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DISTRICT I

December 1, 2020

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

2019AP2368	State of Wisconsin v. Andre N. Burkett (L.C. #1998CF2857)
2019AP2369	State of Wisconsin v. Andre N. Burkett (L.C. #1999CF1892)
2019AP2370	State of Wisconsin v. Andre N. Burkett (L.C. #1999CF2211)

Before Dugan, Graham and White, 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).

Andre N. Burkett, *pro se*, appeals from an order of the circuit court that denied a "motion for final judgment on State key witnesses," which Burkett filed on December 3, 2019. Based upon our review of the briefs and record, we conclude at conference that these cases are

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] The orders are summarily affirmed.

In Milwaukee County Circuit Court Case No. 1998CF2857, a jury convicted Burkett on one count of attempted theft by false representation as a party to a crime. In Case Nos. 1999CF1892 and 1999CF2211, a jury convicted Burkett of six other offenses, including one count of operating a motor vehicle without the owner's consent, two different theft charges, and three counts of felony bail jumping. The various concurrent and consecutive sentences imposed in these three cases totaled approximately eighteen and one-half years imprisonment under the indeterminate sentencing scheme. WIS. STAT. § 973.013. Between the time of Burkett's sentencings and now, he has made no fewer than twelve prior attempts to obtain relief from this court alone.[2]

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

[2] Our records reflect the following proceedings in the court of appeals:

> 1. Appeal No. 2001AP1563-CRNM, in which we summarily affirmed the judgment of conviction from the 1998 case.
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> 2. Appeal Nos. 2002AP1127-CRNM and 2002AP1128-CRNM, in which we summarily affirmed the judgments of conviction from the 1999 cases.
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> 3. Appeal Nos. 2003AP1846 through 2003AP1848, in which we summarily affirmed an order denying a motion for appointment of postconviction counsel.
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> 4. Appeal Nos. 2008AP663 through 2008AP665, in which we affirmed an order denying a motion for postconviction relief.
>
> 5. Appeal Nos. 2015AP352 through 2015AP354, in which we dismissed new appeals as untimely challenges to a December 2001 order.

(continued)

The subject of Burkett's current appeals is his December 2019 motion, entitled:

> MOTION for final judgment on State key witnesses 98CF002858,[3] 2857, and the State of Wisconsin and M.P.D. witnesses, all under 971.19(2) and 946.31(l)e and SCR22.07(4) and SCR22.07(2) and SCR20:14(a) 939.05; Burkett "Not Booked" before "Initial Appearances" or "Preliminary Hearing" or "Trial" or "Appeals". Burkett cannot be barred under 974.06. "Reversal"; innocent man.

The circuit court denied the motion, explaining that "MULTIPLE motions and appeals have been filed, and most of them have been frivolous. The defendant has had MULTIPLE opportunities to

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> 6. Appeal Nos. 2016AP961 through 2016AP963, in which we dismissed new appeals taken in all three cases because no recent final judgment or order from which an appeal could be taken had been entered.
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> 7. Appeal No. 2016AP1124, affirming orders denying a motion for postconviction discovery in the 1998 case.
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> 8. Appeal Nos. 2016AP1125 and 2016AP1126, in which we dismissed appeals taken in the 1999 cases because the order on postconviction discovery had not been entered in those cases.
>
> 9. Appeal No. 2017AP121-CR, in which we dismissed a new appeal taken in Case No. 1999CF1892 because no recent final judgment or order from which appeal could be taken had been entered.
>
> 10. Appeal No. 2017AP123-CR, in which we dismissed a new appeal taken in Case No. 1999CF2211 because no recent final judgment or order from which appeal could be taken had been entered.
>
> 11. Appeal Nos. 2017AP260 and 2017AP261, in which we affirmed orders denying a "letter of motion" seeking postconviction relief in the 1999 cases.
>
> 12. Appeal No. 2018AP517, in which we dismissed an appeal in the 1998 case because Burkett failed to submit an appellant's brief that complied with WIS. STAT. RULE 809.19, despite warnings from this court about noncompliance.

