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DISTRICT II

March 16, 2022

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
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Deshawn D. Johnson, #456307
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You are hereby notified that the Court has entered the following opinion and order:

2020AP215 State of Wisconsin v. Deshawn D. Johnson (L.C. #2006CF1064)

Before Neubauer, Grogan and Kornblum, 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).

Deshawn D. Johnson appeals pro se from an order denying his WIS. STAT. § 974.06 (2019-20)[1] motion for postconviction relief. Johnson asserts his trial and appellate counsel provided ineffective assistance because trial counsel failed to use certain information in police reports to question witnesses at trial, and appellate counsel failed to assert trial counsel acted ineffectively for failing to do so. Johnson also claims the interest of justice warrants a new trial.

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

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. We affirm.

In April 2007, a jury found Johnson guilty of attempted first-degree intentional homicide, contrary to WIS. STAT. §§ 940.01(1)(a), 939.32 (2005-06). The trial court sentenced Johnson to forty years, consisting of twenty-five years of initial confinement and fifteen years of extended supervision.

In March 2008, Johnson's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). The report identified two issues: (1) sufficiency of the evidence; and (2) sentencing. Johnson filed a response to the no-merit report alleging his trial counsel provided ineffective assistance for failing to pursue imperfect self-defense. In June 2008, this court issued an order addressing the no-merit report. During our "independent review of the record," we identified a "potential issue of arguable merit" with respect to sentencing, and we ordered Johnson's appellate counsel to file a supplemental report addressing it. In addition, we: (1) concluded the evidence in the record demonstrated Johnson's conviction was supported by sufficient evidence; (2) identified an issue involving a mistrial motion that appellate counsel did not address, which we subsequently concluded did not have merit; and (3) addressed Johnson's claim of ineffective assistance, which we concluded had no merit.

In July 2008, after reviewing appellate counsel's response to our sentencing question, we concluded that "no potential issues of arguable merit exist and that this appeal may be disposed of summarily."

In February 2019, over a decade after the conclusion of his no-merit appeal, Johnson filed his first WIS. STAT. § 974.06 motion. He alleged his appellate counsel provided ineffective assistance for: (1) failing to file a postconviction motion alleging his trial counsel was ineffective for not reviewing discovery materials—namely police reports he thinks could have been used to question witnesses at trial; and (2) failing to follow proper no-merit procedures.[2] The trial court denied the motion, concluding it failed to set forth any facts to support his allegations and because Johnson's motion was "conclusory in nature."

Johnson appealed the trial court's 2019 decision, but in January 2020, while that appeal was pending, he filed a second WIS. STAT. § 974.06 motion in the trial court. This motion specifically alleged his trial counsel failed to thoroughly prepare for trial, investigate, and properly use information contained within police reports at trial. Johnson asserted that appellate counsel provided ineffective assistance for failing to file a postconviction motion raising trial counsel's alleged ineffectiveness or raising trial counsel's alleged ineffectiveness in his direct appeal. Further, Johnson asserted trial counsel should have investigated and presented information related to cellphone records he believed could have undermined the State's case and that appellate counsel gave him ineffective assistance for failing to raise trial counsel's alleged ineffectiveness with regard to the cellphone records. Finally, Johnson asked the trial court to give him a new trial in the "interest of justice."

In January 2020, the trial court summarily denied Johnson's motion as procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because

[2] Johnson's first WIS. STAT. § 974.06 motion also alleged a suppression issue, but because he did not identify that issue in his second § 974.06 motion, that alleged issue is not relevant here.

Johnson's motion was conclusory and because he failed to provide any sufficient reason for his "'new' ground of [alleged] ineffective assistance." Johnson appealed the trial court's order to this court. In June 2020, Johnson moved to dismiss his 2019 appeal, and we granted his request. Thus, this case involves reviewing only the trial court's 2020 order denying Johnson's second WIS. STAT. § 974.06 motion. Johnson believes the trial court erred in summarily denying his motion as procedurally barred, wants us to address his ineffective assistance claims, and believes he is entitled to a new trial in the interests of justice. We disagree.

WISCONSIN STAT. § 974.06(4) bars a defendant from bringing postconviction claims, including constitutional claims, under § 974.06 if the defendant could have raised the claims in a previous postconviction motion or on direct appeal, unless the defendant has a "sufficient reason" for failing to do so. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.[3] It is therefore imperative that a defendant make all claims of error in his first postconviction motion or direct appeal so "any remedy the defendant is entitled to can be expeditiously awarded." ***Id.*** at 186. This requirement allows the issues to be decided while memories are fresh, witnesses and records are still available, and prevents gaming of the system—strategically waiting to make some arguments years later only after a court has denied the arguments already made. ***Id.*** at 185-

[3] The text of WIS. STAT. § 974.06(4) provides:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

86. A claim brought under § 974.06 is also barred if it has been finally adjudicated during a previous appeal. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. "We need finality in our litigation." ***Id.*** at 185. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Whether any of Johnson's claims brought pursuant to WIS. STAT. § 974.06 are barred by the application of § 974.06(4) and ***Escalona-Naranjo*** presents a question of law which we review de novo. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

