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DISTRICT I

August 28, 2019

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

2016AP383 State of Wisconsin v. Brian A. Patterson (L.C. # 2010CF599)

Before Brash, 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).

Brian A. Patterson, *pro se*, appeals from an order that denied his WIS. STAT. § 974.06 (2015-16)[1] motion without a hearing. Based upon our review of the briefs and record, we

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

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

On February 6, 2010, Patterson was charged with first-degree intentional homicide for the shooting death of Joseph McGowan. Patterson claimed self-defense. The jury, instructed on the original charge plus the lesser-included offenses of second-degree intentional homicide and first-degree reckless homicide ("reckless homicide"), convicted Patterson of the reckless homicide. Patterson was sentenced to twenty-five years of initial confinement and ten years of extended supervision.

Patterson filed a postconviction motion, arguing that the trial court committed plain error when it instructed the jury to consider reckless homicide and that the given instruction improperly shifted the burden of proof to Patterson to show he was acting in self-defense. The trial court denied the motion. Patterson appealed, claiming: (1) the evidence was insufficient to convict him of reckless homicide; (2) the trial court erred in allowing the jury to consider reckless homicide; (3) the trial court erred when it denied his motion for a new trial, which he sought on the grounds that the reckless homicide instruction was plain error; and (4) the trial court erroneously exercised its sentencing discretion. We rejected Patterson's arguments and affirmed. *See* ***State v. Patterson*** (***Patterson I***), No. 2013AP749-CR, unpublished slip op. (WI App July 22, 2014).

In February 2016, Patterson filed the WIS. STAT. § 974.06 (2015-16) motion underlying this appeal. He argued that: (1) he was innocent of reckless homicide because the jury acquitted him of second-degree intentional homicide; (2) the jury instructions denied him the right to present a defense and the right to due process; (3) the trial court denied his right to self-

representation; (4) he did not knowingly, intelligently, and voluntarily waive the right to a jury trial on self-defense; and (5) his two trial attorneys were ineffective in multiple ways. Patterson also alleged that postconviction counsel was ineffective for not raising these "clearly stronger" issues in his original postconviction motion. The trial court denied the motion, finding no merit to any of the issues and concluding that none were clearly stronger than the issues that had been raised in postconviction counsel's motion.

In May 2016, Patterson filed a motion seeking to have the trial court vacate its August 2010 order appointing trial counsel at county expense after Patterson's retained attorney withdrew.[2] The motion also claimed that the trial court should have disqualified itself from deciding his February 2016 motion. The trial court denied the motion, and Patterson appealed.[3] On appeal, he claimed that his right to select counsel of his own choosing was violated and that the order appointing counsel violated his due process rights. We rejected Patterson's claims and affirmed. *See* ***State v. Patterson*** (***Patterson II***), No. 2016AP1119, unpublished slip op. and order (WI App Aug. 10, 2017).

Turning now to the appeal before us, Patterson's appellate brief outlines seven issues with eighteen subissues that can be distilled to the following six claims: (1) he is innocent and must be acquitted of reckless homicide because there was insufficient evidence to convict him and because there was an "acquittal" on second-degree intentional homicide; (2) the jury was not

[2] By order dated May 3, 2016, we granted Patterson's motion for remand so that he could file a motion seeking to vacate the August 2010 order; otherwise, the trial court would have been prohibited from proceeding because the record was already with this court. *See* WIS. STAT. § 808.07(2) (2015-16).

[3] The instant appeal did not progress while Patterson was litigating his May 2016 motion and appeal. Patterson's opening brief in this appeal was filed on July 25, 2018.

properly instructed on self-defense relative to reckless homicide; (3) Patterson was denied the right to represent himself when the trial court appointed counsel; (4) he had "no notice, defense, nor counsel" on the reckless homicide charge; (5) his trial attorneys were ineffective in multiple ways; and (6) postconviction counsel was ineffective for not raising these issues when they were clearly stronger than those in the original postconviction motion.

WISCONSIN STAT. § 974.06 "promotes finality and efficiency by requiring defendants to bring all available claims in a single proceeding unless there exists a sufficient reason for not raising some claims in that initial proceeding." *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶33, 360 Wis. 2d 522, 849 N.W.2d 668. "Thus, without a sufficient reason, a movant may not bring a claim in a § 974.06 motion if it 'could have been raised in a previously filed [WIS. STAT. §] 974.02 [postconviction] motion and/or on direct appeal." *See* ***id.***, ¶34 (quoting ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 173, 517 N.W.2d 157 (1994)).

"In some instances, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal." ***Romero-Georgana***, 360 Wis. 2d 522, ¶36. However, as part of the ineffective assistance analysis, the defendant must demonstrate that "a particular nonfrivolous issue was clearly stronger than issues that counsel did present." *See* ***id.***, ¶¶45-46 (citations and quotation marks omitted).

