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October 2, 2018

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

2017AP1570 State of Wisconsin v. Garry A. Borzych (L. C. No. 1992CF571)

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).

Garry Borzych, pro se, appeals an order denying his fourth WIS. STAT. § 974.06 (2015-16) motion for postconviction relief.[1] Borzych argues that his convictions for armed burglary and first-degree intentional homicide were multiplicitous and, thus, violated double jeopardy. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We determine that Borzych's double jeopardy claim is procedurally barred under § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and it otherwise fails on its merits. Therefore, we summarily affirm the order. *See* WIS. STAT. RULE 809.21.

Borzych and an accomplice committed a home-invasion armed burglary in June of 1991. In the course of doing so, they killed the eighty-seven-year-old homeowner. In May 1993, Borzych was convicted, upon a jury's verdicts, of armed burglary and first-degree intentional homicide, both counts as a party to a crime and as a habitual offender. The sentencing court imposed concurrent prison terms of life and thirty years for the two offenses.[2] Since then, Borzych has filed numerous challenges to his convictions. After two direct appeals were dismissed without prejudice to permit Borzych to pursue circuit court proceedings, his third

[1] Although Borzych identified his motion as an amendment or supplement to what was his third WIS. STAT. § 974.06 (2015-16) motion, the circuit court properly construed the filing as Borzych's fourth § 974.06 motion. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Truth-In-Sentencing became effective for offenses committed after December 31, 1999, and required imposition of determinate sentences. *See* 1997 Wis. Act 283.

attempt at a direct appeal, case No. 1995AP1879-CR, was dismissed for Borzych's failure to file a brief.[3]

Borzych then filed several collateral challenges to his convictions under both WIS. STAT. § 974.06 and the state habeas corpus statute, WIS. STAT. § 782.01. These challenges were summarily rejected, most on grounds that Borzych's claims either had been forfeited by his failure to present a legitimate reason for not earlier raising them or had been previously litigated without success.[4] In what Borzych identified as his third § 974.06 motion, Borzych alleged he was denied the right to testify at trial and that his trial counsel was somehow ineffective when advising him about whether to testify. The circuit court denied that motion. Borzych then filed the underlying § 974.06 motion alleging a double jeopardy violation. The circuit court denied the motion on its merits, and this appeal from the order denying Borzych's fourth § 974.06 motion follows.

We conclude that Borzych's double jeopardy argument is procedurally barred. WISCONSIN STAT. § 974.06(4) requires defendants "to consolidate all their postconviction claims into one motion or appeal." ***Escalona-Naranjo***, 185 Wis. 2d at 178. Successive motions and appeals are procedurally barred unless the defendant can show a sufficient reason as to why the newly alleged errors were not previously raised. ***Id.*** at 185. We determine the sufficiency of a

[3] We note that documents between May 29, 1993, and July 4, 2016, are not included in the appellate record. It is the appellant's responsibility to ensure the record is complete, and this court assumes that missing material supports the circuit court's decision. ***State v. McAttee***, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774. This court, however, may take judicial notice of its own records of Borzych's past writ petitions and appeals. *See* ***State ex rel. Van Hout v. Endicott***, 2006 WI App 196, ¶2 n.2, 296 Wis. 2d 580, 724 N.W.2d 692.

[4] Among Borzych's collateral challenges that have reached this court, resulting in summary rejection, are case Nos. 2004AP2674-W, 2005AP270, 2006AP545, 2007AP716, and 2017AP1236-W.

defendant's reason for circumventing ***Escalona-Naranjo***'s procedural bar by examining the "four corners" of the subject postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. Ineffective assistance of postconviction counsel may, in some circumstances, be a "sufficient reason" as to why an issue was not raised earlier. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To establish ineffective assistance of counsel, Borzych must show that his counsel's performance was deficient and that he suffered prejudice as a result of that deficiency. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether a WIS. STAT. § 974.06 motion alleges a sufficient reason for failing to raise an issue earlier is a question of law that we review independently. ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

