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DISTRICT I

February 16, 2017

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

2015AP1515 State of Wisconsin v. Ricky N. Alexander (L.C. # 2009CF5916)

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

Ricky N. Alexander, *pro se*, appeals an order entered on January 5, 2015, denying his motion seeking postconviction relief pursuant to WIS. STAT. § 974.06 (2015-16).[1] He also appeals orders entered on February 4, 2015, and March 11, 2015, denying reconsideration. 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. We dismiss Alexander's appeal from the

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

January 5, 2015 order for lack of jurisdiction, and we summarily affirm the orders denying reconsideration.

A jury found Alexander guilty of two counts of first-degree sexual assault of a child. He pursued an unsuccessful postconviction motion under WIS. STAT. RULE 809.30(2), and his appellate counsel thereafter filed an appeal and a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Alexander filed a response to the no-merit report, raising a host of claims. We summarily affirmed the judgment of conviction. ***State v. Alexander***, No. 2011AP2992-CRNM, unpublished op. and order (WI App Jan. 14, 2014) (***Alexander I***). The supreme court denied Alexander's petition for review.

On December 22, 2014, Alexander filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06, identifying multiple grounds for relief. By order of January 5, 2015, the circuit court denied his claims as procedurally barred. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (convicted person seeking to pursue a second or subsequent postconviction motion under § 974.06 must present a sufficient reason for failing to allege or adequately raise the issue in earlier litigation). Alexander moved to reconsider on February 2, 2015, arguing that his claims were not barred because our decision in ***Alexander I*** did not provide a satisfactory response to the concerns he raised in his response to the no-merit report. By order of February 4, 2015, the circuit court denied reconsideration. Alexander filed a second motion to reconsider on March 9, 2015, asserting that the circuit court should entertain his § 974.06 motion because the supreme court did not grant his petition for review of

Alexander I and never addressed the issues he wanted to present.[2] By order of March 11, 2015, the circuit court denied the motion.

On April 15, 2015, Alexander filed a circuit court document titled, in pertinent part, "notice of intent to pursue postconviction ... relief." The document reflected his intention to appeal the order of March 11, 2015. In due course, we entered an order construing Alexander's April 15, 2015 filing as a notice of appeal. Our order explained, however, that we could not confirm our jurisdiction over the appeal until we received the record. The matter thereafter proceeded to briefing and is now ready for disposition.

Although Alexander referenced only the March 11, 2015 order in his notice of appeal, the State recognizes that Alexander also seeks to appeal the orders entered on January 5, 2015, and February 4, 2015. The State does not challenge our jurisdiction to review any of the orders, but we have an obligation to resolve whether we have jurisdiction over an appeal. *See* ***Dyer v. Blackhawk Leather LLC***, 2008 WI App 128, ¶28, 313 Wis. 2d 803, 758 N.W.2d 167. We begin with that issue.

We lack jurisdiction to review the order of January 5, 2015, because Alexander did not file a timely notice of appeal from that order. With exceptions applicable only to terminations of parental rights and no-merit proceedings, the deadline for filing a notice of appeal cannot be extended unless the appeal is under WIS. STAT. RULE 809.30. *See* WIS. STAT. RULE 809.82(2)(b).

[2] The two-page motion Alexander filed on March 9, 2015, was titled "Motion to Grant Post-Conviction Motion Under Sec. 974.06." Notwithstanding that title, we agree with the State that the document was a motion to reconsider the decision that his claims are barred. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983) (requiring that we look beyond the label that a *pro se* prisoner selects for his or her submission).

A proceeding under WIS. STAT. § 974.06 is not governed by RULE 809.30 but instead is governed by the rules for civil appeals. *See* WIS. STAT. § 974.02(1); RULE 809.30(2)(L). A person who wants appellate review of an order denying relief under § 974.06 must therefore file a notice of appeal within the time limit—ninety days after entry of the order in this case—set forth in WIS. STAT. § 808.04(1). Thus, the deadline for Alexander to file a timely notice of appeal from the January 5, 2015 order lapsed on Monday, April 6, 2015. *See* RULE 809.82(1); WIS. STAT. §§ 801.15(1)(b); 808.04(1). Alexander filed his April 15, 2015 notice of appeal outside that deadline, and, accordingly, we lack jurisdiction over the January 5, 2015 order. *See* WIS. STAT. § 809.10(1)(e) (absent a timely notice of appeal, we lack jurisdiction over an appeal).

The April 15, 2015 notice of appeal was timely with respect to the orders denying reconsideration entered on February 4, 2015, and March 11, 2015, *see* WIS. STAT. § 808.04(1), but an order denying a motion to reconsider an earlier order is not necessarily appealable, *see* ***Harris v. Reivitz***, 142 Wis. 2d 82, 86, 417 N.W.2d 50 (Ct. App. 1987). There is no right to appeal an order denying a motion for reconsideration unless the motion raised issues that were not resolved by the order sought to be reconsidered. *See* ***id.*** at 86, 89-90. Whether a motion for reconsideration raised new issues presents a question of law for our *de novo* review. *See* ***State v. Edwards***, 2003 WI 68, ¶7, 262 Wis. 2d 448, 665 N.W.2d 136. When conducting that review, we liberally apply the '"new issues"' test. *See* ***id.***, ¶12 (citation omitted).

We are satisfied that the motions to reconsider, liberally construed, presented new issues not addressed in the original motion. While the original motion identified Alexander's substantive claims for postconviction relief, the reconsideration motions sought to refute the circuit court's conclusion that Alexander's claims are procedurally barred. Accordingly, Alexander's April 15, 2015 notice of appeal conferred appellate jurisdiction over the orders

denying reconsideration. We turn to whether the circuit court properly rejected Alexander's efforts on reconsideration to avoid a procedural bar to his claims.

