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DISTRICT I

January 31, 2017

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

2015AP1934 State of Wisconsin v. Ralph Paul Liske (L.C. # 1998CF002895)

Before Brennan, P.J., Kessler and Brash, JJ.

Ralph Paul Liske, *pro se*, appeals an order denying his postconviction motion for sentence modification or resentencing. He alleges the circuit court sentenced him: (1) without considering his eligibility for mandatory release from prison to parole; and (2) in reliance on inaccurate information. Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm the order.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

In 1998, the State charged Liske with two counts of first-degree sexual assault of a child. According to the criminal complaint, Liske had sexual intercourse with two boys younger than thirteen years old while serving as their babysitter during the period between June 1996 and September 1996. *See* WIS. STAT. § 948.02(1) (1995-96). Liske pled guilty as charged. The circuit court imposed a twenty-year indeterminate sentence for one of the counts. As to the other count, the circuit court imposed and stayed a forty-year sentence and ordered Liske to serve a consecutive ten-year term of probation. Liske pursued a no-merit appeal under WIS. STAT. RULE 809.32 (1999-2000). We summarily affirmed. ***State v. Liske*** (***Liske I***), No. 1999AP1376-CRNM, unpublished op. and order (WI App Nov. 5, 1999).

In 2012, Liske filed a postconviction motion for sentence modification. As relevant here, he alleged that the presumptive mandatory release statute, which permits the Department of Corrections to confine him although he has served two-thirds of his sentence, constituted a new factor warranting relief.[2] The circuit court denied the motion, and we affirmed. *See* ***State v. Liske*** (***Liske II***), No. 2012AP2516-CR, unpublished slip op. (WI App June 11, 2013).

In July 2015, Liske filed the postconviction motion underlying this appeal. He alleged that the sentencing court overlooked the presumptive mandatory release scheme and that "a new factor therefore exists" requiring sentence modification. Alternatively, he sought resentencing, alleging that the circuit court sentenced him based on inaccurate information because the author

[2] Generally, a prisoner sentenced in Wisconsin for a crime committed before December 31, 1999, is entitled to mandatory release on parole after serving two-thirds of his or her sentence. *See* WIS. STAT. § 302.11(1). Pursuant to § 302.11(1g), however, a mandatory release date is only a presumptive mandatory release date for prisoners who committed a serious felony, including first-degree sexual assault of a child, between April 21, 1994, and December 31, 1999. The parole commission has broad discretion to deny such prisoners presumptive mandatory release for the reasons listed in § 302.11(1g)(b). *See* ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶¶8-9, 246 Wis. 2d 814, 632 N.W.2d 878.

of the presentence investigation report did not seek either "a sex offender evaluation or a psychiatric evaluation of Liske." The circuit court concluded that both claims were procedurally barred. Liske appeals.

We first address Liske's claim that the presumptive mandatory release scheme constitutes a new factor warranting sentence modification. We reviewed and affirmed the circuit court order rejecting this contention in ***Liske II***. *See* ***id.***, ¶¶6-7. Although a circuit court has inherent authority to consider whether a new factor warrants sentence modification, *see* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828, "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue," *see* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Liske concedes he previously raised his new factor claim but asserts we wrongly resolved it. Litigants often disagree with our decisions, but such disagreements do not permit relitigation of the disputed claim. The remedy for litigants dissatisfied with our decisions is to seek supreme court review within the statutory deadline. *See* WIS. STAT. RULE 809.62.

We turn to the claim that the circuit court sentenced Liske based on inaccurate information. An allegation of inaccurate information at sentencing presents a constitutional claim for relief. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. WISCONSIN STAT. § 974.06 is the mechanism for a defendant to bring constitutional claims after exhausting the right to a direct appeal. *See* ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. The opportunity to bring claims under § 974.06 is limited, however, because "[w]e need finality in our litigation." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, a person may not bring claims under § 974.06 if the person could have raised the claims in a previous postconviction motion or on direct appeal unless the

person states a "sufficient reason" for failing to raise those claims in the earlier litigation. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

"A no-merit appeal clearly qualifies as a previous motion under [WIS. STAT.] § 974.06(4)." ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124. Accordingly, a litigant who pursued such an appeal may not raise claims in subsequent postconviction litigation absent a sufficient reason for failing to raise the claims during the no-merit procedure. ***Id.*** Whether the person offers a reason sufficient to avoid the procedural bar is a question of law that we review *de novo*. *See* ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920. We determine the sufficiency of the reason for serial litigation by examining the four corners of the postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

Our examination of the postconviction motion at issue here reveals that it included no reason, let alone a sufficient reason, that Liske failed during the no-merit appeal to raise his challenge to the accuracy of information at sentencing. Accordingly, Liske did not satisfy the obligation imposed upon a litigant proceeding under WIS. STAT. § 974.06.

Liske nonetheless argues in his appellate brief that his current claim of inaccurate sentencing information should not be barred because "there is no evidence that [he] made a strategic choice to withhold this [sentencing] issue" and because there is no "indication that [he] knew of this issue" before he filed his most recent postconviction motion. Liske offers these reasons for serial litigation for the first time in this court. To satisfy the burden imposed by ***Escalona-Naranjo***, a convicted person must present to the circuit court, not this court, a sufficient reason for a second or subsequent postconviction motion. *See* ***Allen***, 274 Wis. 2d 568,

¶¶9, 27. We will not consider arguments raised for the first time on appeal. *See* ***State v. Pharm***, 2000 WI App 167, ¶9, 238 Wis. 2d 97, 617 N.W.2d 163.

Even though Liske failed to present the circuit court with a sufficient reason for an additional postconviction motion, he might avoid the preclusive effect of his prior no-merit appeal by showing that the proceedings underlying ***Liske I*** did not conform to the no-merit protocol and that his no-merit appeal therefore does not warrant confidence in the outcome. *See* ***State v. Tillman***, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574. Liske had the burden, however, to make that showing in his postconviction motion. *See* ***Allen***, 328 Wis. 2d 1, ¶83. Liske did not attempt to shoulder his burden. Indeed, the postconviction motion omits any mention of the no-merit process.

Nonetheless, to ensure fairness, we have reviewed ***Liske I***. There, we explained that we considered the issues discussed by appellate counsel and independently examined the record as required by WIS. STAT. RULE 809.32 (1999-2000) and ***Anders v. California***, 386 U.S. 738 (1967). *See* ***Liske I***, unpublished op. and order at 1-2. Accordingly, our opinion reflects that we followed the procedure for no-merit appeals, warranting confidence in our conclusion that further proceedings would lack arguable merit. *See* ***Allen***, 328 Wis. 2d 1, ¶¶58, 81-82. Moreover, Liske did not respond to the no-merit report that his appellate counsel served upon him, *see* ***Liske I***, unpublished op. and order at 1, and the records of this court reflect that he did not ask us to reconsider our opinion after we released it.[3] An appellant's failure to respond both

[3] "Generally, a court may take judicial notice of its own records and proceedings for all proper purposes. This is particularly true when the records are part of an interrelated or connected case, especially where the issues, subject matter, or parties are the same or largely the same." ***Johnson v. Mielke***, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970).

to the no-merit report and to the opinion resolving the no-merit appeal "firms up the case for forfeiture of any issue that could have been raised." ***Allen***, 328 Wis. 2d 1, ¶72.

In light of the foregoing, the circuit court correctly concluded that Liske's current claims are barred. Therefore,

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