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DISTRICT IV

September 3, 2020

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

2019AP1613-CR

State of Wisconsin v. Jimmy L. Powell (L.C. # 2009CF792)

Before Fitzpatrick, P.J., Kloppenburg, and Nashold, 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).

Jimmy L. Powell, pro se, appeals the circuit court's order denying his motion to modify a restitution order. 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 809.21.¹ We affirm.

In 2010, Powell was convicted of first-degree reckless injury. The circuit court entered an order requiring Powell to pay \$65,546 in restitution to the victim for medical expenses, most of which had been covered by insurance. The circuit court rejected Powell's argument that restitution should not be payable to the victim for covered amounts.

In 2012, Powell brought a postconviction motion under WIS. STAT. § 974.02 challenging the restitution order and raising additional claims. Powell argued that the victim had already been compensated by his insurer and that the restitution order should have listed the insurer, not the victim, as the proper recipient of restitution. The circuit court denied Powell's postconviction motion. Powell appealed on multiple grounds, but he did not appeal the restitution issue. *See State v. Powell*, No. 2013AP1111-CR, unpublished slip op. (WI App Mar. 27, 2014). This court affirmed. *See id.*

In April 2019, Powell brought his current motion to modify the restitution order. Powell argued that the restitution order provided the victim with a double recovery. As noted, the circuit court denied the motion, and Powell now appeals.

We do not address the merits of Powell's arguments challenging the restitution order. Rather, we affirm based on *State v. Witkowski*, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App.

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

1991). Under *Witkowski*, “[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *See id.* at 990.

In *Witkowski*, the defendant sought to relitigate a matter—sufficiency of the evidence—that he had already litigated in his direct appeal. *See id.* at 987, 992. Here, Powell seeks to relitigate a matter—whether restitution was properly made payable to the victim—that he already litigated in his initial postconviction motion but did not pursue upon direct appeal following denial of that motion. However, *Witkowski* still controls in this circumstance. *See State v. Crockett*, 2001 WI App 235, ¶¶3, 12, 248 Wis. 2d 120, 635 N.W.2d 673 (“Crockett raised this claim in his initial postconviction motion, but the motion was denied and Crockett failed to appeal the issue. Therefore, Crockett may not assert it again here. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).”).²

In his reply brief, Powell makes several assertions that we interpret as an alternative request to construe this appeal as a petition under *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), claiming ineffective assistance of appellate counsel for failing to raise the restitution issue in Powell’s direct appeal. We decline to grant this request because Powell does not demonstrate that a *Knight* petition could succeed. More specifically, Powell does not show that the restitution issue was “clearly stronger” than the issues counsel raised in that appeal. *See*

² In seeking to modify the restitution order, Powell also asserts that the circuit court erred by failing to enforce one of two stipulations relating to restitution. However, as far as we can tell from Powell’s briefing and the record, this stipulation issue is intertwined with the issue of whether restitution was properly made payable to the victim and, therefore, is part of the matter already litigated. Stated another way, Powell does not persuade us that the stipulation issue should survive the procedural bar of *State v. Witkowski*, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991).

State v. Starks, 2013 WI 69, ¶¶32, 349 Wis. 2d 274, 833 N.W.2d 146 (defendant alleging ineffective assistance of appellate counsel must show that “unraised claims were ‘clearly stronger’ than the claims that were raised”), *abrogated on other grounds by State ex rel. Warren v. Meisner*, 2020 WI 55, ¶¶38, 40, 43, 392 Wis. 2d 1, 944 N.W.2d 588.

Therefore,

IT IS ORDERED that the circuit court’s order 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