Here, Borzych's motion claimed that his postconviction counsel was ineffective by failing to raise his double jeopardy claim. As discussed below, Borzych's double jeopardy claim fails on its merits, and counsel cannot be ineffective for failing to pursue a meritless claim. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. Even were we to assume postconviction counsel was somehow ineffective with respect to Borzych's double jeopardy claim, Borzych fails to give a sufficient reason for failing to otherwise raise his double jeopardy argument in the numerous pro se challenges he has filed since his conviction. If Borzych's present claim has been previously raised and rejected, he cannot relitigate it now. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (no matter how artfully rephrased, an appellant may not relitigate matters previously decided). Under either scenario, Borzych's double jeopardy claim is procedurally barred.

In any event, Borzych's double jeopardy claim fails on its merits. In his postconviction motion, Borzych argued that his convictions are multiplicitous because they arose from a single

course of conduct and "the homicide could not have been committed without first committing the underlying armed burglary." The double jeopardy protections prohibit multiple convictions for the same offense. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 363, 557 N.W.2d 821 (Ct. App. 1996). Whether a violation exists in a given case is a question of constitutional law that we review de novo. ***Id.***

We analyze claims of multiplicity using a two-prong test. ***State v. Ziegler***, 2012 WI 73, ¶60, 342 Wis. 2d 256, 816 N.W.2d 238. First, we determine whether the offenses are identical in law and fact using the elements-only test. ***Id.*** (citing ***Blockburger v. United States***, 284 U.S. 299, 304 (1932)). Under the elements-only test, "two offenses are identical in law if one offense does not require proof of any fact in addition to those which must be proved for the other offense." ***Ziegler***, 342 Wis. 2d 256, ¶60. Even where offenses are legally identical, they "are not identical in fact if the acts allegedly committed are sufficiently different in fact to demonstrate that separate crimes have been committed." ***Id.*** If the offenses are identical in law *and* in fact, a rebuttable presumption arises that the legislature did not intend to authorize cumulative punishments. ***Id.***, ¶61. "Conversely, if the offenses are different in law or fact, the presumption is that the legislature intended to permit cumulative punishments." ***Id.***, ¶62.

Here, the armed burglary required proof that Borzych intentionally entered a building or dwelling; that Borzych's entry of the building or dwelling was without the consent of a person in lawful possession and Borzych knew the entry was without consent; that Borzych entered the building or dwelling with the intent to steal or commit a felony; and that Borzych was unarmed, but armed himself with a dangerous weapon while still in the burglarized enclosure. *See* WIS. STAT. § 943.10(2)(b) (1991-92); *see also* WIS JI—CRIMINAL 1424 (1985). On the other hand, first-degree intentional homicide required proof that Borzych caused the death of another human

being and that Borzych intended to kill. *See* WIS. STAT. § 940.01(1) (1991-92); *see also* WIS JI—CRIMINAL 1010 (1989). Under the "elements only" test, the two offenses require different elements and are, thus, not identical in law. Consequently, absent a clear indication of legislative intent to the contrary, punishment for both offenses is constitutionally permissible. After considering factors relevant to legislative intent, our supreme court has determined that cumulative punishments for burglary and first-degree intentional homicide protect "distinct interests of the public," with the burglary statute directed at protecting the public's security in their enclosed property and the homicide statute directed at protecting life and bodily security. ***State v. Kuntz***, 160 Wis. 2d 722, 756-57, 467 N.W.2d 531 (1991). Ultimately, Borzych has not overcome the presumption that the legislature intended to permit multiple punishments for these offenses.

Borzych nevertheless asserts he could not have been convicted of both "felony murder" and the underlying armed burglary charge, as the predicate felony is a lesser-included offense of felony murder. Borzych, however, was convicted of first-degree intentional homicide. Because armed burglary is not a lesser-included offense of first-degree intentional homicide, this alternate double jeopardy claim likewise fails.

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