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September 4, 2019

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

2018AP1509

State of Wisconsin v. Cory M. Welch (L.C. # 2004CF6133)

Before Kessler, Dugan and Gundrum, 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).

Cory M. Welch, *pro se*, appeals a circuit court order denying his July 2018 postconviction motion seeking dismissal of charges for which he was convicted in 2005. He alleges that he suffered a violation of his right to a speedy trial. 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 (2017-18).¹ We affirm.

In November 2004, the State charged Welch with fourteen felonies and two misdemeanors. He made a speedy trial demand on November 10, 2004. The circuit court severed four of the counts, and Welch proceeded to a jury trial on those counts on January 18, 2005, within the ninety-day deadline imposed by WIS. STAT. § 971.10(2)(a).² The jury convicted Welch of all four counts, and the circuit court sentenced him to prison. On August 9, 2005, the district attorney's office received a request seeking prompt disposition of the charges still outstanding against Welch. On November 28, 2015, within the 120-day deadline set forth in WIS. STAT. § 971.11(2), a jury trial commenced on the twelve remaining counts.³ The State moved to dismiss four counts at the close of the evidence, and the jury found Welch guilty of the other eight crimes.

Represented by counsel, Welch pursued a postconviction motion and a direct appeal in which he claimed that the circuit court erroneously granted severance and erroneously admitted

¹ Although this appeal involves a criminal case that arose while the 2003-04 version of the Wisconsin Statutes was in effect, subsequent statutory revisions did not affect the parts of the statutes that are relevant to the discussion in this opinion, and therefore all references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² WISCONSIN STAT. § 971.10, titled "Speedy trial," provides that "[t]he trial of a defendant charged with a felony shall commence within ninety days from the date trial is demanded." *See* § 971.10(2)(a).

³ WISCONSIN STAT. § 971.11, known as the Intrastate Detainer Act, provides that a request for prompt disposition of a felony pending against a prison inmate triggers a 120-day time period for the State to bring the inmate to trial. *See id.*; *see also State v. Davis*, 2001 WI 136, ¶6, 248 Wis. 2d 986, 637 N.W.2d 62.

other-acts evidence at both of his trials. The circuit court denied relief, and we affirmed. *See State v. Welch (Welch I)*, No. 2007AP1688-CR, unpublished slip op. (WI App June 17, 2008).

In October 2008, Welch filed a postconviction motion *pro se* pursuant to WIS. STAT. § 974.06. He alleged that his postconviction counsel was ineffective for several reasons, including for failing to claim that the timing of his second trial violated his right to a speedy trial. The circuit court concluded that Welch's trial counsel preserved the speedy trial issue for appellate review, and therefore Welch's real complaint in regard to that issue was that his appellate counsel—not his postconviction counsel—was ineffective for failing to raise the speedy trial issue in the court of appeals. The circuit court explained that Welch must pursue the claim in the appellate court under *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), and otherwise denied the postconviction motion. We affirmed. *See State v. Welch (Welch II)*, No. 2009AP2045, unpublished slip op. (WI App May 17, 2011).

Welch went on to file a petition in the court of appeals seeking a writ of habeas corpus pursuant to *Knight*. He claimed that his appellate counsel was ineffective for failing to allege violations of his right to a speedy trial under WIS. STAT. § 971.10, U.S. CONST. amend. VI, and WIS. CONST. art. I, § 7. We denied relief in a twelve-page opinion, explaining that none of his speedy trial claims had merit and therefore his appellate counsel was not ineffective for failing to pursue them. *See State ex rel. Welch v. Thurmer (Welch III)*, No. 2010AP2264-W, unpublished slip op. and order (WI App Dec. 29, 2011).

In October 2015, Welch filed a postconviction motion alleging that the circuit court violated his constitutional rights when sentencing him and new factors warranted sentence

modification. The circuit court denied the motion, and we affirmed. *See State v. Welch (Welch IV)*, No. 2015AP2334, unpublished op. and order (WI App Nov. 30, 2016).

Welch subsequently filed the postconviction motion underlying this appeal.⁴ He contended that he was entitled to an order “dismiss[ing] the charges pursuant to WIS. STAT. § 971.11(2)(7) in [their] entirety for failing to give Welch a prompt disposition of the case violating his speedy trial rights under WIS. STAT. § 971.10(2)(4) [and] also under the United States and Wisconsin Constitutions.” The circuit court concluded that the claims were barred, and he appeals.

