



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/II

January 17, 2018

To:

Hon. William Sosnay
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room G-8
901 N. 9th Street
Milwaukee, WI 53233

Thomas J. Balistreri
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

D. L. #05095-089
Legal Mail
P.O. Box 444
Otisville, NY 10963

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

2016AP1449

State of Wisconsin ex rel. D. L. v. State of Wisconsin
(L.C. # 2015CV4131)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

D.L. appeals pro se from a circuit court order denying his petition for a writ of habeas corpus challenging his 1991 convictions for armed robbery and first-degree intentional homicide. Based upon our review of the briefs and record, we conclude at conference that this case is

appropriate for summary disposition. WIS. STAT. RULE 809.21 (2015-16).¹ We agree with the circuit court that D.L.'s habeas claims were either procedurally barred or without a basis in law or fact. We affirm.

In a 1993 appeal, *State v. David Lozano, Jr.*, No. 1992AP1724-CR, unpublished op. and order (WI App Jul. 19, 1993) (*Lozano I*), we rejected D.L.'s challenge to the sufficiency of the evidence to convict him of first-degree intentional homicide and his challenge to testimony about the origin and location of the gunshot wound to the victim's head. In 1997, D.L. sought WIS. STAT. § 974.06 relief alleging ineffective assistance of appellate counsel for not raising certain issues in his direct appeal. We affirmed the circuit court's order denying § 974.06 relief because the issues D.L. raised were barred for lack of a sufficient reason for not raising them in prior proceedings. *State v. David Lozano, Jr.*, No. 1997AP1667, unpublished op. and order (WI App Dec. 15, 1998) (*Lozano II*). In 2005, D.L. filed a petition for a writ of habeas corpus in this court under *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), alleging ineffective assistance of appellate counsel. We denied the petition because D.L. offered no reason for failing to raise this claim earlier and because a variation on this claim had been raised and rejected in D.L.'s 1993 and 1997 proceedings. *State ex rel. David Lozano, Jr. v. Wisconsin Dep't. of Corrections*, No. 2005AP3063-W, unpublished op. and order (WI App Jun. 16, 2008) (*Lozano III*).

We turn to the matter before us: D.L.'s appeal from the circuit court's denial of his May 2015 petition for a writ of habeas corpus. In that petition, D.L. raised three claims, as discussed

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

below. The circuit court denied the petition because the claims were either procedurally barred or lacked a basis in law or fact.

Whether a claim is procedurally barred presents a question of law that we decide de novo.

State v. Tillman, 2005 WI App 71, ¶14, 281 Wis. 2d 157, 696 N.W.2d 574.

[A]ll claims of error that a criminal defendant can bring should be consolidated into one motion or appeal, and claims that could have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason for why the claims were not raised on direct appeal or in a previous § 974.06 motion.

State v. Lo, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756 (discussing *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994)). We applied the *Escalona-Naranjo* bar in *Lozano II* and *III*. This procedural bar also applies to habeas petitions. *State v. Pozo*, 2002 WI App 279, ¶9, 258 Wis. 2d 796, 654 N.W.2d 12. Additionally, a matter once litigated may not be relitigated in a subsequent request for postconviction relief no matter how artfully it may be rephrased. See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

We address D.L.'s three habeas claims. First, D.L. argued that his trial and appellate counsel were ineffective. The circuit court deemed these claims barred under *Escalona-Naranjo* after considering D.L.'s prior assertions of ineffective assistance of counsel and his failure to offer any reason for not raising all aspects of his ineffective assistance claims in prior proceedings. We agree with the circuit court that these claims are barred. *Pozo*, 258 Wis. 2d 796, ¶9.

Second, D.L. argued that the State failed to correct a witness's false trial testimony about the origin and location of the gunshot wound to the victim's head, and his counsel was ineffective in relation to that matter. The circuit court rejected this claim because a slight variation on this claim was rejected in *Lozano I. Lozano I*, unpublished op. and order at 5-6. We agree with the circuit court that this claim was previously litigated. A matter once litigated may not be relitigated in a subsequent postconviction motion no matter how artfully the issue may be rephrased. *Witkowski*, 163 Wis. 2d at 990.

Third, relying on *Miller v. Alabama*, 567 U.S. 460 (2012), D.L. argued that his life sentence was an Eighth Amendment violation because he was a juvenile when he was sentenced. The circuit court rejected this claim because *Miller* does not apply. We agree. In *Miller*, the Supreme Court held that it was an Eighth Amendment violation to sentence a juvenile to life in prison without the possibility of parole. *Id.* at 479. Here, D.L. received a life sentence with the possibility of parole in 2025 (around the time of his fiftieth birthday).² D.L.'s Eighth Amendment claim lacks factual and legal support.

For the reasons stated, we affirm the circuit court's denial of D.L.'s habeas petition.³

Upon the foregoing reasons,

² In *State v. D.L.*, No. 2012AP2329-CR, unpublished slip op. (WI App Nov. 13, 2013), we affirmed a circuit court order denying D.L.'s motion for sentence modification due to new factors.

³ To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. See *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

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.

Diane M. Fremgen
Acting Clerk of Court of Appeals