Additionally, a WIS. STAT. § 974.06 motion "is not a substitute for a direct appeal." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***Id.***

Patterson's first claim on appeal is that he must be acquitted of reckless homicide because there was insufficient evidence and because there was an acquittal on the second-degree intentional homicide charge. Sufficiency of the evidence was previously litigated in ***Patterson I***. *See* ***id.***, No. 2013AP749-CR, ¶¶10-14. There, we explained how the jury could acquit on first-degree intentional homicide—by rejecting the notion that Patterson intended to kill McGowan—while convicting Patterson of the reckless homicide by concluding that his conduct was criminally reckless. *See* ***id.***, ¶¶13-14. Like first-degree intentional homicide, second-degree intentional homicide has an intent element, *see* WIS. STAT. § 940.05(1), so an "acquittal" on that offense also does not necessitate acquittal on the reckless homicide.

Patterson's second complaint, that the jury was not properly instructed on self-defense relative to the reckless homicide and should not have been allowed to consider that offense at all, was also previously litigated. *See* ***Patterson I***, No. 2013AP749-CR, ¶¶15-18.

Patterson's third claim is that the trial court erred in appointing him counsel after his retained attorney withdrew, denying him the right to self-representation. *See, e.g.*, ***Faretta v. California***, 422 U.S. 806, 807 (1975); ***Imani v. Pollard***, 826 F.3d 939, 941 (7th Cir. 2016). Arguably, Patterson has already litigated the propriety of appointed trial counsel when he alleged in his May 2016 motion that doing so violated his right to choose his own counsel and his right to due process. *See* ***Patterson II***, No. 2016AP1119 at 3-5. This is simply a different theory by which to challenge trial counsel's appointment.

In any event, the record reflects that after Patterson's retained attorney withdrew, the trial court wanted Patterson to meet with successor counsel, and the trial court stated that it would revisit the issue at the next appearance. At the next hearing, successor counsel noted that she had

a conflict with the pending trial date, but Patterson was anxious to try to matter, so she told Patterson he could ask for her to be relieved if her schedule was a problem. When the trial court asked Patterson whether he wanted the court to find someone who might be able to try the case as scheduled, Patterson indicated that he wanted to keep appointed counsel, who was "a little more competent" to represent him than he was to represent himself. Because Patterson decided to continue with appointed counsel when given the option to decide how to proceed, he also fails to show how this issue is clearly stronger than issues actually raised by postconviction counsel.

Patterson's fourth claim is that he had "no notice, defense, nor counsel" on the reckless homicide charge. This, though, is similar to an issue raised in the first appeal, that instructing the jury on the reckless homicide charge "'change[d] the fundamental nature of the charge after [Patterson] had defended the case as an intentional crime.'" ***Patterson I***, No. 2013AP749-CR, ¶15 (brackets in ***Patterson I***).

Further, every "less serious type of criminal homicide" is a lesser-included offense of first-degree intentional homicide. *See* WIS. STAT. § 939.66(2) (2009-10). "When a defendant is charged with a crime he is automatically put on notice that he is subject to an alternative conviction of any lesser[-]included crime; the whole contains all its parts." ***Kirby v. State***, 86 Wis. 2d 292, 299-300, 272 N.W.2d 113 (Ct. App. 1978) (citation omitted). "[N]otice and charge on the greater offense as a matter of law includes notice of the included crime. Notice of the whole is notice of the parts." ***Geitner v. State***, 59 Wis. 2d 128, 134, 207 N.W.2d 837 (1973). Thus, Patterson was provided notice of the possibility of the lesser-included reckless homicide charge. *See* ***Patterson I***, No. 2013AP749-CR, ¶16.

Patterson's final substantive argument asserts approximately six instances of ineffective trial counsel. However, we are not persuaded that any of these claims are clearly stronger than the issues actually raised by postconviction counsel: to the extent that we can discern Patterson's highly confusing and meandering claims, we conclude that they are based on a misreading of the record or misunderstandings of the law, or are simply conclusory. We decline to address them further. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (an appellate court need not address every issue raised).

Because Patterson's issues are either previously litigated or not clearly stronger than the issues raised in the first postconviction motion and appeal, they are procedurally barred from further litigation.[4] The trial court thus did not err in denying Patterson's WIS. STAT. § 974.06 (2015-16) motion.

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

[4] In its response brief, the State focused on the available procedural bars as a basis for affirming the order appealed from. In his reply brief, Patterson argues that because the State did not directly refute his arguments, we should deem the State to have admitted them. *See, e.g.*, ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979). However, the State expressly reserved its right to brief the merits of the case if so requested by this court. *See* ***State v. Tillman***, 2005 WI App 71, ¶13 n.4, 281 Wis. 2d 157, 696 N.W.2d 574.