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August 28, 2017

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

| | |
|------------|---|
| 2016AP789 | State of Wisconsin v. E. P. Wallace (L.C. # 2004CF1192) |
| 2016AP1520 | State of Wisconsin v. E. P. Wallace (L.C. # 2004CF1192) |

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

E. P. Wallace, *pro se*, appeals from two orders of the circuit court. In appeal No. 2016AP789, Wallace challenges a March 2016 order denying his motion for the appointment of counsel. In appeal No. 2016AP1520, Wallace challenges a July 2016 order

denying his “notice/petition for redress.” We consolidate these matters for disposition and, based upon our review of the briefs and records, we conclude at conference that the cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ The orders are summarily affirmed.

On December 17, 2004, a jury convicted Wallace on one count of first-degree reckless homicide as party to a crime and one count of battery. On the homicide charge, which stemmed from the shooting death of Jerry Taylor, Wallace was sentenced to twenty-two years’ initial confinement and eight years’ extended supervision.² He had a direct appeal, which he lost. *See State v. Wallace*, No. 2006AP2031-CR, unpublished slip op. (WI App July 29, 2008).

In December 2009, Wallace filed a *pro se* motion under WIS. STAT. § 974.06 (2009-10). The motion was denied,³ and Wallace appealed. One of the issues on appeal was whether trial counsel was ineffective when he failed to “present evidence that the victim, Taylor, told officers that a man named Von had shot him[.]” *See State v. Wallace*, No. 2010AP768, unpublished slip op. (WI App Feb. 15, 2011). We affirmed the circuit court’s order, explaining that there was no reasonable probability of a different result even if Taylor’s statement to police about the shooter’s identity had been introduced. *See id.*, ¶¶17-26. In short, “Von” was Wallace’s brother, there was evidence both men had been at Taylor’s apartment during the shooting, and Wallace had been charged as a party to a crime.

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

² The Honorable Elsa C. Lamelas imposed Wallace’s sentence.

³ The Honorable Rebecca F. Dallet denied Wallace’s December 2009 motion.

Wallace filed another postconviction motion in October 2013, claiming a new factor because the trial court had been unaware of Taylor’s statement to police about the shooter’s identity. The circuit court denied the motion because the issue of Taylor’s statement had been raised in the prior motion and rejected by both the circuit court and the court of appeals.⁴ Wallace did not appeal that order.

In March 2016, Wallace filed a motion asking the circuit court to appoint him counsel under WIS. STAT. ch. 977 so as to “help bring forth the actual issues of [Wallace’s] innocence.” On March 28, 2016, the circuit court denied the motion, explaining that ch. 977⁵ does not confer the power to appoint counsel upon the circuit court.⁶

Wallace then filed a *pro se* notice of appeal in which he indicated that he was appealing a January 2010 order denying his WIS. STAT. § 974.06 motion. By order dated May 26, 2016, this court explained that we had no jurisdiction over the January 2010 order—aside from Wallace’s prior appeal of that order, the 2016 notice of appeal was untimely as to the 2010 order. We noted, however, that we had jurisdiction to review the order denying the motion to appoint counsel, so our order stated that “the appeal is limited to [the] issue decided by the March 28, 2016 order.”⁷

⁴ The Honorable Stephanie G. Rothstein denied Wallace’s October 2013 motion.

⁵ WISCONSIN STAT. ch. 977 is entitled “State public defender.”

⁶ The Honorable Thomas J. McAdams denied Wallace’s March 2016 motion.

⁷ Wallace was invited to dismiss the appeal if he did not wish to challenge the order denying the motion to appoint counsel.

In July 2016, Wallace filed a “notice/petition for redress” in the circuit court. He alleged, in relevant part, that “he was deprived of his Constitutional rights to a fair trial when ‘both’ sides failed to present to the jury at the time of trial, the statement’s of the decease ... about who shot him.” The circuit court denied the motion,⁸ noting that the issue of Taylor’s statements had been raised in the 2009 WIS. STAT. § 974.06 motion and, thus, Wallace was “precluded from relitigating this issue in another motion, however it may be labeled.”⁹ Wallace appeals.

Appeal No. 2016AP789

Our May 26, 2016 order specified that appeal No. 2016AP789 was limited to the issue decided by the March 28, 2016 order—that is, the circuit court’s denial of the motion to appoint counsel under WIS. STAT. ch. 977. On appeal, Wallace does not address the order in any fashion, nor does he refute the State’s claim that he has abandoned the issue. We agree with the State that Wallace has abandoned any challenge to the order denying the motion to appoint counsel. *See Reiman Assocs., Inc. v. R/A Advert., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

Appeal No. 2016AP1520

Wallace believes we should utilize our power of discretionary reversal because the issue of the identity of Taylor’s shooter was not fully tried if his statement to police was never introduced at trial. Aside from the fact that our discretionary reversal power under WIS. STAT.

⁸ Judge McAdams also denied this motion.

⁹ Contrary to the representation in Wallace’s reply brief in appeal No. 2106AP1520, the circuit court did not deny his petition “because Wis. Stat., 752.35 could only be brought in the Court of Appeals.”

§ 752.35 is not available in a collateral challenge such as this, *see State v. Allen*, 159 Wis. 2d 53, 55-56, 464 N.W.2d 426 (Ct. App. 1990), Wallace has already raised, litigated, and lost the issue of Taylor's statement at least twice before. He is precluded from raising the issue yet again.

It is irrelevant that Wallace has attempted to frame his current challenge as a First Amendment issue: the right "to petition the Government for a redress of grievances" does not impose a burden on the government to consider or respond to the petition. *See We the People Found., Inc. v. United States*, 485 F.3d 140, 143 (D.C. Cir. 2007). More to the point, "[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).

Upon the foregoing, therefore,

IT IS ORDERED that appeal Nos. 2016AP789 and 2016AP1520 are consolidated for disposition. *See* WIS. STAT. RULE 809.10(3).

IT IS FURTHER ORDERED that the orders appealed from are summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals