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DISTRICT I

November 18, 2019

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

2018AP1848

State of Wisconsin v. Cedric Hayes, Sr. (L.C. # 2012CF3450)

Before Brash, P.J., Kessler and Fitzpatrick, 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).

Cedric Hayes, Sr., *pro se*, appeals the order denying his request for postconviction relief.

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 summarily affirm.

This is Hayes’s second appeal stemming from his 2013 conviction for repeated sexual assault of a child. *See State v. Hayes*, No. 2015AP1357-CR, unpublished slip op. (WI App Dec. 6, 2016). We will not repeat all of the background information outlined in our prior decision resolving Hayes’s direct appeal. Instead, we provide only that information that we deem relevant to the claims now before us.

According to the criminal complaint, Q.L.W., a thirteen-year-old girl, ran away from home and stayed with Hayes, then thirty-seven years old, during the periods of April 20, 2012, through April 30, 2012, and June 3, 2012, through June 18, 2012. The State alleged that during each of those periods, Hayes engaged Q.L.W. in an act of sexual intercourse, and the State charged Hayes with two counts of second-degree sexual assault of a child in violation of WIS. STAT. § 948.02(2) (2011-12). Hayes disputed the charges and demanded a jury trial.

Six days before trial began, the State filed an amended information alleging a single count of repeated sexual assault of the same child between April 20, 2012, and June 18, 2012. *See* WIS. STAT. § 948.025(1)(e) [(2011-12)]. Hayes, by counsel, said he did not object.

....

Q.L.W. testified [at trial] that on the day she met Hayes, his house was cold and had no heat or electricity. Hayes suggested she get into bed with him to keep warm. She complied, and they had sexual intercourse twice during that night. Q.L.W. went on to testify that between the time she first arrived at Hayes’s house and Mother’s Day, Hayes had sex with her “every day. Sometimes twice a day.” When she returned to him after Mother’s Day, they had sexual intercourse approximately “every other day.” She described an incident in June 2012 when she had sexual intercourse with Hayes three times, explaining that one of the acts

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

terminated because Hayes's houseguest, Kayla Sienko, approached the bedroom.

....

The jury found Hayes guilty as charged, and he moved for postconviction relief. His primary contention was that trial counsel was ineffective for failing to investigate the status of his utility service during the charging period. In support, he produced documentation from a utility company showing that he had heat and electricity in his house from April 1, 2012, until more than a year later. Therefore, he argued, if trial counsel had undertaken an investigation, trial counsel would have discovered that the utilities in his house were functioning throughout the charging period of April 20, 2012, through June 18, 2012. In Hayes's view, counsel's failure to investigate the status of his utility service was a prejudicial deficiency because the utility company documents prove "(1) the assaults never occurred and (2) if they did, they occurred outside the charging period."

Hayes raised four other claims of trial counsel's alleged ineffectiveness that are relevant here. Specifically, he claimed his trial counsel was ineffective for: (a) agreeing to the amended information; (b) not objecting to [Detective Tammy] Tramel-McClain's testimony on the grounds that it was improper expert testimony and improper vouching for Q.L.W.; (c) not objecting to Sienko's rebuttal testimony; and (d) not investigating Q.L.W.'s "numerous lies" that, according to Hayes, he could have used at trial to impeach her credibility.

The circuit court rejected Hayes's claims without a hearing and then denied Hayes's motion for reconsideration.

Hayes, No. 2015AP1357-CR, ¶¶2-3, 7, 12-14 (footnotes omitted).

Hayes appealed the circuit court's ruling on his claims of ineffective assistance of trial counsel, and we affirmed. *See id.*, ¶1. The Wisconsin Supreme Court denied Hayes's petition for review.

In 2018, Hayes, *pro se*, filed a "Motion to Present Unresolved Issues and Claims," which the circuit court construed as a WIS. STAT. § 974.06 motion. (Some uppercasing omitted.) Hayes made four main arguments: (1) the State failed to disclose exculpatory evidence; (2) the

State breached WIS. STAT. § 971.23 by inadequately summarizing certain statements used at trial; (3) the charge against him was not supported by probable cause and the evidence was insufficient to support the conviction; and (4) Hayes received ineffective assistance from trial counsel because trial counsel failed to adequately investigate, failed to consult with Hayes, and failed to provide Hayes with discovery materials. The circuit court denied Hayes's motion without a hearing. This appeal follows.

