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

February 11, 2019

To:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

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

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

Anne Christenson Murphy
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Raymond Earl Baker 222201
Wisconsin Resource Center
P.O. Box 220
Winnebago, WI 54985-0220

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

2017AP1795 State of Wisconsin v. Raymond Earl Baker (L.C. # 2012CF77)

Before Brennan, Brash 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).

Raymond Earl Baker, *pro se*, appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 (2017-18)[1] motion for postconviction relief. Based upon our review of the

---

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. The order is summarily affirmed.

In January 2012, Baker was charged with one count of first-degree intentional homicide with use of a dangerous weapon for shooting a woman eight times while she sat in her car. Baker went to the police station, asked to speak with officers, and told them about what he had done. Baker agreed to plead guilty to the charge, in exchange for which the State would recommend release eligibility after thirty-two years, but the circuit court would not accept the plea because Baker refused to acknowledge any facts that would have satisfied the intent element of the crime. The matter was then tried to a jury, which convicted Baker of second-degree intentional homicide with a dangerous weapon, a lesser-included offense.

Baker was sentenced to forty years of initial confinement and ten years of extended supervision. He appealed. His attorney filed a no-merit report, to which Baker filed a response. This court affirmed the conviction. *See* ***State v. Baker***, No. 2013AP2843-CRNM, unpublished op. and order (WI App Apr. 12, 2016).

In June 2017, Baker filed a WIS. STAT. § 974.06 postconviction motion in the circuit court seeking an order "vacating the jury verdict, judgment of conviction, and sentence and Ordering a New Trial, or in the alternative, allowing Defendant to enter a plea to the charge of First Degree Reckless Homicide." In his motion, he listed five issues: (1) there was newly discovered evidence to show that he was not made aware of a second plea offer from the State to plead to first-degree reckless homicide; (2) the court of appeals and postconviction/appellate counsel failed to discover this meritorious issue for appeal; (3) trial counsel was ineffective for failing to inform him of this second plea offer and for failing to inform him of a letter from his

family urging him to accept the plea; (4) postconviction/appellate counsel was ineffective for not discovering this meritorious issue of the second plea offer; and (5) trial counsel was ineffective for failing to object to the use of Baker's inculpatory statements given without appropriate warnings under ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966).

The circuit court conducted an evidentiary hearing at which Baker's trial counsel testified. Trial counsel indicated that the second plea "offer" was actually Baker's counter-offer to the State's original offer. This counter-offer called for Baker to plead guilty to first-degree reckless homicide and for the parties to make a joint sentencing recommendation of thirty-five years of initial confinement and twenty years of extended supervision. Trial counsel explained that Baker felt confident the State would accept this offer because the thirty-five years of initial confinement was higher than the minimum of thirty-two years called for under the original offer. The State, however, was not interested in reducing the charge to reckless homicide. Based on trial counsel's testimony, the circuit court concluded that there was no second plea offer extended by the State and, thus, it denied the motion. Baker appeals.

On appeal, Baker first contends that he provided sufficient newly discovered evidence to establish a manifest injustice, and that warrants a new trial. The decision to grant a motion for a new trial based on newly discovered evidence rests in the circuit court's discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. A defendant seeking a new trial based on newly discovered evidence must establish "'by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). If the defendant satisfies these requirements, "'the circuit court must

determine whether a reasonable probability exists that a different result would be reached in a [new] trial.'" ***Id.*** (citation omitted). "A reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to the defendant's guilt.'" ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (citation and two sets of brackets omitted).

Baker's newly discovered evidence claim is premised on his belief that the State extended a second plea offer, but the circuit court found that there was no second offer. The circuit court also found that trial counsel was more credible; implicit in this determination is the circuit court's acceptance of trial counsel's testimony that the second offer was actually Baker's counter-offer to the State.[2] This means that the evidence was not discovered after conviction—the counter-offer was known to all the parties well before trial. Because Baker did not demonstrate the existence of newly discovered evidence, we discern no erroneous exercise of discretion by the circuit court in denying the motion.

Baker also complains that the circuit court erroneously exercised its discretion when it failed to consider the other issues in his motion. Three of the other four issues—that trial counsel was ineffective for failing to relay the second offer, that postconviction/appellate counsel and this court failed to identify an arguably meritorious issue from that failure, and that postconviction/appellate counsel was ineffective for not identifying the issue—are premised on the existence of a second plea offer. These claims necessarily collapse in light of the circuit

[2] We observe that this "offer" was on a plea questionnaire form, and not in any offer letter. Trial counsel explained that he had altered, by hand, the form he had previously typed in preparation for a plea to the State's original offer.

court's determination that there was no second offer from the State. We therefore discuss those three issues no further.[3]

Baker did raise one issue in his motion that was unrelated to the existence of a second plea offer: whether trial counsel should have objected to the State's use of Baker's inculpatory statements for lack of proper ***Miranda*** warnings. This issue, however, is procedurally barred.

A defendant must raise all grounds for relief in his or her original, supplemental or amended motion for postconviction relief. *See* WIS. STAT. § 974.06; ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). The ***Escalona*** procedural bar also applies to no-merit appeals. "[W]hen a defendant's postconviction issues have been addressed by the no merit procedure … the defendant may not thereafter again raise those issues[.]" ***State v. Tillman***, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574. In addition, "a defendant may not raise issues in a subsequent § 974.06 motion that he [or she] could have raised in response to a no-merit report, absent a 'sufficient reason' for failing to raise the issues earlier in the no-merit appeal." ***State v. Allen***, 2010 WI 89, ¶4, 328 Wis. 2d 1, 786 N.W.2d 124.

The trial court in this case conducted a ***Miranda/Goodchild*** hearing[4] before trial and determined that Baker's inculpatory statements were admissible. Our no-merit opinion expressly

[3] In his appellate brief, Baker complains that the circuit court did not allow him to argue his other issues, and he cites to portions of the transcript where he attempted to ask questions of trial counsel, but the State objected. In those instances, though, Baker appears to have been asking questions about a plea of not guilty by reason of mental disease or defect (NGI) and for trial counsel's opinion of Baker's level of understanding. Baker does not show that these issues were raised in his postconviction motion or that the circuit court erred in sustaining the State's objections to these lines of questioning.

[4] *See* ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 264-65, 133 N.W.2d 753 (1965).

discussed the admission of Baker's inculpatory statements and concluded that there was no arguable merit to a claim that the circuit court erred by admitting them.[5] *See* ***Baker***, No. 2013AP2843-CRNM, at 3-4. The postconviction motion does not indicate that Baker raised this issue in the no-merit response and does not identify a sufficient reason for failing to do so. Baker is barred from raising or relitigating this issue now.[6] *See* ***Tillman***, 281 Wis. 2d 157, ¶19; *see also* ***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

[5] The no-merit opinion also discussed Baker's competency and the possibility of an NGI plea. *See* ***State v. Baker***, No. 2013AP2843-CRNM, unpublished op. and order at 2-3 (WI App Apr. 12, 2016).

[6] To the extent that Baker claims trial counsel committed frauds on the trial and circuit courts, we generally do not consider issues raised for the first time on appeal, *see* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980), *superseded on other grounds by statute,* WIS. STAT. § 895.52, and Baker does not show he ever brought these alleged frauds to the attention of the trial or circuit court.