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

July 11, 2018

To:

Hon. M. Joseph Donald
Circuit Court Judge
Felony Division
821 W. State St., Rm. 506
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Jeffrey J. Kassel
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

Darrell Lemont Otis
4174 N. 92nd St. - Lower
Milwaukee, WI 53222-1616

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

2016AP2456 State of Wisconsin v. Darrell Lemont Otis (L.C. # 2005CF2329)

Before Kessler, P.J., Brennan 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).

Darrell Lemont Otis, *pro se*, appeals an order denying his motion to vacate his sentences for two of six convictions on the ground that the sentences violate the constitutional prohibition against *ex post facto* application of the law. Specifically, he claims that the sentences run afoul of the bar against imposing a greater punishment for a crime than the law allowed when the crime was committed. Based upon our review of the briefs and record, we conclude at

conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm.

In June 2005, the State filed an amended information charging Otis with six crimes: two counts of repeated sexual assault of the same child younger than sixteen years old (counts one and six); two counts of sexual intercourse with a child age sixteen or older (counts two and four); and two counts of second-degree sexual assault by use of force or violence (counts three and five). In October 2005, a jury found him guilty as charged. He filed a direct appeal with the assistance of counsel, and we affirmed. *See* ***State v. Otis***, No. 2006AP2194-CR, unpublished slip op. (WI App Sept. 20, 2007). Otis went on to pursue a series of collateral attacks on his convictions, and our resolution of the instant appeal requires us to provide an overview of that collateral litigation.

In April 2009, Otis filed a motion *pro se* seeking postconviction relief under WIS. STAT. § 974.06 (2009-10). As relevant here, his claims involved challenges to his convictions of the charges alleged in count one and count six of the amended information. In count one, the State charged Otis with violating WIS. STAT. § 948.025(1)(b)[2]—prohibiting repeated sexual assault of the same child younger than sixteen years old—during the period between June 1, 2001, through June 18, 2003. In count six, the State charged Otis with violating § 948.025(1)(b) during the

[1] Several versions of the Wisconsin statutes are cited in this opinion and will be identified as appropriate.

[2] The amended information did not identify the applicable version of WIS. STAT. § 948.025(1)(b) referenced.

period from August 1998 through December 2001. Otis complained that his convictions for these counts violated the prohibition against *ex post facto* application of the law because "sub. (1)(b) was not ... effective until February 1, 2003." He subsequently abandoned this motion when the public defender determined that his case met the criteria for the appointment of counsel.

In November 2009, Otis, by counsel, moved the circuit court for postconviction relief pursuant to WIS. STAT. § 974.06 (2009-10).[3] His challenges turned on the sufficiency of the evidence. The circuit court denied the motion, and Otis appealed.[4] We rejected his claims. *See* ***State v. Otis***, No. 2010AP589, unpublished slip op. (WI App Feb. 1, 2011).

In August 2015, Otis, once again *pro se*, moved to correct the judgment of conviction as to count one. He complained that the judgment incorrectly described a violation of WIS. STAT. § 948.025(1)(b) as a Class B felony when the crime he committed was actually a Class C felony. *See* WIS. STAT. § 948.025(1)(b) (2003-04). The circuit court agreed with Otis and amended the judgment of conviction accordingly. The circuit court went on to observe, however, that the judgment of conviction designated the crime of conviction in count six as a violation of WIS. STAT. § 948.025(1)(b) and a Class C felony; the circuit court then concluded that both designations were incorrect. The circuit court explained that from August 1998 through

[3] All subsequent references to WIS. STAT. § 974.06 are to the 2015-16 version.

[4] Otis also filed an unsuccessful petition in this court challenging the effectiveness of his appellate counsel. *See* ***State ex rel. Otis v. Pollard***, No. 2010AP1137-W, unpublished slip op. (WI App Feb. 1, 2011).

December 2001, the period during which Otis committed the crime charged in count six, the legislature codified the crime as a violation of WIS. STAT. § 948.025(1)—not § 948.025(1)(b)—and classified the crime as a Class B felony.[5] Accordingly, on October 1, 2015, the circuit court entered an amended judgment of conviction reflecting that Otis was convicted in count six of violating § 948.025(1), a Class B felony. Otis did not appeal.

In July 2016, Otis filed a *pro se* motion seeking a hearing to "address the inadequacies in the current [judgment of conviction] dated October 1, 2015." He alleged that the circuit court lacked authority to enter the amended judgment and that he had a constitutional due process right "to be present with his attorney to challenge the court's discretion." By order of August 3, 2016, the circuit court denied relief. Otis did not appeal.

In October 2016, Otis filed the motion underlying the instant appeal, seeking to vacate his sentences as to counts one and six on the ground that those sentences violate the constitutional prohibition against *ex post facto* application of the law.[6] *See* WIS. CONST. art. I, § 12, and U.S. CONST. art. I, § 10. As to count six, he said he was convicted of committing the underlying acts of repeated sexual assault of a child during the period from August 1998 through December 2001, but was sentenced under the determinate sentencing provisions that went into effect on

[5] *See* WIS. STAT. § 948.025(1) (1997-98), WIS. STAT. § 948.025(1) (1999-2000), WIS. STAT. § 948.025(1) (2001-02).

