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DISTRICT I

April 20, 2021

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

2019AP1749 State of Wisconsin v. Carlos D. Lindsey (L.C. # 2010CF4876)

Before Brash, P.J., Dugan and Donald, 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).

Carlos D. Lindsey, *pro se*, appeals an order denying his motion for postconviction relief brought under WIS. STAT. § 974.06 (2019-20).[1] He alleges that his trial counsel was ineffective in various ways and that he did not receive a fair trial. The circuit court concluded that his claims were procedurally barred. Based upon our review of the briefs and record, we conclude at

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

A jury in 2011 found Lindsey guilty as charged of five counts of sexually assaulting a child under thirteen years of age: three counts involving JDM, one count involving CDM, and one count involving SEJ. The circuit court imposed an aggregate twenty-four-year term of imprisonment bifurcated as sixteen years of initial confinement and eight years of extended supervision. Lindsey pursued an appeal under the no-merit procedures set forth in WIS. STAT. RULE 809.32. We affirmed. *See* ***State v. Lindsey*** (***Lindsey I***), No. 2012AP2153-CRNM, unpublished op. and order (WI App May 20, 2015).

Four years after we resolved ***Lindsey I***, Lindsey filed the postconviction motion underlying the instant appeal. He alleged that his trial counsel was ineffective for failing to: (1) call witnesses who would have provided exculpatory testimony; (2) consult an expert about the lack of physical evidence of the sexual assaults; (3) raise a multiplicity challenge to the three charges involving JDM on the ground that they occurred "in a short time period"; and (4) move for a mistrial based on an alleged emotional outburst by the victims' family members during the State's closing argument. He also alleged that the circuit court failed to protect his right to a fair trial by neglecting to question the jurors about whether they could remain impartial following the alleged outburst. The circuit court rejected the claims, and Lindsey appeals.

WISCONSIN STAT. § 974.06 is the mechanism for a prisoner to bring constitutional and jurisdictional claims after exhausting his or her statutory direct appeal rights. *See* ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. The opportunity to bring such claims is limited, however, because "[w]e need finality in our litigation." *See* ***State v. Escalona-***

Naranjo, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, a person may not bring postconviction claims under § 974.06, if the person could have raised the issues in a previous postconviction motion or on direct appeal unless the person states a "sufficient reason" for failing to raise or adequately address those issues earlier. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 184. Whether a person's claims are procedurally barred in any particular case is a question of law that this court reviews *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

"A no-merit appeal clearly qualifies as a previous motion under [WIS. STAT.] § 974.06(4)." ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124. Nonetheless, when we consider the preclusive effect of no-merit proceedings, our review includes an assessment of whether appellate counsel and this court followed the no-merit procedures and whether those procedures warrant confidence in their outcome. *See* ***State v. Tillman***, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574.

As ***Tillman*** requires, we have conducted an assessment of the no-merit proceedings underlying ***Lindsey I***. Our assessment reveals that appellate counsel filed a no-merit report and, at our request, a supplemental no-merit report. Lindsey filed a response. Our summary affirmance reflects that we reviewed the entirety of the record as required by ***Anders v. California***, 386 U.S. 738 (1967), and we considered appellate counsel's no-merit reports, Lindsey's response, and documents that Lindsey filed in advance of the no-merit reports. *See* ***Lindsey I***, No. 2012AP2153-CRNM at 3 & n.2. We then concluded that no basis existed for an arguably meritorious appeal. *See* ***id.*** at 17. In reaching that conclusion, we discussed numerous issues, including many that appellate counsel did not address, *see* ***id.***, *passim*, and we expressed some surprise at appellate counsel's description of the steps he took at certain points in the

appellate process, *see* ***id.*** at 11 n.4. Ultimately, however, we determined that nothing before the court supported an arguably meritorious claim for postconviction or appellate relief.

