OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

October 31, 2017

To:

Hon. M. Joseph Donald
Milwaukee County Courthouse
821 W State Street
Milwaukee, WI 53233

Jacob J. Wittwer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John Barrett, Clerk
Milwaukee County Courthouse
821 W. State Street
Milwaukee, WI 53233

Kenneth Fowler #084903
Jackson Corr. Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

Karen A. Loebel
Asst. District Attorney
821 W. State Street
Milwaukee, WI 53233

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

2016AP2273 State of Wisconsin v. Kenneth Fowler
(L.C. # 1997CF974685)

Before Brennan, P.J., Kessler and Dugan, 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).

Kenneth Fowler, *pro se*, appeals from a trial court order denying his WIS. STAT. § 974.06 (2015-16) postconviction motion without a hearing.[1] We conclude at conference that this matter

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

is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We agree with the trial court that Fowler's motion is procedurally barred. Therefore, we summarily affirm.

This is the third time Fowler has filed an appeal related to this case. The following is a brief summary of prior litigation. Additional details are available in our previous decisions and we will not repeat them here.

In 1998, Fowler entered ***Alford*** pleas to two felonies he committed in 1997: burglary and kidnapping. *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). Although Fowler sought to withdraw his pleas prior to sentencing, his motion was denied and he was sentenced to two consecutive terms of forty years of imprisonment.

Represented by postconviction counsel, Fowler again moved to withdraw his pleas. He argued that he was the victim of prosecutorial vindictiveness and that when he entered his pleas, he was not aware the jury would have to be unanimous to convict him. He also argued that his trial counsel provided ineffective assistance by failing to do any of the following: object to the prosecution's conduct, raise the issue of Fowler's competence, arrange for a defense expert on Fowler's competence, inform the trial court about Fowler's illiteracy, timely review the presentence investigation ("PSI") report with Fowler, and point out inaccuracies in that PSI report. Fowler argued in the alternative that he was entitled to sentence modification based on "two major and material inaccuracies" in the PSI report and the trial court's disbelief of Fowler's claimed illiteracy.

The trial court conducted a ***Machner*** hearing at which trial counsel, Fowler, one of Fowler's fellow inmates, and a psychologist testified.[2] The testimony addressed a variety of issues, including: Fowler's understanding of his right to a unanimous verdict, whether Fowler was told he was likely to receive probation, whether Fowler was competent to proceed, and whether Fowler suffered from intellectual deficiencies. The trial court rejected Fowler's challenges to his pleas, concluded that trial counsel had not provided ineffective assistance, and declined to modify Fowler's sentence. Fowler appealed the denial of his postconviction motion. We affirmed the judgment and order. *See* ***State v. Fowler***, No. 2000AP2292-CR, unpublished slip op. (WI App Sept. 5, 2001).

In 2010, Fowler filed several *pro se* motions seeking sentence modification or relief pursuant to WIS. STAT. § 974.06.[3] His motions were denied. He appealed, raising seven issues:

> First, that the sentencing court had no authority to impose a consecutive sentence under WIS. STAT. § 973.15(1). Second, that the sentencing court failed to consider the felony sentencing guidelines or provide its reasoning for departing from them. Third, that the prosecutor and the presentence report writer provided the sentencing court with erroneous information about Fowler's prior record. Fourth, that the prosecutor breached the plea agreement. Fifth, that the sentencing court improperly considered his juvenile record. Sixth, that the Department of Corrections used his juvenile record for sex offender treatment purposes. And seventh, that his convictions were multiplicitous.

[2] The Honorable Elsa C. Lamelas presided over the ***Machner*** hearing and decided the postconviction motion. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). The Honorable Laurence C. Gram accepted Fowler's pleas and sentenced him.

[3] The Honorable Rebecca F. Dallet denied the motions Fowler filed in 2010 and 2012.

See ***State v. Fowler***, No. 2010AP2251-CR, unpublished slip op. ¶5 (WI App Nov. 22, 2011). We concluded that some of his arguments were procedurally barred and rejected others on their merits. *See* ***id.***, ¶¶7-13.