[3] Milwaukee County Circuit Court Case No. 1998CF2858 pertains to Burkett's co-defendant in the 1998 case, not to Burkett himself. The circuit court thus declined to address matters related to that case, as do we.

raise all of his issues and obtain appellate review of his arguments." The circuit court also concluded that the "motion for final judgment" was frivolous. It assessed $50 costs against Burkett; directed its clerk to file, without response, any further motions submitted by Burkett; and directed its clerk to impose $50 in costs for each additional motion that Burkett might file after December 5, 2019. Burkett appeals.

Although Burkett does not clearly identify the procedural basis for his motion, we construe it as a motion under WIS. STAT. § 974.06. Such motions are the "primary statutory means of [collateral] postconviction relief for criminal defendants" after their direct appeal rights have been exhausted, ***State v. Henley***, 2010 WI 97, ¶¶44-50, 328 Wis. 2d 544, 787 N.W.2d 350, and Burkett does not explain how any other statutes and Supreme Court Rules he cites provide a procedural basis for relief.[4] Burkett is not entitled to relief for three reasons.

First, a person seeking relief via WIS. STAT. § 974.06 "must be in custody under the sentence he desires to attack[,]" *see* ***State v. Bell***, 122 Wis. 2d 427, 430-31, 362 N.W.2d 443 (Ct. App. 1984), but Burkett has not demonstrated that he was in custody for any of these three

[4] Of the statutes referenced in the title of Burkett's motion, WIS. STAT. § 971.19(2) is a venue provision; WIS. STAT. § 946.31(1)(e) criminalizes false swearing before a "notary public while taking testimony for use in an action or proceeding pending in court"; and WIS. STAT. § 939.05 is the party-to-a-crime modifier. Of the Supreme Court Rules referenced in the title of Burkett's motion, SCR 22.07(2) and (4) relate to the operation of preliminary review panels within the lawyer regulation system, and there is no SCR 20:14(a). However, there is a Rule 20:1.4(a), an introductory clause that states only "An attorney shall:", and there is a Rule 20:1.14(a), which requires a lawyer to maintain as normal an attorney-client relationship as possible with a client of diminished mental capacity.

circuit court cases at the time he filed his "motion for final judgment."[5] That alone forecloses Burkett's attempt at relief.

Second, a defendant is required to raise all grounds for relief in his or her original, supplemental or amended motion for postconviction relief, unless sufficient reason is shown for failing to raise the issues earlier. *See* WIS. STAT. § 974.06(4); *see also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). Burkett has had multiple prior postconviction proceedings and appeals. While Burkett asserts that he "cannot be barred under 974.06," he does not develop any argument in support of that assertion. This court need not consider unexplained and undeveloped arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

Finally, to secure an evidentiary hearing on a postconviction motion, the motion must adequately allege within its four corners the "who, what, where, when, why, and how" of the claim. *See* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. Burkett's primary issue appears to be some variation of a claim that "[h]e was not booked under § 943.20 or 939.05, 939.62."[6] This conclusory assertion fails to address almost all of the ***Allen*** requirements. For example, Burkett does not explain what he means when he says he was "not booked" or how he thinks such a defect would invalidate his convictions.[7] He also fails to cite

[5] In March 2014, the circuit court docketed a notice in Case No. 1999CF1892, reflecting that the Department of Corrections planned to discharge Burkett in June 2014.

[6] These statutes are the basis for his conviction in the 1998 case. *See* WIS. STAT. §§ 939.62 (1997-98) (attempt); 943.20 (1997-98) (theft); 939.05 (1997-98) (party to a crime).

[7] Burkett may be attempting to argue that defects in "booking" invalidate the signature bond in the 1998 case; that bond was the predicate for his bail jumping charges in the 1999 cases. If that is (continued)

any relevant controlling legal authority in support of his claims. This court "need not consider arguments unsupported by reference to legal authority." *See* ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286.