Johnson's first appeal in 2008 proceeded under our no-merit procedures. *See* WIS. STAT. RULE 809.32. The ***Escalona-Naranjo*** procedural bar applies to no-merit appeals as long as the proper no-merit procedures were followed. *See* ***State v. Tillman***, 2005 WI App 71, ¶2, 281 Wis. 2d 157, 696 N.W.2d 574 (extending procedural bar to no-merit appeals); ***State v. Allen***, 2010 WI 89, ¶64, 328 Wis. 2d 1, 786 N.W.2d 124 (procedural bar applies to no-merit appeals unless defendant presents "sufficient reason" to show "the court of appeals did not follow no-merit procedure"). Thus, for Johnson to successfully pursue additional claims of error under WIS. STAT. § 974.06 following his no-merit appeal, he must provide a sufficient reason justifying his failure to make his "new" allegations of ineffective assistance during his no-merit appeal.

Overcoming the procedural bar when an appeal proceeded through the no-merit procedure is particularly challenging because when a defendant has a no-merit appeal, the court of appeals is tasked with identifying *all* potential errors for the defendant. *See* ***Allen***, 328 Wis. 2d 1, ¶58 (court of appeals "must perform a 'full examination of all the proceedings' to search for any 'legal points arguable on their merits'" (quoting ***Anders***, 386 U.S. at 744)). "If

the no-merit procedure was followed, then it is irrelevant whether [a defendant] raised his claims. He got review of those claims from the court of appeals, and he is barred from raising them again." ***Allen***, 328 Wis. 2d 1, ¶63. In other words, if there are any meritorious issues—any legal errors that occurred below that warrant relief—the court of appeals will identify them. Accordingly, *all* potential meritorious claims have been considered in the no-merit appeal.

Johnson's 2020 motion fails to allege that the no-merit procedure itself was not followed in his first appeal.[4] And, the record conclusively demonstrates that the no-merit procedure was properly followed. This court reviewed appellate counsel's communication and counsel's handling of the case, the no-merit report, and Johnson's response. We identified potential issues appellate counsel did not raise and reviewed them. We asked appellate counsel for a supplemental report. We addressed the ineffective assistance issue Johnson raised in his response to the no-merit report and determined it had no merit. We conducted a complete and thorough independent review of the record. Johnson has failed to provide us with anything that "undermine[s] our confidence in the court's decision," he has not identified any "issue of such obvious merit that it was an error by the court not to discuss it," and he has not shown there was a failure to follow the proper no-merit procedure. *See* ***Allen***, 328 Wis. 2d 1, ¶83. Because we are confident the no-merit procedure was followed, applying ***Escalona-Naranjo***'s procedural bar here is therefore appropriate.

[4] Johnson's 2019 motion alleges appellate counsel "failed to follow the steps cited in procedure [WIS. STAT. §] 809.32." However, the record belies his conclusory assertion, and he did not make this argument in the 2020 motion, which underlies this appeal.

Further, Johnson fails to provide any *other* sufficient reason (beyond an attack on the no-merit procedure itself) for his failure to raise a *different* ineffective assistance of counsel claim in a WIS. STAT. § 974.06 motion from the one he originally raised in his response to the no-merit report. Johnson plucks out bits and pieces from police reports he asserts should have been used during his trial and argues in his appellate brief that he could not make this argument earlier because he did not have the police reports until after the no-merit appeal had concluded. In Johnson's 2020 postconviction motion, however, he says nothing about not having the police reports. Moreover, he presents nothing to this court establishing he did not have this information during the trial or during his no-merit appeal. He fails to provide any evidence at all that he requested his file before or during his first appeal or that any requests for his file were ignored or denied.

Johnson's 2020 postconviction motion does not satisfy WIS. STAT. § 974.06(4)'s "sufficient reason" requirement because it consists solely of conclusory allegations about how his trial counsel should have used particular information in the police reports and conclusory assertions about how his appellate counsel should have recognized trial counsel's failures. Because Johnson's 2020 postconviction motion failed to include *any* reason why his new claims were not made during his no-merit appeal, Johnson's claims are procedurally barred.

Finally, Johnson asks us to exercise our discretionary authority under WIS. STAT. § 752.35 to reverse his conviction and order a new trial "in the interest of justice." We decline this request. Our statutory authority under § 752.35 is used "sparingly and with great caution" and only if "it appears from the record that the real controversy has not been fully tried." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. When we independently reviewed Johnson's case in 2008 during his no-merit appeal, we concluded—based on our

review of the entire record—that no meritorious claims existed. The testimony presented at trial, which included testimony from the victim (who had known Johnson for a long time), overwhelmingly showed that Johnson was the shooter. The jury heard many witnesses testify to the events, and the jury determined the credibility of the witnesses. *See* ***State v. John***, 11 Wis. 2d 1, 10, 103 N.W.2d 304 (1960) ("credibility of the witnesses was for the jury"). Johnson's attempt to challenge those credibility determinations over a decade later based on his conclusory and self-serving allegations does not warrant § 752.35 reversal.

Therefore,

IT IS ORDERED that the order of the circuit court 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