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January 8, 2018

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

2017AP796 State of Wisconsin v. Toni J. Toston (L.C. # 2001CF1184)

Before Sherman, Kloppenburg and Fitzpatrick, 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).

Toni Toston, pro se, appeals from a circuit court order denying his postconviction motion to withdraw his guilty pleas to charges of armed robbery, attempted armed robbery, and attempted homicide, all as a party to a crime. Toston argues that the plea colloquy was insufficient because the circuit court did not adequately explain party-to-a-crime liability. 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 Toston is procedurally barred from raising this claim, we affirm.

Toston was charged with several offenses following a robbery and a subsequent attempted robbery at a fast food restaurant in 2001. As noted above, Toston pleaded guilty to three offenses, all as a party to a crime. At the plea hearing, Toston confirmed that he had reviewed the jury instructions for each offense with his attorney, as well as the party-to-a-crime jury instruction, and that he understood the nature of each offense. The circuit court accepted Toston's guilty pleas and sentenced him to a total of forty-five years, including thirty-two years of initial confinement and thirteen years of extended supervision. Toston filed a postconviction motion seeking resentencing, but the circuit court denied this motion and we affirmed. Toston's conviction became final after the supreme court denied his petition for review in 2004.

Since that first unsuccessful challenge to his sentence, Toston has filed several additional postconviction motions. In each instance, Toston sought to withdraw his pleas on the ground that they were not made knowingly and voluntarily. Each motion was denied as procedurally barred. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) (a claim for relief that could have been made on direct appeal or in an earlier postconviction motion is procedurally barred unless there is a sufficient reason for not raising it previously).

In his most recent postconviction motion, Toston argues that he had a sufficient reason for not raising this particular claim for plea withdrawal in his first postconviction motion. Specifically, he contends that in 2007 our supreme court announced a new rule regarding the

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

circuit court's duty to ensure that a defendant who is pleading guilty understands the nature of party-to-a-crime liability. *See* ***State v. Howell***, 2007 WI 75, ¶¶37-48, 301 Wis. 2d 350, 734 N.W.2d 48. Toston further contends that the holding in ***Howell*** represents a "watershed rule of criminal procedure" and, as such, he has a sufficient reason for not raising it in his first postconviction motion.

Toston's attempts to argue around the procedural bar of ***Escalona-Naranjo*** go nowhere. In 2010, Toston filed a postconviction motion seeking plea withdrawal. Assuming for the sake of argument that the holding in ***Howell*** did provide Toston with a new basis for withdrawing his guilty pleas, Toston still needs to overcome the procedural bar of ***Escalona-Naranjo*** with respect to his 2010 motion.

We see no argument from Toston that he had a sufficient reason for not raising this issue in his 2010 postconviction motion. Instead, he contends that he did argue these issues in that 2010 motion. However, we see no indication in Toston's 2010 motion that he sought plea withdrawal on the ground that the plea colloquy was defective. Instead, Toston argued that his pleas were not knowing and voluntary because the prosecution withheld exculpatory evidence in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963).

As best we can tell, Toston first raised the issue of a defective plea colloquy in his 2011 postconviction motion, in which he presented an argument for plea withdrawal that is almost

identical to the argument he makes in his current motion.[2] The circuit court denied his 2011 postconviction motion as procedurally barred under ***Escalona-Naranjo***, and we affirmed.

The same procedural bar applies to Toston's current motion. Because Toston did not raise the issue of a defective plea colloquy in his 2010 motion for plea withdrawal, his argument that he could not have brought this type of claim prior to 2007 does not allow him to circumvent the procedural bar of ***Escalona-Naranjo***. Accordingly, we affirm the circuit court's order denying Toston's motion to withdraw his pleas.

Upon the foregoing reasons,

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

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

Diane M. Fremgen
Acting Clerk of Court of Appeals

[2] Toston's 2011 postconviction motion focused on the same argument he presents here, namely, that the circuit court did not adequately advise Toston regarding party-to-a-crime liability. That 2011 motion cites ***State v. Howell***, 2007 WI 75, 301 Wis. 2d 350, 734 N.W.2d 48. Thus, Toston's current motion suffers from the additional flaw that he is trying to relitigate issues that we have already rejected. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 992, 473 N.W.2d 512 (Ct. App. 1991) (affirming the denial of a postconviction motion because "attempts to rephrase or re-theorize [a] previously-litigated challenge are of no avail").