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October 7, 2020

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

2018AP2284

State of Wisconsin v. Michael A. Fischer (L.C. #2013CF624)

Before Reilly, P.J., Gundrum and Davis, 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).

Michael A. Fischer appeals, pro se, from circuit court orders denying his postconviction motions to withdraw his pleas and for reconsideration of the court's denial of his motion to withdraw his pleas. He contends the circuit court erred in denying these motions without a hearing. 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 2014, Fischer pled no contest to possession of child pornography and using a computer to facilitate a child sex crime. The circuit court sentenced him to an eleven-year bifurcated sentence on count one and an eight-year bifurcated sentence on count two, consecutive to count one. Fischer appealed, his counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32, Fischer filed a response, and counsel filed a supplemental no-merit report. *State v. Fischer*, No. 2015AP1358-CRNM, unpublished slip op. and order at 1-2 (WI App June 14, 2017). In a 2017 summary order, we accepted the reports, agreed there was no arguable merit to any issue that could be raised on appeal, and affirmed the judgment of conviction. *See id.* at 2.

In April 2018, Fischer filed a pro se motion for postconviction relief, claiming: (1) there was an insufficient factual basis to support his plea to the charge of using a computer to facilitate a child sex crime and thus his plea colloquy was invalid; (2) his trial counsel had performed ineffectively by failing to obtain the police report, failing to investigate a witness, failing to have Fischer undergo a polygraph test, and recommending that he enter a plea to the charges against him; (3) evidence should have been suppressed due to an invalid search warrant and the police exceeding the scope of the warrant; and (4) his appellate counsel was ineffective for failing to recognize that the judgment erroneously imposed DNA surcharges. The circuit court denied this motion, and Fischer did not appeal.

In September 2018, Fischer filed the instant pro se postconviction motion seeking to withdraw his pleas, contending that there was an insufficient factual basis to support his plea to the charge of using a computer to facilitate a child sex crime and that he received ineffective

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

assistance of counsel based on counsel's failure to object to the insufficient factual basis as to that same charge, to investigate the charges against him, to preserve a record, to challenge the search and seizure of his cell phone, to object to the legitimacy of the search warrant, and to argue that the police exceeded the scope of the warrant. The circuit court denied the motion without a hearing. Fischer moved for reconsideration, and the circuit court denied that motion as well.

Fischer asserts on appeal that the circuit court erred in denying the instant postconviction motion and reconsideration motion without a hearing.²

A defendant is not automatically entitled to an evidentiary hearing on his or her postconviction motion. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). A hearing must be held only if the defendant alleges "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a defendant has alleged such facts is a question of law we review de novo. *Id.*, ¶9. "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Id.* We review the court's discretionary decision under the erroneous exercise of discretion standard. *Id.*

Absent a sufficient reason, a defendant is procedurally barred from raising claims for relief in a subsequent WIS. STAT. § 974.06 postconviction motion that were or could have been raised in a previous postconviction motion or on direct appeal. *See* § 974.06(4); *State v.*

² Fischer alternatively asks us to reverse the decision of the circuit court "in the interest of justice," pursuant to WIS. STAT. § 752.35. Because he fails to sufficiently develop a legal argument in support of this issue but merely rehashes his same points on the issues we have already noted, we decline to reverse on this basis. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (holding that "[w]e may decline to review issues inadequately briefed" and that "[a]rguments unsupported by references to legal authority will not be considered").

Escalona-Naranjo, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994); *State v. Tillman*, 2005 WI App 71, ¶1, 281 Wis. 2d 157, 696 N.W.2d 574. Whether a defendant's claims are procedurally barred is a question of law we review de novo. *State v. Fortier*, 2006 WI App 11, ¶18, 289 Wis. 2d 179, 709 N.W.2d 893 (Ct. App. 2005). We conclude that the circuit court did not err in denying Fischer's most recent motions without a hearing as the claims he raises are procedurally barred.

Fischer previously filed a pro se postconviction motion, in which he either raised or could have raised the issues he now raises. The claims he did raise are procedurally barred because they have been finally adjudicated, and the claims he could have raised, but did not, are procedurally barred unless he can show a sufficient reason why he did not previously raise them. See *Escalona-Naranjo*, 185 Wis. 2d at 181-82. Citing *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996), Fischer states that ineffective assistance of postconviction counsel may present a sufficient reason to overcome the *Escalona-Naranjo* procedural bar. While this is true, Fischer was not represented by counsel on his previous postconviction motion; thus, ineffective assistance of counsel could not be the reason Fischer failed to raise all of his current claims in that motion.³

³ Fischer also asserts that his claims should not be procedurally barred because there has been a change to the substantive law related to the charge of using a computer to facilitate a sex crime and because he is "factual[ly] innocen[t]" as to that charge. These assertions fall as Fischer fails to develop sufficient arguments related to them and merely cites in support to an unpublished per curiam decision, which does not change substantive law and cannot even be "cited in any court of this state" as precedent or persuasive authority. See WIS. STAT. § 809.23(3)(a),(b); see also *Pettit*, 171 Wis. 2d at 646.

Because all of the claims of Fischer’s September 2018 postconviction motion are procedurally barred, we affirm the order of the circuit court dismissing the motion without a hearing.⁴

Therefore,

IT IS ORDERED that the orders of the circuit court are 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 Fischer does not assert that the no-merit procedures were not followed, and the record reflects that they were followed. *See State v. Tillman*, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574 (recognizing that “a no merit appeal is a different breed” and concluding that the circuit and appellate court, in determining whether to apply the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-83, 517 N.W.2d 157 (1994), “must pay close attention to whether the no merit procedures were in fact followed”). While a no-merit appeal “clearly qualifies” as a previous postconviction motion, *State v. Allen*, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124, and also could serve as a basis to procedurally bar Fischer’s claims in this case, because Fischer’s claims are barred based upon the filing of his April 2018 postconviction motion, we need not determine whether his claims also are barred either because he raised them or could have raised them in response to the no-merit report.