We are satisfied that the no-merit process unfolded as contemplated by ***Anders*** and WIS. STAT. RULE 809.32, and therefore we have confidence in the proceedings underlying ***Lindsey I***. ***Escalona-Naranjo*** thus applies here. *See* ***Tillman***, 281 Wis. 2d 157, ¶20. Accordingly, Lindsey may not pursue his current claims unless he demonstrates a sufficient reason that they were not asserted or were inadequately raised in ***Lindsey I***. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 184.

Lindsey offers two reasons to allow additional litigation in regard to his claims that trial counsel was ineffective for failing to interview and present exculpatory witnesses. We consider each in turn.

First, Lindsey asserts that in ***Lindsey I***, this court erred in response to his allegations about potential witnesses. In support, he cites ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893. There, we concluded that a convicted person had a sufficient reason for a second postconviction motion because in an earlier no-merit appeal, this court and appellate counsel overlooked an issue readily apparent from the record, namely, that the defendant had received an illegally enhanced sentence. *See* ***id.***, ¶¶9-10, 27. ***Fortier*** does not assist Lindsey, however, because he fails to show that we overlooked any claims in the no-merit proceedings. To the contrary, our decision in ***Lindsey I*** shows that we rejected Lindsey's allegation that his trial counsel failed "to investigate whether to call witnesses," explaining that the claim lacked merit because trial counsel in fact called witnesses. *See* ***Lindsey I***, No. 2012AP2153-CRNM at 12. We also addressed Lindsey's vague allegation that trial counsel could have called to the stand more "powerful" witnesses than those presented, concluding both that nothing in the record

supported this claim and that Lindsey failed to identify anything outside of the record from which we could conclude that trial counsel's actions deprived him of any meaningful testimony. *See* ***id.*** Indeed, Lindsey's bald and conclusory allegation that trial counsel should have called better witnesses clearly failed to identify an arguably meritorious reason to believe that trial counsel could have presented a stronger case. *See* ***State v. Allen***, 2004 WI 106, ¶¶24, 30, 274 Wis. 2d 568, 682 N.W.2d 433.

Second, Lindsey asserts that he should be permitted to litigate an additional postconviction claim that trial counsel was ineffective for failing to seek out witnesses because he lacks legal training, and therefore he relied on this court and his appellate counsel to identify and develop the issue in proceedings underlying ***Lindsey I***. This reason for serial litigation, like the first, is insufficient to overcome the procedural bar imposed by ***Escalona-Naranjo*** and WIS. STAT. § 974.06. Most litigants lack legal training and rely on their lawyers. Indeed, no court in this state has concluded that a litigant's lack of legal knowledge constitutes a sufficient reason for a second or subsequent postconviction motion. *See* ***Jackson v. Baenen***, No. 12-CV-00554, 2012WL5988414, at *1 (E.D. Wis. Nov. 29, 2012) (observing that "[n]o Wisconsin court has recognized ignorance of the law as a 'sufficient reason' under § 974.06(4)").

Moreover, Lindsey took no action in this court or in the supreme court after we issued our opinion in ***Lindsey I***. Specifically, the record shows that he did not move this court for reconsideration or petition the supreme court for review. *See* ***Allen***, 328 Wis. 2d 1, ¶71. He also failed to take prompt action to seek relief in the circuit court and instead waited four years before filing the postconviction motion underlying this appeal. *See* ***id.*** His inaction is a relevant consideration and "firms up the case for forfeiture of any issue that could have been raised." *See* ***id.***, ¶72. In sum, Lindsey fails to identify a sufficient reason to permit an additional

postconviction motion in regard to trial counsel's alleged failure to seek out and present exculpatory witnesses.

The appellant's brief that Lindsey filed in this appeal does not include any discussion of the other issues that he sought to raise in his WIS. STAT. § 974.06 motion, nor does the brief identify, let alone discuss, any specific reasons that he should be permitted to raise those issues now. The State argues in its respondent's brief that Lindsey's postconviction motion failed to demonstrate a sufficient reason for pursuing any of his current claims. Lindsey did not file a reply brief, thus conceding the State's responsive arguments. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578. The record shows that his concession is fully warranted. Accordingly, we conclude that his claims are barred, and we therefore summarily affirm.

IT IS ORDERED that the postconviction 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