, i.e., that the circuit court erred in denying Dye's request to impeach a prosecution witness's credibility with evidence of her drug addiction. See *State v. Dye*, No. 2002AP3085-CR, unpublished slip op. (WI App Aug. 26, 2003).

“We need finality in our litigation.” *State v. Escalona–Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, any claim that could have been raised in a prior postconviction motion or direct appeal cannot form the basis for a subsequent motion under Wis. STAT. § 974.06 unless the defendant demonstrates a sufficient reason for failing to raise the claim earlier. *Escalona–Naranjo*, 185 Wis. 2d at 185. Further, a defendant may not relitigate a matter previously litigated, “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).

Applying these principles to the case at hand, we conclude that Dye’s claims are procedurally barred. The issues of ineffective assistance of counsel relating to the failure to stipulate to certain elements of the crime of kidnapping and the failure to call Dye’s sister as a witness were already litigated and cannot be relitigated now. *Id.* The same is true regarding the alleged insufficiency of the evidence. *Id.* As for the other issues raised in Dye’s postconviction motion, he has not demonstrated a sufficient reason for failing to raise them earlier.³ *See Escalona-Naranjo*, 185 Wis. 2d at 185. Accordingly, we are satisfied that the circuit court properly denied Dye’s motion.⁴

³ Dye suggests that his previous counsel was ineffective for failing to raise all of his claims. A defendant must do more than merely identify issues that postconviction counsel failed to raise and assume that it establishes ineffective assistance of counsel justifying another postconviction proceeding. Such an interpretation would vitiate the bar against successive postconviction motions and appeals set out in *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). *See State v. Romero-Georgana*, 2014 WI 83, ¶62, 360 Wis. 2d 522, 849 N.W.2d 668 (the mere fact that postconviction counsel did not pursue certain claims does not demonstrate ineffectiveness, and “[w]e will not assume ineffective assistance from a conclusory assertion”).

⁴ To the extent we have not addressed an argument raised by Dye on appeal, the argument is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals