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DISTRICT II

June 21, 2017

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

2015AP2180

State of Wisconsin v. Melvin L. Kellam (L.C. # 2005CF553)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Melvin L. Kellam 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. *See* WIS. STAT. RULE 809.21 (2015-16).¹ Because Kellam's postconviction claims are procedurally barred by WIS. STAT. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), we affirm.

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

Following a 2006 jury trial, Kellam was convicted of four felonies for which he received an aggregate bifurcated sentence totaling eighty years. We affirmed Kellam's judgment on direct appeal. *State v. Kellam*, No. 2007AP2452-CR, unpublished slip op. (WI App July 29, 2009). The Wisconsin Supreme Court denied Kellam's petition for review.

In 2010, Kellam filed a pro se WIS. STAT. § 974.06 postconviction motion asserting that his trial counsel should have objected to jurors who were allegedly sleeping during testimony and that postconviction counsel was ineffective for failing to raise this claim. The circuit court denied Kellam's motion, determining that Kellam failed to show ineffective assistance because the issue was raised and addressed at trial.

In 2012, Kellam filed another motion for postconviction relief grounded in the issue of the allegedly sleeping jurors. This time, he argued that his trial counsel was ineffective for failing to object to the judge's decision to leave the courtroom while the State played an expert witness's videotaped deposition. Kellam asserted that the judge's absence was prejudicial because if the judge had been present, he would have seen the allegedly sleeping jurors. The circuit court denied the motion without a hearing, determining Kellam previously litigated this claim in his 2010 postconviction motion. On appeal, we determined that Kellam's 2012 postconviction motion was procedurally barred under *Escalona-Naranjo* and affirmed the circuit court's order. *State v. Kellam*, No. 2012AP1411, unpublished op. and order at 3 (WI App May 15, 2013) (*Kellam II*).²

² We also rejected Kellam's appellate argument that his right to due process was violated when the judge left the courtroom, observing Kellam failed to first raise this claim in his postconviction motion.

Most recently, in 2015, Kellam filed a motion in the circuit court seeking to vacate his judgment of conviction as void. The circuit court denied the motion as procedurally barred under *Escalona-Naranjo*. On appeal, Kellam maintains that the circuit court lost jurisdiction over his case when the judge left the courtroom during the expert witness's videotaped testimony and presided over other circuit court matters.

We conclude that the circuit court properly denied Kellam's 2015 postconviction motion because all claims raised therein are procedurally barred. *See* WIS. STAT. § 974.06(4); *Escalona-Naranjo*, 185 Wis. 2d at 181-82 (successive motions and appeals are procedurally barred unless the defendant can show a sufficient reason why the newly alleged errors were not previously raised). Kellam acknowledges that his jurisdictional claim could have been raised in prior proceedings. He argues that jurisdictional issues cannot be waived or forfeited and that this constitutes a "sufficient reason" under *Escalona-Naranjo*. Alternatively, he contends that the circuit court lost jurisdiction by leaving the courtroom during his trial and that everything thereafter, including the entry of his judgment of conviction, was a nullity. From this proposition, he asserts that his direct appeal and successive postconviction proceedings were all void and cannot serve to procedurally bar his instant claims.

We disagree. None of Kellam's proffered explanations constitutes a legally cognizable sufficient reason for not including the jurisdictional claim in his prior postconviction motions or appeals. *See State v. Romero-Georgana*, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668 (we independently review whether a postconviction motion alleges a sufficient reason for failing to bring available claims earlier). Further, to the extent Kellam's jurisdictional arguments merely reframe his earlier claims made in prior proceedings, "[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).

Finally, the State requests that this court warn Kellam “that further attacks on his convictions will result in the Court imposing conditions restricting the circumstances under which Kellam may pursue appeals and that this Court will impose restrictions at least as severe as those imposed” in *State v. Casteel*, 2001 WI App 188, ¶¶25-26, 247 Wis. 2d 451, 634 N.W.2d 338 (where appellant filed a frivolous appeal after being warned that further frivolous litigation would result in sanctions, it was proper for this court to require that future filings be accompanied by an affidavit explaining why the appeal was not frivolous, and to refuse to accept any filing deemed to be frivolous). To the extent the State is asking this court to decide now that *Casteel* sanctions are appropriate and should be imposed if Kellam again unsuccessfully challenges his judgment, we decline to make such a determination. However, we advise Kellam that continued litigation on points previously addressed and rejected, if such litigation is deemed frivolous, may subject him to sanctions. *See id.*, ¶¶23-27. The State remains free to respond to further appeals of Kellam’s judgment with another request for specific and direct warnings or for the imposition of sanctions.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals