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July 31, 2018

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

2017AP448

State of Wisconsin v. Andrew J. Burkart (L. C. No. 2012CF519)

Before Stark, P.J., Hruz and Seidl, 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).

Andrew Burkhart, pro se, appeals from an order denying his WIS. STAT. § 974.06 (2015-16)¹ motion for postconviction relief. Based upon our review of the briefs and record on appeal, we conclude at conference that this case is appropriate for summary disposition, and we summarily affirm. *See* WIS. STAT. RULE 809.21(1).

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

Burkhart was convicted on one count of attempted second-degree sexual assault, use of force. The charges stemmed from an incident in which Burkhart went to the victim's home in the early morning hours with the intent to sexually assault her. Burkhart knew the victim for years prior to the incident, and he was familiar with her work schedule. Burkhart arrived at the victim's home prior to 5:30 a.m., and as the victim opened the garage door and got into her vehicle to go to work, Burkhart entered the garage, placed his hand over her mouth to keep her from screaming, and knocked off her glasses. However, the victim succeeded in screaming and pulling away from Burkhart. The victim ran back into the house, alerted her husband, and they called the police.

Burkhart later stated to the police that he wanted to physically touch the victim, and his intention was to put his hand down her pants and massage her clitoris until she orgasmed. Burkhart claimed he did not want to rape the victim "and leave DNA behind." Burkhart's understanding was that his DNA "was on file from a previous incident he was charged with."

In exchange for his guilty plea, an additional count of burglary of a building was dismissed. After he was sentenced, Burkhart filed several motions for sentence modification. He also filed a notice of intent to pursue postconviction relief, but no appeal was taken. In 2013, Burkhart filed a motion to withdraw his plea.² Burkhart's plea withdrawal motion contended his plea was defective for three reasons: (1) he received ineffective assistance of trial counsel because his attorney allegedly told him to lie to the court and say that there was an extraneous

² Burkhart's plea withdrawal motion was purportedly filed pursuant to WIS. STAT. § 971.08(2), which applies to deportation warnings not applicable to the present appeal. In all events, the 2013 motion represents a substantive postconviction motion seeking relief from his criminal conviction, no matter how Burkhart denominated that motion.

factor that interrupted his attempted sexual assault of the victim; (2) there was an insufficient factual basis for his plea because he never attempted any sex act against the victim; and (3) because there was no sex act against the victim, he should not have been found guilty of attempted sexual assault.

The circuit court denied the plea withdrawal motion on multiple grounds, including that: (1) the plea hearing transcript established that “the Court never posed the question to which Burkhart asserts he lied in response”; (2) the criminal complaint provided a sufficient factual basis for the plea, and during the plea colloquy Burkhart “agreed that the facts in the Complaint were essentially true and accurate”; and (3) a completed sex act was not necessary to sustain a conviction for attempted sexual assault, and Burkhart’s actions coupled with his admitted plan to sexually assault the victim were enough to sustain a guilty plea to an attempted sexual assault charge.

Although Burkhart filed a notice of intent to appeal, and the record was assembled, he did not take an appeal from the circuit court order denying his motion to withdraw his plea. Burkhart then attempted unsuccessfully to have his appeal rights restored by filing a petition for a writ of habeas corpus, alleging a violation of his right to counsel. This court denied the habeas petition ex parte, noting that we had extended the time for filing a notice of intent to appeal, and Burkhart timely filed that notice. Further, Burkhart chose to represent himself, and his lack of counsel for appeal could not accurately be described as a denial of the right to counsel. Finally, we noted computer entries showed no request for appointment of counsel for his appeal.

In October 2016, Burkhart filed the WIS. STAT. § 974.06 postconviction motion underlying the present appeal. As Burkhart admits in his briefs on appeal to this court, that

§ 974.06 motion addresses the same issues he had raised in his 2013 motion for plea withdrawal. Recognizing this fact, the circuit court denied Burkhart's motion without addressing the merits, pursuant to *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The court stated it would not "re-examine issues already fully adjudicated in an earlier Decision and Order." Burkhart now appeals.

"[A]ll claims of error that a criminal defendant can bring should be consolidated into one motion *or* appeal[.]" *State v. Lo*, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. Successive postconviction efforts to litigate the same issue are barred. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 Wis. 2d 512 (Ct. App. 1991).

Burkhart asks this court to review the merits of the same claims he advanced in his 2013 plea withdrawal motion. It is axiomatic that a WIS. STAT. § 974.06 motion may not be used to again raise the same claims raised in a previous postconviction motion, "no matter how artfully the defendant may rephrase the issue." *Witkowski*, 163 Wis. 2d at 990. Here, Burkhart has merely rephrased matters that he previously litigated and lost, and therefore his claims are barred.

Moreover, the facts concerning the alleged improprieties with Burkhart's guilty plea existed when he filed his 2013 motion, and Burkhart raised them at that time. Burkhart suggests that due to his pro se status, his earlier plea withdrawal motion "was inadequately formulated" and "lacked the necessary substance needed to be deemed meritorious." However, Burkhart may not use his pro se status to claim ignorance of the law as a justification to "expand" on previously raised issues, and his ignorance of the law does not constitute a sufficient reason to reargue those issues. Allowing Burkhart to "more adequately" raise claims that were raised during his earlier

motion would be contrary to the policy of finality in litigation. But that is exactly what Burkhart sought to do in his WIS. STAT. § 974.06 motion—relitigate the issues already decided against him in his previous motion. To the extent Burkhart is contending his current arguments are, to any degree, newly alleged, he has provided no sufficient reason why the legal grounds now presented were not previously raised. See *Escalona-Naranjo*, 185 Wis. 2d at 185. Defendants are not entitled to pursue an endless succession of postconviction motions. Accordingly, the circuit court correctly refused to delve deeper into Burkhart’s procedurally barred arguments.

Therefore,

IT IS ORDERED that the order is summarily affirmed. 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