[6] For Otis's convictions in counts one and six, the sentencing court imposed consecutive fourteen-year terms of imprisonment, both bifurcated as six years of initial confinement and eight years of extended supervision.

December 31, 1999, after the charging period began.[7] As to both count one and count six, he alleged that he was convicted for violations of WIS. STAT. § 948.025(1)(b) but, he said, that statute took effect on February 1, 2003, after the charging periods began and "after the last alleged act was to have taken place [sic]." The circuit court determined that his claims were procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Otis appeals.

WISCONSIN STAT. § 974.06 is the mechanism for a convicted prisoner to raise constitutional and jurisdictional claims after the time for a direct appeal has passed. *See* ***State v. Henley***, 2010 WI 97, ¶¶52-53, 328 Wis. 2d 544, 787 N.W.2d 350. As the supreme court long ago explained, however, "[w]e need finality in our litigation." *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. Therefore, all grounds for relief must be included in a convicted person's original, supplemental, or amended postconviction motion. *See* ***id.*** at 181. Additional claims under § 974.06 are barred unless the person offers a sufficient reason for failing to allege or adequately raise the claims in the prior proceeding. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

Otis did not invoke WIS. STAT. § 974.06 in his October 2016 postconviction motion. Instead, he cited the circuit court's inherent sentencing authority. Courts are required, however, to look beyond the label that an incarcerated person applies to pleadings to determine if the person is entitled to relief. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384

[7] On December 31, 1999, 1997 Wis. Act 283 went into effect, abolishing parole and establishing a determinate sentencing structure. *See* ***State v. Ninham***, 2011 WI 33, ¶42 n.10, 333 Wis. 2d 335, 797 N.W.2d 451.

(1983). Here, Otis's October 2016 motion was based on constitutional claims that are cognizable under § 974.06. Therefore, the claims are barred absent a sufficient reason for Otis's failure to litigate all of his claims in the earlier proceedings.

Whether a convicted person has offered a sufficient reason for serial litigation is a question of law for our independent review. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668. We conduct that review by examining only the allegations contained within the four corners of the person's postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. The motion that Otis filed in October 2016 offered no reason, much less a sufficient reason, for serial litigation. Accordingly, the circuit court correctly determined that his claims were barred.

Otis asserts in this court that he has a sufficient reason to pursue his current claims, namely, that the 2015 amendments to the judgment of conviction "produce[d] an *ex post facto* violation" by enhancing his punishment. The State sets forth numerous arguments in support of its contention that Otis's proffered reason is not sufficient to permit his serial litigation. We agree with the State.

First, Otis offered his reason for serial litigation for the first time in his appellate brief. We do not normally consider matters presented for the first time on appeal. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838.

Second, the 2015 amendments to the judgment of conviction did not enhance Otis's punishment. Otis's sentences are those pronounced following his convictions in 2005. Otis disagrees. He states that the circuit court increased his punishment for count six because, as a result of classifying count six as a Class B felony, he could not pursue sentence adjustment under

WIS. STAT. § 973.195 (2015-16) (permitting a person confined for a crime other than a Class B felony to petition the sentencing court to adjust the sentence under some circumstances). Otis is confused. The 2015 amendments did not reclassify his crime. The amendments merely served to correctly memorialize the classification established by the legislature.

Third, Otis's October 2016 postconviction motion was not based on the 2015 amendments to the judgment of conviction. To the contrary, his motion affirmatively alleged, first, that when the circuit court amended the judgment of conviction in 2015, the court "overlooked a more serious problem," namely that the original sentencing court had applied a sentencing scheme that was enacted after the "initial acts" alleged in counts one and six. This alleged problem is unrelated to the errors addressed by the 2015 amendments to the judgment of conviction. Otis's second basis for relief in 2016 was his allegation that WIS. STAT. § 948.025(1)(b) was not in effect throughout the time he committed the crimes underpinning his convictions in counts one and six. As we have seen, however, Otis made a virtually identical claim in his April 2009 postconviction motion. Accordingly, the 2015 amendments were not a necessary predicate to the postconviction claims Otis made in 2016.

Fourth, assuming solely for the sake of argument that Otis was unable to pursue his most recent claims until the circuit court amended the judgment of conviction in 2015, Otis fails to explain why he did not raise those claims in the motion he filed in July 2016. Otis raised a due process claim in that motion, and he offers no reason that he was unable to present his claims of *ex post facto* violations in the same proceeding.

Significantly, Otis did not file a reply brief in this court. Thus, he has not responded to the State's arguments that he failed to overcome the procedural bar imposed by ***Escalona-***

Naranjo. We take his lack of response as a concession that the reason for serial litigation belatedly offered in his appellate brief is insufficient as a matter of law to permit him to pursue the motion he filed in August 2016. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (failure to respond in a reply brief may be deemed a concession). Therefore,

IT IS ORDERED that the order is summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals