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DISTRICT III

October 2, 2018

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

2017AP147 State of Wisconsin v. Yatau Her (L. C. No. 2005CF103)

Before Hruz, Seidl and Blanchard, 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).

Yatau Her appeals from an order denying his WIS. STAT. § 974.06 (2015-16)[1] motion to withdraw his plea. Based upon our review of the briefs and record, we conclude at conference

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

that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21.

Her pleaded guilty to one count of attempted first-degree intentional homicide after shooting a woman in the back and neck during the commission of an armed robbery of a food store in Eau Claire. As part of the plea deal, another count of armed robbery with use of force, and one count of possession of a firearm by an adjudged delinquent, both as repeaters, were dismissed and read-in. Though still represented by counsel, Her then filed two "pro se" presentence motions for plea withdrawal, which the circuit court denied.[2] The court specifically found the latter motion "is pretext and made merely for the purposes of delay."

The matter proceeded to sentencing. Her's appointed postconviction counsel subsequently determined there were no meritorious issues for appeal. Her was presented with the options of: (1) closing the file; (2) filing a no-merit report; or (3) discharging counsel and proceeding pro se. Her refused the choice of a no-merit report and opted instead to proceed pro se, after which postconviction counsel was discharged from representation.

Her then filed a pro se postconviction motion pursuant to WIS. STAT. RULE 809.30, claiming the circuit court erroneously exercised its discretion when it denied his pre-sentencing plea withdrawal motion. Her also claimed he was entitled to plea withdrawal because his trial counsel had been ineffective for conducting an inadequate investigation and failing to share discovery with him. Her also claimed trial counsel coerced him into entering the plea. The

[2] Her does not suggest that we should reverse in this appeal because the circuit court addressed the "pro se" presentence motions for plea withdrawal at a time when Her was represented by counsel.

circuit court denied Her's postconviction motion. We affirmed the judgment of conviction and the denial of the postconviction motion. *See* ***State v. Her***, No. 2006AP1892-CR, unpublished slip op. (Apr. 17, 2008). Our supreme court denied Her's petition for review. Her also filed a petition for writ of habeas corpus in federal court, which was denied. ***Her v. Thurmer***, No. 10-C-717, 2010 U.S. Dist. LEXIS 108779 (E.D. Wis. Sept. 27, 2010).

Her subsequently filed another pro se postconviction motion to vacate, set aside or correct the sentence, pursuant to WIS. STAT. § 974.06, which is the motion at issue in this appeal. Her claimed his plea was not knowingly, intelligently, and voluntarily entered because he did not understand "how the read-in charges would affect the sentence, especially that I exposed myself to the likelihood of a higher sentence." Her also claimed his postconviction attorney had been ineffective for failing to file a postconviction motion and for failing to explain to Her the effect of read-in charges. Her further claimed his conviction was invalid because he had a constitutional right to a grand jury determination of probable cause.

The circuit court denied the WIS. STAT. § 974.06 postconviction motion, noting that it had conducted an extensive plea colloquy and had explained to Her its sentencing discretion. The court also determined the read-ins were irrelevant, as it did not consider them in the course of sentencing Her. It also rejected Her's arguments regarding grand jury indictment and ineffective assistance of counsel. Her now appeals.

Her's claims are barred by WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). ***Escalona-Naranjo*** stands for the proposition that due process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error. *See* ***State ex rel. Macemon v. Christie***, 216 Wis. 2d

337, 343, 576 N.W.2d 84 (Ct. App. 1998). Convicted defendants are not entitled to pursue an endless succession of postconviction remedies. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental, or amended motion. Successive motions and appeals, all of which could have been brought at the same time, run counter to the design and purpose of the legislation. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. Thus, where a defendant's claim for relief could have been, but was not, raised in a prior postconviction motion or on direct appeal, the claim is procedurally barred absent a sufficient reason for failing to raise it previously. ***Id.***