In 2012, Fowler filed another *pro se* WIS. STAT. § 974.06 motion. He sought to withdraw his pleas on grounds that they were not knowingly, intelligently, and voluntarily entered. He asserted that he entered his pleas based on the mistaken belief that he would not have to undergo sexual offender programming in prison.[4] Fowler argued that there was a "sufficient reason" he did not previously raise this issue: the ineffectiveness of trial counsel and postconviction counsel. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) (A defendant who has had a direct appeal or other postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding unless there is a "sufficient reason" for failing to raise it earlier.) (emphasis omitted). The trial court denied the motion on grounds that Fowler failed to provide a sufficient reason for not raising his claims in prior litigation. Fowler did not appeal.

In 2016, Fowler filed the *pro se* WIS. STAT. § 974.06 motion that is currently before this court.[5] At the outset, the motion recognized that because Fowler had already pursued postconviction motions, he had to provide a "sufficient reason" for raising additional issues. *See* ***Escalona-Naranjo***, 168 Wis. 2d at 185 (emphasis omitted). The motion argued that Fowler's

[4] At the time Fowler decided to enter a plea agreement with the State, he was facing one count of first-degree sexual assault and one count of second-degree sexual assault. Pursuant to the plea agreement, the sexual assault charges were dismissed.

[5] The Honorable M. Joseph Donald denied the motion at issue in this appeal.

intellectual deficiencies and continuing lack of competence were sufficient reasons. The motion asserted that the ineffective assistance of trial counsel and postconviction counsel provided another sufficient reason. For instance, Fowler argued that postconviction counsel provided ineffective assistance by not alleging that trial counsel performed deficiently by "misinform[ing]" Fowler about "the construction and consequences" of his pleas and "encourag[ing] him to enter into the plea[s] under false pretenses."

The motion advanced several arguments in support of Fowler's request to vacate his pleas and have a trial. For instance, it asserted that the plea colloquy was insufficient, that Fowler's pleas were not knowingly, intelligently, and voluntarily entered, and that Fowler was not adequately informed of the potential for WIS. STAT. ch. 980 consequences.

The trial court denied the motion on grounds that it was procedurally barred. Whether a defendant's WIS. STAT. § 974.06 motion is procedurally barred is a question of law that appellate courts review *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). We agree with the trial court that Fowler's claims are procedurally barred.

First, to the extent Fowler is attempting to raise issues that were already raised and rejected in past litigation, his motion fails. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). As the litigation history outlined above demonstrates, Fowler has raised several issues multiple times, sometimes with counsel and sometimes *pro se*. He cannot relitigate those issues. *See* ***id.***

Second, to the extent Fowler is attempting to raise new issues, he is procedurally barred from doing so unless he identifies a "sufficient reason" for failing to raise the issues in his prior

postconviction motions.[6] *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185 (emphasis omitted). Fowler's motion asserts that his illiteracy, his incompetence, and the ineffective assistance of his postconviction counsel and trial counsel provide sufficient reasons. We are not persuaded. Fowler's claims about his competency and illiteracy have already been litigated and decided against Fowler, and we are not convinced that they provide a sufficient reason to overcome the ***Escalona-Naranjo*** bar. In addition, Fowler's claim that his postconviction counsel should have alleged trial counsel ineffectiveness is not a sufficient reason because Fowler filed *pro se* motions in 2010 and 2012 and has not offered a sufficient reason for not raising his new issues in those motions. We conclude that Fowler has not demonstrated a sufficient reason for not previously raising the issues outlined in his 2016 motion and, therefore, his new issues are procedurally barred.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Diane M. Fremgen
Clerk of Court of Appeals

[6] It is not clear whether Fowler's motion raises new issues. For instance, the fact that he might be subject to a WIS. STAT. ch. 980 petition in the future was mentioned in his 2010 motion. However, even if we assume that Fowler's claims about the inadequacy of his pleas and the plea colloquy raise new issues that were not previously addressed, Fowler is barred from litigating those issues because he has not provided a sufficient reason for not raising them in past motions.