Thus, because Burkett's "motion for final judgment" is both procedurally barred and wholly conclusory,[8] and because Burkett develops no argument to the contrary, we conclude that the circuit court did not erroneously exercise its discretion in denying Burkett's motion. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

We further discern no error in the circuit court's determination that the motion was frivolous and its imposition of sanctions. A claim is frivolous if the party knew or should have known that the claim was without any reasonable basis in law or equity. *See* ***Howell v. Denomie***, 2005 WI 81, ¶8, 282 Wis. 2d 130, 698 N.W.2d 621. We do not upset a circuit court's factual findings unless they are contrary to the great weight of the evidence, and the ultimate conclusion about whether what the party knew or should have known supports a determination of frivolousness is a question of law. *See* ***id.***

Burkett does not specifically challenge the circuit court's finding of frivolousness, but, in any event, we agree with that finding. The circuit court had previously warned Burkett, relative

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Burkett's intent, he has already litigated that claim on at least two prior occasions. *See* ***State v. Burkett***, Nos. 2002AP1127-CRNM and 2002AP1128-CRNM, unpublished op. and order at 6-7 (WI App Mar. 6, 2003) (direct appeals in the 1999 cases); ***State v. Burkett***, Nos. 2008AP663 through 2008AP665, unpublished slip op. ¶¶7-10 (WI App Dec. 22, 2009) (appeals from order denying WIS. STAT. § 974.06 motion). Burkett cannot relitigate this issue, no matter how he might repackage it. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

[8] Burkett's fleeting references to false arrest, perjury, and ineffective assistance of trial counsel are also conclusory and procedurally barred.

to a record supplementation issue, that his request was "completely without basis" and that further similar requests would result in the imposition of costs. Thus, Burkett should have known that ongoing baseless requests would subject him to sanctions.

Further, this court previously informed Burkett of the ***Escalona*** procedural bar in his 2008 appeals from an order denying a WIS. STAT. § 974.06 motion in all three cases. *See* ***State v. Burkett***, Nos. 2008AP663 through 2008AP665, unpublished slip op. ¶8 (WI App Dec. 22, 2009). More recently, we cautioned Burkett that he "must do more than simply toss a bunch of concepts into the air with the hope that either the … court or the opposing party will arrange them into viable and fact-supported legal theories." *See* ***State v. Burkett***, Nos. 2017AP260 and 2017AP261, unpublished op. and order at 5 (WI App Feb. 21, 2018) (quoting ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999)). Thus, Burkett should have known that his current claims lacked any basis in fact or law.[9]

Because a claim correctly adjudged to be frivolous in circuit court is frivolous *per se* on appeal, *see* ***Riley v. Isaacson***, 156 Wis.2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990), the State has asked that we sanction Burkett by imposing restrictions on Burkett's further appellate filings pursuant to ***State v. Casteel***, 2001 WI App 188, 247 Wis. 2d 451, 634 N.W.2d 338. In ***Casteel***, we concluded that the appeal was frivolous and sanctioned the *pro se* appellant by imposing requirements for filing future appeals. *See* ***id.***, ¶¶1, 25. In that case, however, the appellant had been warned that a previous appeal was frivolous, and that if he continued to file frivolous

[9] We reject any claim by Burkett that we should hold him to lower standards because he is not "trained in law." Self-represented litigants are generally bound to the same appellate rules as attorneys; self-representation is not a license to avoid or ignore the relevant procedural and substantive law. *See* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992).

appeals, he would be sanctioned. *See* ***id.***, ¶¶19-20. Burkett has not yet received such a warning from this court, but we provide one now. If Burkett continues to file motions and appeals without offering a sufficient reason why he did not litigate the issue previously, or if he continues to file motions and appeals raising issues previously litigated, we will declare the appeal to be frivolous, and we will impose appropriate sanctions, which may include monetary sanctions and restrictions on future appellate filings. *See* ***id.***, ¶¶23-25; *see also* WIS. STAT. RULE 809.25(3).

Upon the foregoing, therefore,

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