"We need finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. Therefore, a convicted person may not pursue postconviction claims that could have been raised in a previous postconviction motion or appeal unless the person provides a '"sufficient reason"' for serial litigation. *See* ***id.*** at 181-82 (citing WIS. STAT. § 974.06(4)). "A no-merit appeal clearly qualifies as a previous motion under § 974.06(4)." ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124. Accordingly:

> when a defendant's postconviction issues have been addressed by the no merit procedure under WIS. STAT. RULE 809.32, the defendant may not thereafter again raise those issues or other issues that could have been raised in the previous motion, absent the defendant demonstrating a sufficient reason for failing to raise those issues previously.

State v. Tillman, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574. Before applying the rule of ***Escalona-Naranjo*** to postconviction motions filed after a no-merit appeal, however, we "consider whether the no-merit procedures (1) were followed; and (2) warrant sufficient confidence to apply the procedural bar." ***Allen***, 328 Wis. 2d 1, ¶62.

We have conducted an assessment of the no-merit proceedings underlying ***Alexander I*** and determined that appellate counsel and this court properly followed the procedures required by ***Anders*** and WIS. STAT. RULE 809.32. As our opinion in ***Alexander I*** reflects, we independently examined the record and reviewed the submissions from Alexander and his appellate counsel, then concluded that no basis existed for an arguably meritorious appeal. *See* ***id.***, unpublished op. and order at 2. In reaching our conclusion, we observed that appellate counsel's no-merit report was "very thorough," and we opined that appellate counsel's

representation of Alexander was "exemplary." ***Id.*** at 10. The proceedings unquestionably warrant confidence in the outcome of ***Alexander I***.

Alexander therefore may not pursue claims under WIS. STAT. § 974.06 unless he demonstrates a sufficient reason for serial litigation. *See* ***Allen***, 328 Wis. 2d 1, ¶61. We determine the sufficiency of Alexander's reasons by examining the four corners of his motions for reconsideration, not his appellate briefs. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

Alexander asserted in his February 2, 2015 reconsideration motion that he "did raise[] the same issues in the no-merit response as he [is] raising now in the postconviction motion." He argued that he was entitled to raise the issues again because this court did not address each of his claims. These contentions do not constitute a sufficient reason for serial litigation. This court is not required to write separately about every issue that might be distilled from the submissions presented in a no-merit proceeding. *See* ***State v. Foster***, 2014 WI 131, ¶63, 360 Wis. 2d 12, 856 N.W.2d 847. Rather, we are required to examine the record and determine whether it presents issues of arguable merit. *See* ***id.***, ¶¶62-63. We did so here.

Moreover, as demonstrated by our eleven-page opinion resolving ***Alexander I***, we extensively considered Alexander's potential claims. We additionally assured Alexander that, to the extent we had not addressed a specific point he raised, we had nonetheless considered it and concluded that no basis existed for further postconviction or appellate relief. *See* ***id.***, unpublished op. and order at 10. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding 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). Accordingly, Alexander's

contention that this court did not adequately discuss his claims in ***Alexander I*** fails to set forth a sufficient reason for serial litigation.

In the March 9, 2015 request for reconsideration, Alexander asserted he was entitled to bring an additional postconviction motion because the supreme court declined to grant his petition for review of ***Alexander I***. This assertion is wrong. Review by the supreme court rests entirely in its discretion, and the supreme court grants such review "only when special and important reasons are presented." ***State v. Minued***, 141 Wis. 2d 325, 327, 415 N.W.2d 515 (1987). When, as here, the supreme court denies review, our decision finally adjudicates the issues. *See* WIS. STAT. § 808.09. As we have already explained, a matter once litigated may not be relitigated in a subsequent postconviction proceeding.[3] *See* ***Witkowski***, 163 Wis. 2d at 990.

We also reject the suggestion, found in both the February and the March reconsideration motions, that Alexander is entitled to pursue relief under WIS. STAT. § 974.06 because his postconviction counsel was ineffective for failing to raise the claims that he now hopes to pursue. A defendant claiming ineffective assistance of counsel must make a two-prong showing both that the lawyer performed deficiently and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Alexander cannot make the required showing. We followed the no-merit procedure outlined in WIS. STAT. RULE 809.32, so Alexander received

[3] We add that the supreme court accepts only a select few cases for review. *See* Wisconsin Supreme Court Annual Statistical Report 2015-2016 Term, at 1-2, https://www.wicourts.gov/supreme/sc_statistical.jsp (last visited Jan. 12, 2017) (reflecting that in the 2015-16 term, the supreme court received 642 petitions for review and granted review in fifty cases, twenty-one of which were criminal matters). Consequently, we do not deem the supreme court's discretionary decision to deny review a sufficient reason for a second or subsequent postconviction motion. Were we to conclude otherwise, we would wholly undermine the policy favoring finality reflected in WIS. STAT. § 974.06.

review of the potential issues in his case. *See **Allen***, 328 Wis. 2d 1, ¶¶61-62 (explaining that, if the court of appeals follows the no-merit protocol, the defendant receives review of issues, whether or not they were expressly raised). Because we concluded that the potential issues lacked arguable merit, Alexander suffered no prejudice from any failure by his counsel to pursue those issues. *See **State v. Luedtke***, 2014 WI App 79, ¶28, 355 Wis. 2d 436, 851 N.W.2d 837 (attorney not ineffective for failing to raise meritless claims).

Upon the foregoing reasons,

IT IS ORDERED that the circuit court orders of February 4, 2015, and March 11, 2015, are summarily affirmed.

IT IS FURTHER ORDERED that Alexander's appeal of the January 5, 2015 order is dismissed for lack of jurisdiction.

Diane M. Fremgen
Clerk of Court of Appeals