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DISTRICT II

August 21, 2019

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

2018AP645 State of Wisconsin v. Gary P. Abt (L.C. #2013CF161)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Gary P. Abt appeals pro se from the circuit court's order denying his WIS. STAT. § 974.06 (2017-18)[1] postconviction motion. Based upon our review of the briefs and record, we conclude

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

at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We agree with the circuit court that Abt's claims are procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirm the order of the circuit court.

Abt pled guilty to first-degree sexual assault of a child. The victim was his three-year-old granddaughter. Prior to sentencing, Abt moved to withdraw his guilty plea. Abt claimed that his previous counsel was ineffective for failing to allow Abt to view his recorded interview with police, that there was insufficient evidence to convict him, and that he was confused during the plea colloquy because he thought the judge would reduce his offense and because he did not understand the charge to which he pled.

After two days of evidentiary hearings on the motion, the court denied Abt's motion, finding that Abt had failed to provide a "fair and just reason" to withdraw the plea. The court found that Abt had been afforded a chance to view the evidence against him prior to the plea colloquy, including the CD of his interview with police. The court also found that Abt's previous counsel had provided effective representation, including as it related to alleged alibi witnesses. The court also rejected Abt's claims that he was confused during the plea colloquy. The court sentenced Abt to twenty years' initial confinement, followed by twenty years' extended supervision.

Abt appealed and we summarily affirmed the circuit court's decision. The supreme court denied review.

About three years after sentencing, Abt filed a pro se motion for postconviction relief under WIS. STAT. § 974.06, again seeking to withdraw his guilty plea and also requesting resentencing. Abt claimed that no factual basis existed for his plea. He asserted that the circuit court erred in crediting trial counsel's testimony at the plea-withdrawal hearing. He claimed that the victim's statements were coerced. Abt also claimed that his trial counsel was ineffective for not arguing that the State had "tampered" with the CD recording of Abt's police interview and that the detective who conducted the interview had "perjured" herself on the stand, failing to interview his wife and son, and sending an e-mail to the assistant district attorney assigned to the case. He claimed improper use of evidence at sentencing, including Abt's statement to the police that he "couldn't control" himself, and a supplement to the presentence investigation. Abt also raised claims that he abandons on appeal, such as alleged ***Brady***[2] violations, variations of ineffective assistance of counsel and plea-colloquy error. The circuit court denied Abt's motion without a hearing, and Abt now appeals.

We review de novo whether a defendant's motion under WIS. STAT. § 974.06 is procedurally barred. ***State v. Fortier***, 2006 WI App 11, ¶18, 289 Wis. 2d 179, 709 N.W.2d 893 (2005). "We need finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. A defendant may not relitigate a matter previously litigated, "no matter how artfully the defendant

[2] ***Brady v. Maryland***, 373 U.S. 83 (1963).

may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Further, any claim that could have been raised in a prior postconviction motion or direct appeal cannot form the basis for a subsequent motion under WIS. STAT. § 974.06 unless the defendant demonstrates a sufficient reason for failing to raise the claim earlier. ***Escalona-Naranjo***, 185 Wis. 2d at 185. Ineffective assistance of postconviction counsel may be a "sufficient reason" for failing to raise a claim on direct review. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. "[I]gnorance of the facts or law underlying the claim" may provide a sufficient reason for failure to bring the claim on direct review. ***State v. Allen***, 2010 WI 89, ¶¶44, 91, 328 Wis. 2d 1, 786 N.W.2d 124. However, "the defendant must allege specific facts that, if proved, would constitute a sufficient reason for failing to raise the issues" on direct review. ***Id.***, ¶91.

Applying these principles to the case at hand, we conclude that Abt's challenge to his conviction is procedurally barred. Issues such as whether there was ineffective assistance involving Abt's review of the CD of the police interview, alleged alibi witnesses, or plea-colloquy error were already litigated and cannot be relitigated now. *See* ***Witkowski***, 163 Wis. 2d at 990.

As for all of the new issues raised in Abt's postconviction motion or his appellant's brief, he has not demonstrated a "sufficient reason" for failing to raise them on direct review, all of which were available to him at that time. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. In his

motion, Abt indicated that "[e]vidence did not exist [at] time of guilty plea," but he fails to identify any new evidence. His claim that he did not know of the evidence or understand the law is unavailing, as he was represented by postconviction counsel and fails to identify how his own ignorance mattered. Moreover, "the record [ ] belies [Abt's] argument that he was unaware of his claims," given that Abt's claims "involve events in which [he] was personally involved and had personal knowledge." *See* ***Allen***, 328 Wis. 2d 1, ¶48. To the extent that he now criticizes his postconviction counsel, he failed to so allege in his motion, much less show, how postconviction counsel provided ineffective assistance or that these new issues present clearly stronger claims than those raised in his direct appeal. *See* ***State v. John Allen***, 2004 WI 106, ¶2, 274 Wis. 2d 568, 682 N.W.2d 433 (to adequately raise a claim for relief, a defendant must allege "sufficient material facts—e.g., who, what, where, when, why, and how—that, if true, would entitle [the defendant] to the relief he seeks"). Accordingly, we are satisfied that the circuit court properly denied Abt's motion.[3]

Upon the foregoing reasons,

[3] We have closely examined Abt's twenty-six-page postconviction motion, doing our best to identify each of the issues raised by Abt, which at times is challenging. We have noted those that we could discern, but there may have been some that Abt simply has not developed nor provided any form of factual support. *See* ***Acevedo v. City of Kenosha***, 2011 WI App 10, ¶20 n.2, 331 Wis. 2d 218, 793 N.W.2d 500 (2010) (reviewing court need not address issues that "lack sufficient merit to warrant individual attention").

IT IS ORDERED that the order of the circuit court 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