The postconviction procedures of WIS. STAT. § 974.06 allow a convicted offender to attack a conviction after the time for a direct appeal has expired. *See State v. Escalona*, 185 Wis. 2d 168, 176, 517 N.W.2d 157 (1994). The opportunity to bring postconviction motions, however, is not limitless. Section 974.06(4) requires a prisoner to raise all constitutional and jurisdictional grounds for postconviction relief in his or her original, supplemental, or amended motion. *See id.*; *see also Escalona*, 185 Wis. 2d at 185. If a convicted offender did not raise his or her grounds for postconviction relief in a prior postconviction proceeding, or if prior litigation resolved the offender's claims, they may not become the basis for a subsequent postconviction motion under § 974.06 unless the offender demonstrates a sufficient reason for failing to allege or adequately raise the claims in the prior proceeding. *Escalona*, 185 Wis. 2d at 181-82.

“Whether a WIS. STAT. § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier is a question of law subject to *de novo* review.” *State v. Romero-Georgana*, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668 (italics added). A court determines the sufficiency of an offender's reason for serial litigation by examining the four corners of his or her postconviction motion. *See State v. Allen*, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

At the outset we note Hayes's concession that he is relitigating some of the claims before us. In his reply brief, Hayes states that he "believes that he is entitled to relitigate previously raised claims via supplementation of the issues." Hayes is wrong. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Beyond this, Hayes does not even reference the sufficient-reason requirement let alone offer one in his postconviction motion. See *Escalona*, 185 Wis. 2d at 181-82. Consequently, his claims are procedurally barred.

Hayes attempts to rectify his inadequate pleading by fleshing it out a bit on appeal. For the first time in his reply brief, Hayes claims his "postconviction counsel fumbled on presenting his claims of ineffective assistance of trial counsel. Specifically, the issues were presented to the court absent vital documentary and demonstrative evidence." Additionally, for the first time in his reply brief, Hayes alleges his appellate counsel was ineffective and asks that we construe his filing "under [the] *Knight* appellate umbrella." See *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). We decline to consider these arguments. See *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (explaining that the court of appeals generally does not address arguments raised for the first time in a reply brief).

Lastly, Hayes asks us to grant him a new trial in the interest of justice. See WIS. STAT. § 752.35. He submits that the real controversy in this matter has not been fully tried. See *Vollmer v. Luety*, 156 Wis. 2d 1, 16, 456 N.W.2d 797 (1990) (explaining that an appellate court may order a new trial in the interest of justice "(1) whenever the real controversy has not been

fully tried or (2) whenever it is probable that justice has for any reason miscarried”). We exercise our discretionary power to set aside a conviction only rarely and only in “exceptional cases.” See *State v. Avery*, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted).

Hayes submits that the jury did not have the opportunity to hear evidence that would have impacted its assessment of Q.L.W.’s credibility—most notably, evidence about whether Hayes had electricity while Q.L.W. was at his home. When we resolved Hayes’s direct appeal, we concluded that Hayes’s trial counsel was not ineffective for failing to investigate the details of his utility service and for failing to determine that the heat and electricity were operating in his house throughout the charging period. See *Hayes*, No. 2015AP1357-CR, ¶¶17-24. Hayes’s attempt to repackage his ineffective assistance of counsel claim falls short. We are unconvinced that this same evidence bore on an important issue in the case. See *State v. Burns*, 2011 WI 22, ¶24, 332 Wis. 2d 730, 798 N.W.2d 166 (explaining that the real controversy is not fully tried when the jury is not given an opportunity to hear important testimony that bears on a key issue of the case or when it had before it testimony or evidence that was improperly admitted so as to obscure a crucial issue).

As to Hayes’s remaining assertions, which amount to additional ways in which he believes Q.L.W. lied during her testimony, they do not amount to the exceptional circumstances necessary to earn him the extraordinary relief he seeks. Rather, as summed up by the State, they amount to “an ancillary attack on [Q.L.W.]’s reliability coming well after trial; it does not go to the core issue of whether Hayes assaulted her.” The real controversy in this matter was fully tried.

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