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DISTRICT I

October 1, 2019

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

2018AP1540 State of Wisconsin v. Shane C. McCarthy (L.C. # 2005CF021)

Before Brash, P.J., Kessler 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).

Shane C. McCarthy, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2017-18) motion.[1] Based upon our review of the briefs and record, we conclude at conference

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

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We conclude that the motion is procedurally barred and, on that basis, we affirm.

In 2006, a jury found McCarthy guilty of three counts of causing great bodily harm by operating a motor vehicle while under the influence of cocaine, in violation of WIS. STAT. § 940.25(1)(am) (2003-04). Prior to trial, McCarthy alleged that his due process rights were violated when the vehicle involved in the crimes was destroyed, which prevented him from testing the brakes to determine if they were defective and could have caused the accident that injured the victims. The trial court denied him relief, but McCarthy continued to argue the issue at trial and at sentencing.[2]

Postconviction counsel was appointed for McCarthy, but she moved to withdraw at McCarthy's request so that he could proceed *pro se*. Thereafter, McCarthy personally advised the trial court that he was waiving his right to appointed counsel. The trial court granted the motion to withdraw. McCarthy, proceeding *pro se*, filed a postconviction motion that addressed several issues, including his allegation that he was denied due process because the vehicle was destroyed. The trial court denied the motion without a hearing.[3]

[2] The Honorable Karen E. Christenson denied the pretrial motion. The Honorable Charles F. Kahn, Jr., presided over McCarthy's trial and sentenced him.

[3] The Honorable Daniel L. Konkol denied McCarthy's postconviction motion.

McCarthy appealed, again raising several issues, including his claim that his due process rights were violated. This court affirmed. *See* ***State v. McCarthy***, No. 2008AP398-CR, unpublished slip op. (WI App Sept. 17, 2009). McCarthy filed a petition for review in the Wisconsin Supreme Court, which was denied on February 23, 2010.

McCarthy subsequently filed a petition for habeas corpus in federal court, which was denied. In 2011, the Seventh Circuit Court of Appeals affirmed the denial of McCarthy's petition, addressing the due process issue McCarthy raised concerning the destruction of the vehicle. *See* ***McCarthy v. Pollard***, 656 F.3d 478, 483-87 (7th Cir. 2011).

In 2018, McCarthy filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. McCarthy argued that trial counsel provided constitutionally defective representation concerning the destroyed vehicle by failing to address WIS. STAT. § 342.40(2), which relates to the removal and disposal of abandoned vehicles. McCarthy acknowledged that he previously litigated due process issues concerning the vehicle, but he argued that the motion should not be procedurally barred because:

> (I) he was unaware of the state statute that governed the destruction of the car; (II) trial counsel failed to be skilled and versed in the statutory law underlying McCarthy's due process claim; [and] (III) Good faith defense, the Statute was concealed in the context to the framework of the court's finding.

On July 18, 2018, the circuit court denied McCarthy's WIS. STAT. § 974.06 motion without a hearing.[4] The circuit court concluded that the motion was procedurally barred because

[4] The Honorable Michelle A. Havas denied the postconviction motion at issue in this appeal. We will refer to Judge Havas as the circuit court.

"there is no reason that the arguments set forth in his current motion could not have been raised previously." The circuit court added: "Further, even if they had been, there is not a reasonable probability that the discovery of the statute would have altered the outcome of any of the proceedings in this case." This appeal follows.[5]

We begin our analysis with the applicable legal standards. WISCONSIN STAT. § 974.06 permits collateral review of a defendant's conviction based on errors of jurisdictional or constitutional dimension. *See* ***State v. Johnson***, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981). However, the statute "was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Thus, a defendant may not seek collateral review of an issue "that could have been raised on direct appeal or in a [WIS. STAT. §] 974.02 motion" unless there is a "sufficient reason" for failing to raise it earlier. *See* ***id.*** (italics omitted). Whether a § 974.06 motion is procedurally barred "presents a question of law [that] we review *de novo*." ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997) (italics added).