In the present appeal, Her argues "we are concerned, primarily, with the circuit court's mandatory duty to notify the defendant of the direct consequences of his plea." Specifically, Her argues the plea colloquy was faulty because the court did not inform him the read-in charges would likely cause the court to increase his sentence within the statutory maximum. He also argues the plea questionnaire and waiver of rights form explaining the effects of read-in charges "presents information about read-ins that is confusing and misleading, if not downright inaccurate." According to Her, his plea was thus not knowingly, voluntarily, and intelligently entered and he was entitled to a hearing on his WIS. STAT. § 974.06 postconviction motion. He also asserts his trial counsel performed deficiently by failing to adequately explain the effect of a read-in charge. Additionally, he claims the "time has come" to revisit the United State Supreme Court's 130-year-old holding that the Fifth Amendment's grand jury clause does not apply to the States.

Her's WIS. STAT. § 974.06 postconviction motion in the circuit court asserted he had sufficient reason for not raising his issues previously because his postconviction attorney failed to identify and inform him of the issues, and the attorney made a no-merit determination instead

of filing a postconviction motion. Her argues that he was thus "unable to personally argue in his pro se direct appeal that he was never informed of the read-in consequences or grand jury right, precisely *because* he was never so informed."

However, Her could have pursued all of his present claims during his direct appeal because they all stem from proceedings that took place before Her filed his original postconviction motion, pro se. The transcript from the plea hearing was available to Her, as was the plea questionnaire and waiver of rights form that Her signed. The factual basis for Her's claims of a faulty plea colloquy could have, and should have, been known to him at the time the original postconviction motion was filed after sentencing. And if Her was truly confused about read-ins, he would have learned about the effect of the read-in charges at sentencing, which obviously took place long before Her's appeal of his conviction. In addition, Her's argument that he received ineffective assistance of trial counsel could have readily been pursued in his direct appeal.

To the extent Her claims he received ineffective assistance of postconviction counsel, his claims also fails. Her did not proceed with postconviction counsel. He opted to proceed pro se. Her filed his own WIS. STAT. RULE 809.30 postconviction motion and pursued a direct appeal, pro se, after his postconviction counsel told Her there were no issues of arguable merit. Her cannot show ineffective assistance of postconviction counsel that he did not have.

Similarly, Her's claim that the circuit court lacked jurisdiction because the Fifth Amendment requires that a grand jury make the probable cause determination could have been raised in his original postconviction motion. The preliminary hearing, at which Her was bound over for trial, took place long before Her's conviction. Once again, the basis for Her's claims

regarding the requirement of a grand jury indictment could have, and should have, been known to Her at the time the original postconviction motion was filed. But in any event, Her concedes in his appellate briefs that "this court does not have the authority to grant relief on this claim …."

Accordingly, we conclude Her's claims are procedurally barred. Her could have raised all of his claims on direct appeal, and he has not shown a sufficient reason to avoid the procedural bar.[3]

Upon the foregoing,

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.

Sheila T. Reiff
Clerk of Court of Appeals

[3] Her previously filed a motion to strike the State's response brief because the State limited its briefing to the procedural bar issues, asking leave to file a supplemental brief to address the merits of Her's claims if we should decide that Her was not procedurally barred from raising his appellate claims. In an order denying the motion dated December 20, 2017, we indicated that "bifurcation of the issues was specifically authorized by ***State v. Tillman***, 2005 WI App 71, ¶13 n.4, 281 Wis. 2d 157, 696 N.W.2d 574 …." We subsequently denied Her's motion for reconsideration, in which Her insisted "[t]he court is clearly mistaken." We now similarly reject Her's continued insistence in his reply brief that the State improperly failed to first seek approval for bifurcating the issues, and conceded Her's plea withdrawal arguments by limiting its briefing to the procedural bar issue. Furthermore, we reject Her's contention in his reply brief that the State forfeited the procedural bar, and we decline Her's invitation to exercise our discretion and address his claims on the merits even though he could have raised them earlier.