Preliminarily, we observe that Welch purported to file his most recent postconviction motion “pursuant to WIS. STAT. [§] 974.02(2).” That statute, however, unequivocally requires compliance with the deadlines and procedures set forth in WIS. STAT. RULE 809.30, which governs direct challenges to a conviction. *See State v. Henley*, 2010 WI 97, ¶¶46-47, 328 Wis. 2d 544, 787 N.W.2d 350. Welch long ago exhausted his direct appeal rights under RULE 809.30, and he therefore cannot use § 974.02(2) to obtain postconviction relief.

WISCONSIN STAT. § 974.06 is the mechanism by which a prisoner may raise constitutional and jurisdictional claims after the time for a direct appeal has passed. *See Henley*, 328 Wis. 2d 544, ¶52. Welch did not label his most recent postconviction motion as a proceeding under § 974.06, but we look beyond the labels that *pro se* prisoners apply to their submissions, relabeling them when necessary. *See bin-Rilla v. Israel*, 113 Wis. 2d 514, 521, 335 N.W.2d 384

⁴ Welch filed postconviction motions in addition to those described in this opinion. A summary of the entirety of those motions is unnecessary.

(1983). We therefore treat Welch's current appeal as arising out of a § 974.06 motion for postconviction relief.

Although WIS. STAT. § 974.06 permits collateral attacks on criminal convictions, “[w]e need finality in our litigation,” see *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), and § 974.06(4) thus requires that all grounds for relief be included in an original, supplemental, or amended postconviction motion. Any additional claims are barred unless the prisoner offers a sufficient reason for failing to allege or adequately raise the claims in a prior proceeding. See *Escalona-Naranjo*, 185 Wis. 2d at 181-82. Whether a prisoner has offered a sufficient reason for serial litigation under § 974.06 is a question of law that we review *de novo*. See *State v. Kletzein*, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

Welch asserts that he has a sufficient reason for raising his speedy trial claims now: the circuit court declined to address similar allegations when it resolved the postconviction motion that he filed in 2008, and this court followed suit when we affirmed the circuit court in *Welch II*. His proposed reason is insufficient as a matter of law. Regardless of the proceedings surrounding *Welch II*, the petition underlying *Welch III* afforded Welch a full opportunity to air his speedy trial claims in a postconviction proceeding. Moreover, after we released *Welch III* in 2011, Welch raised constitutional claims in his 2015 postconviction motion. See *Welch IV*, No. 2015AP2334, unpublished op. and order at 2. Welch does not mention the 2015 postconviction motion in his current round of litigation, let alone explain why the 2015 motion failed to include his current claims. Because Welch had multiple opportunities following *Welch II* to raise his claims, the proceedings in that matter do not provide a sufficient reason for permitting Welch's instant litigation.

Welch also suggests that he may pursue his current litigation because he is raising new arguments in support of his theory that he was denied a speedy trial. Specifically, he now asserts that his speedy trial demand under WIS. STAT. § 971.10 “must be considered together” with the request he made under WIS. STAT. § 971.11 for prompt disposition of the charges that were ultimately resolved in the second trial. His allegedly new arguments do not aid him. As we have already explained, Welch fails to offer a sufficient reason for omitting his current arguments from his earlier litigation, namely, the proceedings in *Welch III* and *Welch IV*. See *Escalona-Naranjo*, 185 Wis. 2d at 185 (defendant may not “strategically wait” to raise grounds for relief). Additionally, Welch contended in *Welch III* that he was entitled to relief because he was denied a speedy trial, and we addressed the merits of those contentions. See *id.*, No. 2010AP2264-W at 7-11. “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). Accordingly, Welch’s attempts to “re-theorize his previously-litigated challenge[s] are of no avail.” See *id.* at 992.

Finally, Welch asks this court to grant him “discretionary reversal” in the interest of justice pursuant to WIS. STAT. § 752.35. The conclusory four-line sentence he devotes to this contention does not offer any additional argument or information warranting relief. “Larding a final catch-all plea for reversal adds nothing; zero plus zero equals zero.” See *State v. Marhal*, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992) (citations and brackets omitted). The request for relief under § 752.35 is therefore denied.

IT IS ORDERED that the postconviction 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