Further, to the extent a WIS. STAT. § 974.06 motion raises issues that were previously litigated, they are also procedurally barred. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473

[5] After filing his notice of appeal from the July 18, 2018 order, McCarthy filed a motion in the circuit court alleging that McCarthy's *postconviction* counsel also provided ineffective assistance and asking the circuit court to incorporate these new allegations in his previously filed WIS. STAT. § 974.06 motion. The circuit court denied the motion, and McCarthy has not appealed from the denial of that motion. This court will consider only the arguments McCarthy presented in his original § 974.06 motion because the July 18, 2018 order denying that motion is the only order over which this court has jurisdiction.

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.").

Applying those standards, we conclude that McCarthy's WIS. STAT. § 974.06 motion is procedurally barred. It is undisputed that he previously litigated whether his due process rights were infringed by the destruction of the vehicle he was driving at the time of his crimes. He cannot relitigate that issue. *See* ***id.***

Nonetheless, McCarthy claims that his motion—which now includes allegations of ineffective assistance of trial counsel—should not be procedurally barred because he was not previously aware of WIS. STAT. § 342.40(2), and because both trial counsel and the trial court failed to apply that statute. Even if we accept McCarthy's assertion that his motion is alleging new issues, rather than relitigating issues decided in his prior appeal, we are not persuaded that McCarthy has overcome the procedural bar outlined in ***Escalona-Naranjo***. Specifically, McCarthy has not identified a "sufficient reason" for not raising these issues in his first postconviction motion. Section 342.40(2) existed at the time McCarthy committed his crimes. McCarthy could have alleged in his first postconviction motion that the trial court failed to apply that statute and that his trial counsel was ineffective for not considering that statute.

McCarthy suggests that his ignorance of the law is a valid reason for not having addressed WIS. STAT. § 342.40(2) in his first postconviction motion and appeal. He cites language from ***State v. Allen***, 2010 WI 89, ¶91, 328 Wis. 2d 1, 786 N.W.2d 124, for the proposition that a "sufficient reason" can include "ignorance of the … law underlying the claim." *See* ***id.*** In response, the State contends that McCarthy "misinterprets ***Allen***." (Bolding added.) The State explains:

> In ***Allen***, the defendant argued that "he was unaware" of certain claims at the time of his no-merit appeal, so it was allowable for him to raise them in a [WIS. STAT.] § 974.06 motion. ***Allen***, 328 Wis. 2d 1, ¶43. However, the Wisconsin Supreme Court disagreed. The court noted that [***State v. Howard***, 211 Wis. 2d 269, 564 N.W.2d 753 (1997)], on which ***Allen*** relied, involved a subsequent supreme court decision creating a "new rule of substantive law" that gave the defendant a sufficient reason for failing to raise the claim earlier. ***Id.***, ¶44. ***Allen***'s claims, on the contrary, were based in the settled law of ***Strickland*** [***v. Washington***, 466 U.S. 668 (1984)]. ***Id.*** Thus, because there was no change in the law to make ***Allen*** aware of new claims, his motion failed [to] establish that he was unaware of his claims for purposes of raising a sufficient reason under … § 974.06. ***Id.***, ¶¶43-44.
>
> McCarthy's argument here is like Allen's. McCarthy believes that because he did not think of an argument until now, he has a sufficient reason for failing to raise it earlier. But that is not what ***Allen*** says; ***Allen*** provides only that a change in substantive law could create a circumstance where a defendant has a sufficient reason for failing to raise a claim earlier. *See* ***Allen***, 328 Wis. 2d 1, ¶44. That is not the case here. McCarthy does not make any argument that a change in the law yields a sufficient reason, only a change in his understanding. That is not enough.

(Bolding and two commas added; record citation and footnotes omitted.)

McCarthy has not responded to the State's argument and, therefore, we deem it admitted. *See* ***State v. Chu***, 2002 WI App 98, ¶54, 253 Wis. 2d 666, 643 N.W.2d 878 (holding that the State's argument in a response brief that was not disputed in the defendant's reply brief is deemed admitted). Further, we are persuaded by the State's argument. Accordingly, we reject McCarthy's suggestion that his ignorance of the existence of WIS. STAT. § 342.40(2) is a basis to overcome the ***Escalona-Naranjo*** procedural bar.

For the foregoing reasons, we conclude that McCarthy's WIS. STAT. § 974.06 motion is procedurally barred. Therefore, we summarily affirm.

IT IS ORDERED that the circuit court's order is summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals