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DISTRICT I

January 14, 2019

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

2018AP230

State of Wisconsin v. Kenneth Lamont Kennedy
(L.C. # 2013CF931)

Before Kessler, P.J., Brennan 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).

Kenneth Lamont Kennedy, *pro se*, appeals from an order of the circuit court that denied his motion for postconviction relief as procedurally barred. Based upon our review of the briefs

and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ The order is summarily affirmed.

In December 2013, Kennedy pled guilty to four drug- and gun-related crimes. He was given concurrent and consecutive sentences totaling nine years of initial confinement and seven years of extended supervision. In May 2015, appointed postconviction counsel filed a postconviction motion that sought, in part, to vacate multiple DNA surcharges. Ultimately, the circuit court vacated three of four DNA surcharges. In February 2016, counsel timely filed a notice of appeal on Kennedy's behalf. Because of cases pending in this court related to DNA surcharges, counsel moved to stay briefing. We placed the appeal on hold in June 2016.

While the appeal was on hold, Kennedy moved to discharge his attorney so that he could proceed *pro se*. We advised Kennedy of the risks of proceeding *pro se* and directed him to file a response. Based on that response, we discharged counsel and extended the deadline for Kennedy to file a postconviction motion in the circuit court.

Kennedy's postconviction motion was filed in the circuit court on February 15, 2017. Because this was after the February 10, 2017 deadline we had set, the circuit court informed Kennedy that he would need to obtain an extension from this court for the motion to be considered under WIS. STAT. RULE 809.30. Alternatively, the court would review the motion under WIS. STAT. § 974.06. Kennedy elected to proceed under § 974.06. The circuit court denied the motion, and Kennedy appealed in July 2017. In December 2017, though, he voluntarily dismissed the appeal.

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

In January 2018, Kennedy filed another postconviction motion in the circuit court. The circuit court denied the motion, stating that Kennedy's arguments were barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because the circuit court had "denied the entirety of the defendant's claims in a decision and order dated April 17, 2017." While Kennedy had claimed that the *Escalona* bar should not apply because of ineffective postconviction counsel, the circuit court noted that postconviction counsel's performance did not excuse Kennedy's own failure to pursue issues in his previous litigation. Kennedy appeals.

"[A]ny claim that could have been raised on direct appeal or in a previous Wis. Stat. § 974.06 ... postconviction motion is barred from being raised in a subsequent § 974.06 postconviction motion, absent a sufficient reason." *State v. Lo*, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756; *see also Escalona*, 185 Wis. 2d at 184-85. In some circumstances, ineffective assistance of postconviction counsel may constitute sufficient reason for not raising an issue. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (1996). Whether a procedural bar applies is a question of law. *See State v. Tillman*, 2005 WI App 71, ¶14, 281 Wis. 2d 157, 696 N.W.2d 574.

On appeal, Kennedy's main brief is essentially a copy of the postconviction motion. He does not directly address any part of the circuit court's invocation of the procedural bar or its explanation for why *Rothering* does not suffice. We may decline to address undeveloped, unexplained arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

We do agree with the circuit court, however, that Kennedy's 2018 *pro se* postconviction motion is procedurally barred by his 2017 *pro se* postconviction motion. We further agree that

Rothering has no application here. Even if postconviction counsel had been ineffective in her 2015 motion, Kennedy’s opportunity to remedy that was with his 2017 motion. Any ineffectiveness by counsel does not carry over to justify the 2018 motion.

Moreover, most of the issues that Kennedy raised in his 2018 motion—ineffective trial counsel; an unknowing, unintelligent, and involuntary plea; search warrant issues; and sufficiency of the evidence—are essentially the same issues raised in the 2017 motion. Thus, *Escalona* is not the only applicable procedural bar: Kennedy cannot relitigate issues previously raised and ruled upon. “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

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