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DISTRICT I

December 21, 2021

To:

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Circuit Court Judge
Electronic Notice

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John D. Flynn
Electronic Notice

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

2020AP1291-CR State of Wisconsin v. Clarence D. Shelton, III (L.C. # 2018CF297)

Before Brash, C.J., Donald, P.J., and White, J.

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).

Clarence D. Shelton, III, *pro se*, appeals a judgment of conviction entered after he pled guilty to first-degree reckless homicide as a party to a crime. Upon review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] Because Shelton raises his claims for the first time on appeal, we do not address them, and we summarily affirm.

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

Shelton pled guilty to first-degree reckless homicide as a party to a crime, and the circuit court imposed a forty-year term of imprisonment. Shelton's postconviction counsel moved for postconviction relief on his behalf, seeking resentencing. The circuit court denied the motion without a hearing. Proceeding *pro se*, Shelton next filed a belated notice of appeal that we made timely by an order retroactively extending his deadline for a direct appeal. *See* WIS. STAT. RULES 809.30(2)(j), 809.82(2)(a). The notice of appeal set forth that Shelton sought to challenge the judgment of conviction.

Shelton argues on appeal that his trial counsel was ineffective in numerous ways. He also seeks plea withdrawal on the ground that his guilty plea was not knowing, intelligent, and voluntary. He failed, however, to raise these claims in the circuit court before filing a notice of appeal.[2]

We do not consider issues raised for the first time on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Therefore, a defendant seeking postconviction relief under WIS. STAT. RULE 809.30, normally must raise his or her claims in a postconviction motion filed in the circuit court unless the defendant seeks to challenge the sufficiency of the evidence or issues previously raised. *See* WIS. STAT. § 974.02(2). The rule requiring a convicted defendant to raise claims first in the circuit court is applicable to claims of ineffective assistance

[2] The record reflects that Shelton filed a postconviction motion pursuant to WIS. STAT. § 974.06 after filing the notice of appeal in this case. The circuit court denied the motion without prejudice on the ground that a defendant cannot proceed under § 974.06 while a direct appeal is pending. *See* ***State v. Redmond***, 203 Wis. 2d 13, 23, 552 N.W.2d 115 (Ct. App. 1996). Shelton's notice of appeal does not bring either the § 974.06 motion or the order denying that motion before this court for review. *See* ***State v. Baldwin***, 2010 WI App 162, ¶61, 330 Wis. 2d 500, 794 N.W.2d 769 (explaining that, to confer this court's jurisdiction over an order or judgment, a notice of appeal must identify the order or judgment appealed from; and a notice of appeal cannot identify an order or judgment that resolves a motion filed after the notice of appeal).

of counsel and to motions for plea withdrawal. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). Specifically, "[a] claim of inadequate trial counsel is to be raised by a hearing in the [circuit] court, at which trial counsel can testify concerning the reasons behind actions taken." ***State v. Mosely***, 102 Wis. 2d 636, 657, 307 N.W.2d 200 (1981). Similarly, "a challenge to the validity of the plea is not properly made for the first time in the context of an appeal.... [T]he appropriate remedy is by a post-conviction motion to withdraw the plea addressed to the circuit court." ***County of Racine v. Smith***, 122 Wis. 2d 431, 438, 362 N.W.2d 439 (Ct. App. 1984).

Shelton concedes in his reply brief that he must raise his claims first in the circuit court and that he failed to do so. He nonetheless suggests that we should assess the claims stated in his appellate briefs, deem those claims meritorious, and remand them for a hearing. We decline to proceed in that fashion. A motion for postconviction relief must be assessed pursuant to the standards set forth in ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433. There, our supreme court explained that the circuit court must conduct an evidentiary hearing on the defendant's claims if the postconviction motion alleges sufficient material facts that, if true would entitle the defendant to relief. *See* ***id.***, ¶9. If, however:

> 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. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion."

Id. (citations omitted).

Interests of judicial economy and efficiency dictate that we proceed in a way that permits the circuit court to conduct the initial review of Shelton's claims. *Cf.* ***Huebner***, 235 Wis. 2d 486,

¶12 (explaining that raising issues at the circuit court level allows that court to correct or avoid errors and may eliminate the need for an appeal). Moreover, we are not permitted to exercise the circuit court's discretion. *See* ***Barrera v. State***, 99 Wis. 2d 269, 282, 298 N.W.2d 820 (1980). Therefore, we will adhere to the rule requiring a defendant to raise claims for postconviction relief in the circuit court, not this court.

Finally, we have considered the State's assertion that, "by pleading guilty, Shelton forfeited any claims that are not related to the plea proceedings." We recognize the rule that a valid guilty plea normally results in a forfeiture of nonjurisdictional defects, including constitutional claims. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886. However, we will not decide here whether Shelton has forfeited any claims. We have declined to assess the postconviction claims that he raised for the first time in this court, and we do not know what claims he might later pursue. We do not resolve issues based on hypothetical or future facts. *See* ***State v. Armstead***, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998). For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment of conviction 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