



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

June 22, 2022

To:

Hon. Maureen D. Boyle
Circuit Court Judge
Electronic Notice

Brian H. Wright
Electronic Notice

Sharon Millermon
Clerk of Circuit Court
Barron County Justice Center
Electronic Notice

George E. Phelps III 648612
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

Sara Lynn Shaeffer
Electronic Notice

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

2021AP698

State of Wisconsin v. George E. Phelps, III
(L. C. No. 2016CF26)

Before Stark, P.J., Hruz and Gill, 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).

George Phelps appeals from an order that denied his second postconviction motion for plea withdrawal. 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 (2019-20).¹ We affirm.

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

In 2016, in exchange for the dismissal of multiple other charges, Phelps pled guilty to one count each of child enticement and second-degree sexual assault of a child under the age of sixteen. The circuit court sentenced Phelps to consecutive sentences of five years' initial confinement followed by ten years' extended supervision on the child enticement count and ten years' initial confinement followed by ten years' extended supervision on the sexual assault count.

In 2020, Phelps moved to withdraw his pleas based upon claims of ineffective assistance of counsel. Specifically, Phelps alleged that his trial attorney: (1) failed to investigate and find a cell phone that would show the victim had claimed to be eighteen years old on an online dating site; (2) spent an inadequate amount of time with Phelps, such that his attorney "knew nothing" about Phelps or the case, which in turn pressured Phelps to enter his pleas out of fear; and (3) did not inform Phelps that his bond could be revoked pending sentencing until after Phelps had already signed the plea questionnaire.

The circuit court denied the motion without a hearing. The court concluded that Phelps' allegations were insufficient to establish prejudice (i.e., that Phelps would not have entered the pleas absent counsel's alleged conduct—in light of the plea colloquy), the overwhelming evidence of Phelps' guilt, the substantial benefit Phelps received from the dismissal of other charges, and Phelps' confession to the agent who authored his presentence investigation report (PSI) that he knew the child's age. Phelps filed an untimely appeal, which this court dismissed for lack of jurisdiction.

In 2021, Phelps filed a second plea withdrawal motion, which is the subject of this appeal. The motion repeated, nearly verbatim, the same claims raised in Phelps' first motion,

asserting an additional allegation that trial counsel had led Phelps to believe that his “case could be overturned by bringing forward unseen evidence during the PSI.” The circuit court denied the motion on the ground that the issues raised had already been litigated in Phelps’ first plea withdrawal motion.

In this appeal, Phelps renews his claims of ineffective assistance of counsel, although he slightly reframes the cell phone issue in terms of a Sixth Amendment argument. Phelps does not, however, address the circuit court’s determination that the claims are procedurally barred.

Whether a defendant is procedurally barred from filing a successive postconviction motion is a question of law subject to de novo review. *State v. Romero-Georgana*, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668. A matter already decided cannot be relitigated in subsequent postconviction proceedings “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). Additionally, no claim that could have been raised in a previously filed postconviction motion or direct appeal can be the basis for a subsequent WIS. STAT. § 974.06 motion unless the court finds there was sufficient reason for failing to raise the claim in the earlier proceeding. Sec. 974.06(4); *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

We conclude that Phelps’ claims that his trial counsel failed to investigate the cell phone, that counsel’s consultation with Phelps about his case was inadequate and pressured Phelps into entering his pleas, and that counsel failed to advise Phelps that his bond could be revoked prior to sentencing are all barred by *Witkowski* because they were previously litigated. We further conclude that Phelps’ additional claim that counsel misinformed him that he could “overturn” his case by submitting additional evidence to the PSI agent is barred by *Escalona-Naranjo* because

Phelps has failed to provide a sufficient reason why he did not raise that issue in his first plea withdrawal motion. We therefore summarily affirm the circuit court's denial of Phelps' second plea withdrawal motion.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. 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