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DISTRICT I

June 13, 2018

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

2017AP1421 State of Wisconsin v. Darryl Tucker (L.C. #2001CF006394)

Before Brennan, Brash 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).

Darryl Tucker, *pro se*, appeals from a circuit court order denying his WIS. STAT. § 974.06 (2015-16) postconviction motion without a hearing.[1] Based on our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See*

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. The Honorable John DiMotto presided over Tucker's plea and sentencing hearings. The Honorable Jeffrey A. Conen issued the decision and order denying the postconviction motion at issue on appeal.

WIS. STAT. RULE 809.21. We further conclude ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), applies to procedurally bar Tucker's claims. Therefore, we summarily affirm.

Background

In 2001, the State charged Tucker with two counts of second-degree sexual assault of a child. During the course of the proceedings, Tucker filed a motion to compel discovery of, among other things, any previous accusations of sexual assault by the victims. At the final pretrial hearing, the State indicated that it was trying to track down information in its possession related to Tucker's discovery request, but had not been able to find any responsive documents.

One week later, Tucker signed a plea agreement and waiver of rights indicating his intent to plead guilty to the charges. At the plea hearing, the State informed the circuit court that Tucker had agreed to enter guilty pleas, and in exchange, the State had agreed to forgo issuing "additional charges involving the defendant's ongoing sexual abuse of [the victims]." Tucker agreed with the State's representation of the plea agreement, and, after telling the court that he understood the nature of the second-degree sexual assault charges and the possible penalties, he entered guilty pleas. The circuit court accepted his guilty pleas and imposed consecutive sentences totaling twenty-five years of imprisonment.

Tucker's appellate counsel subsequently filed a no-merit report to which Tucker responded. After reviewing the submissions and the record, this court upheld Tucker's convictions. *See* ***State v. Tucker***, No. 2002AP3130-CRNM, unpublished op. and order (WI App June 9, 2003) (***Tucker I***). The Wisconsin Supreme Court denied Tucker's petition for review on October 1, 2003.

In the years that followed, Tucker, *pro se*, filed multiple postconviction motions and petitions for writs of habeas corpus, all of which have been denied. *See, e.g.*, ***State ex rel. Tucker v. Tegels***, No. 2011API527-W, unpublished op. and order (WI App Mar. 1, 2012) (***Tucker II***). In 2014, this court affirmed an order denying Tucker's second motion for sentence modification. *See* ***State v. Tucker***, No. 2013AP1130-CR, unpublished op and order (WI App May 7, 2014) (***Tucker III***).

In the motion underlying this appeal, filed fifteen years after he was convicted, Tucker, *pro se*, moved for postconviction discovery and inspection. Tucker additionally sought to withdraw his pleas based on his allegation that the State withheld exculpatory evidence that he requested in his pretrial discovery motion—namely, purported evidence that the two victims made prior accusations of sexual assault. The postconviction court concluded that Tucker was not entitled to posconviction discovery and denied the motion for plea withdrawal after concluding it was barred. As to the plea withdrawal motion, the postconviction court noted, "[t]here is absolutely no reason why this issue couldn't have been raised previously in one of the defendant's prior motions."

Discussion

The postconviction procedures of WIS. STAT. § 974.06 allow a defendant to attack his conviction after the time for appeal has expired. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 176. There is, however, a limitation: an issue that could have been raised on direct appeal or by prior motion is barred from being raised in a subsequent postconviction motion absent a sufficient reason for not raising the issue earlier. *See* ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. Allowing "[s]uccessive motions and appeals, which all could have been brought at

the same time" is prohibited by § 974.06 and ***Escalona-Naranjo***, which teaches that "[w]e need finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185.

"A no-merit appeal clearly qualifies as a previous motion under [WIS. STAT.] § 974.06(4)." ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124. Accordingly:

> when a defendant's postconviction issues have been addressed by the no merit procedure under WIS. STAT. RULE 809.32, the defendant may not thereafter again raise those issues or other issues that could have been raised in the previous motion, absent the defendant demonstrating a sufficient reason for failing to raise those issues previously.

State v. Tillman, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574. Before applying the rule of ***Escalona-Naranjo*** to postconviction motions filed after a no-merit appeal, however, we "consider whether the no-merit procedures (1) were followed; and (2) warrant sufficient confidence to apply the procedural bar[.]" ***Allen***, 328 Wis. 2d 1, ¶62.

Tucker does not suggest impropriety during the no-merit proceedings. *See* ***id.***, ¶83 ("The defendant has the burden of proof in a [WIS. STAT.] § 974.06 motion."). The State argues that the no-merit procedures were in fact followed and that application of the procedural bar is warranted. Tucker did not file a reply and accordingly conceded this point. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

Even if we set aside Tucker's concession, he needed to present a sufficient reason for not raising his current claims earlier to avoid the procedural bar. The closest Tucker came to doing so in his postconviction motion was his allegation that his trial counsel was ineffective.

He argued that his trial counsel was ineffective for failing to recognize what Tucker believes was a discovery violation by the State and asserts that if trial counsel had pursued the issue, there was a strong chance Tucker would not have pled guilty. Tucker posited: the postconviction court "must acknowledge the plain ineffectiveness displayed by trial counsel as being the root cause of the defendant's failure to bring this issue in a prior postconviction motion, and that it provides more than enough sufficient reason to allow [his] plea[s] to be withdrawn[.]" (Bolding and uppercasing omitted.) On appeal, he deviates from this approach and instead argues as a sufficient reason for avoiding the procedural bar that his postconviction attorney "abandoned" the issue by filing a no-merit appeal instead of pursuing a postconviction motion on Tucker's behalf. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (Postconviction counsel's ineffectiveness may, in some circumstances, constitute a sufficient reason for serial litigation.).

Tucker was capable of making these specific arguments as to trial counsel and postconviction counsel's ineffectiveness regarding the disclosure of evidence of alleged previous accusations by the victims in his response to the no-merit report or in his multiple other postconviction motions and filings.[2] *See, e.g.,* ***Allen***, 328 Wis. 2d 1, ¶87 ("Allen's motion does not allege a reason why the failure of postconviction counsel to bring a postconviction motion prevented him from raising the issue in a response to the no-merit report."). The same is true of his claim for postconviction discovery. Defendants may not bifurcate postconviction litigation

[2] Indeed, in our opinion and order resolving the no-merit appeal, we noted that "Tucker's response articulates nonspecific dissatisfaction with trial counsel, appellate counsel, the procedural errors that flawed the proceedings below, and the sentences imposed. His response does not identify any appellate issues beyond those raised in the no-merit report." ***Tucker I***, No. 2002AP3130-CRNM, unpublished op. and order at 2 (WI App June 9, 2003).

into procedural and substantive motions to avoid the procedural bar.[3] ***State v. Kletzien***, 2011 WI App 22, ¶¶8-17, 331 Wis. 2d 640, 794 N.W.2d 920. He failed to make the arguments he now raises; consequently, Tucker's claims are procedurally barred.

Therefore,

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.

Sheila T. Reiff
Clerk of Court of Appeals

[3] As to Tucker's demand for postconviction discovery and inspection, the postconviction court held that he was not entitled to discovery at this stage in the proceedings. We will affirm the posconviction court if it reached the correct result, even if this court employs different reasoning. *See* ***State v. Thames***, 2005 WI App 101, ¶10, 281 Wis. 2d 772, 700 N.W.2d 285.