



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 II

October 12, 2022

To:

Hon. Bruce E. Schroeder
Circuit Court Judge
Electronic Notice

Christine A. Remington
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Thomas A. Burks, #451176
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2021AP1356

State of Wisconsin v. Thomas A. Burks (L.C. #2013CF1378)

Before Neubauer, Grogan and Lazar, 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).

Thomas A. Burks, pro se, appeals from an order denying his motion seeking reconsideration of the circuit court's order that denied his request for a *Machner*¹ hearing. 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).² Because Burks's reconsideration motion failed to raise any new issues, we lack jurisdiction to review his appeal and therefore affirm.

¹ *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

² All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In December 2013, the State charged Burks with four counts of first-degree sexual assault of a child under the age of thirteen, one count of attempted first-degree sexual assault of a child under the age of twelve, three counts of incest, one count of causing a child under the age of thirteen to view/listen to sexual activity, one count of exposing genitals or pubic area, and two counts of felony bail jumping. In June 2014, Burks entered *Alford*³ pleas to two counts of first-degree sexual assault of a child under the age of thirteen, two counts of incest with a child, and one count of causing a child under the age of thirteen to view/listen to sexual activity, contrary to WIS. STAT. §§ 948.02(1)(e) (2013-14), 948.06(1) (2013-14), and 948.055(1) (2013-14), respectively. The remainder of the counts were dismissed but read in. The circuit court imposed a global sentence of twenty years' initial confinement followed by fifteen years' extended supervision. Burks did not file a direct appeal.

In January 2021, Burks filed a pro se postconviction motion asking for an evidentiary hearing “to establish” a manifest injustice based on his assertion that trial counsel gave him ineffective assistance. In the postconviction motion, Burks argued that his counsel should have informed him that his statements to police could have been excluded by filing a suppression motion and that his counsel should have objected to his “illegal arrest” or the “insufficiency of the information[.]” He also filed a motion for substitution against the assigned circuit court. On February 5, 2021, the circuit court denied Burks’s substitution motion as untimely. The State, on February 17, 2021, filed a response to Burks’s ineffective assistance postconviction motion, asserting that Burks’s motion was insufficient to warrant an evidentiary hearing. On

³ See *North Carolina v. Alford*, 400 U.S. 25 (1970).

February 25, 2021, the circuit court denied Burks’s request for a *Machner* hearing because Burks’s motion failed to provide sufficient reasons to warrant a hearing.

On March 3, 2021, after the circuit court had already denied his motion, Burks filed a reply to the State’s February 17th response. On April 21, 2021, Burks filed a reconsideration motion asking the circuit court to reconsider its denials of his substitution and postconviction motions and invited the circuit court to use his March 3rd reply as “an additional Amended/Supplement to [his] original motion for an (evidentiary)” hearing on his ineffective assistance claim. On July 8, 2021, Burks filed another motion asking the circuit court to issue a decision on his motions. On August 6, 2021, the circuit court denied Burks’s reconsideration motion, explaining in a memorandum decision that Burks’s reconsideration motion was meritless. On that same day—August 6th—Burks filed a notice of appeal purportedly from the circuit court’s original February 25, 2021 order.⁴

In a November 3, 2021 order, we concluded this court lacked jurisdiction to review the February 25, 2021 order because the applicable ninety-day appeal period in WIS. STAT. § 808.04(1) had expired, *see* WIS. STAT. RULE 809.10(1)(e), and Burks’s reconsideration motion “did not affect the time for appealing because it was not filed after a trial to the court or other evidentiary hearing. *See* WIS. STAT. § 805.17(3); *Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.*, 175 Wis. 2d 527, 533-35, 499 N.W.2d 282 (Ct. App. 1993).” *State v. Burks*, No. 2021AP1356, order at 1 (WI App Nov. 3, 2021). We further directed that this court might

⁴ The notice of appeal identified the denial of both the motion for an evidentiary hearing and the motion for substitution. However, the only date referenced in the notice was February 25, 2021, which was the date the circuit court denied the motion for evidentiary hearing. As noted above, the circuit court denied the substitution motion as untimely on February 5, 2021.

also lack jurisdiction over the August 6, 2021 order denying Burks’s motion for reconsideration because “an appeal cannot be taken from an order denying a motion for reconsideration which presents the same issues as those determined in the order sought to be reconsidered. *See Silverton Enters., Inc. v. General Cas. Co.*, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988).” *Burks*, No. 2021AP1356, at 2.

We explained: “The concern is that a motion for reconsideration not be used to extend the time to appeal from a judgment or order when that time has expired. *Id.*; *see also Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 197 N.W.2d 752 (1972).” *Burks*, No. 2021AP1356, at 2. Because it was unclear at the time of our November 3rd order whether Burks’s reconsideration motion presented the same issues as his original postconviction order, we directed the parties to “address that threshold jurisdictional issue as the first issue in their appellate briefs.” *Id.*

Burks claims his reconsideration motion raised new issues, and we therefore have jurisdiction to review the August 6, 2021 order. Specifically, he says the reconsideration motion raised whether “a warrant was filed with the complaint on record pursuant [t]o” WIS. STAT. § 968.21 “and thus the certification of non-filing pursuant to [WIS. STAT. § 889.09] remain open[.]” The State contends that his reconsideration motion failed to raise any new claim and points out that Burks’s reconsideration motion does not specifically mention his warrant claim.

“Whether a court has jurisdiction presents an issue of law” that this court reviews de novo. *State v. Inglin*, 224 Wis. 2d 764, 778, 592 N.W.2d 666 (Ct. App. 1999). “An order denying a motion to reconsider an earlier order is not necessarily appealable.” *Harris v. Reivitz*, 142 Wis. 2d 82, 86, 417 N.W.2d 50 (Ct. App. 1987). “No right of appeal exists from an order denying a motion to reconsider which presents the same issues as those determined in the order

or judgment sought to be reconsidered.” *Silverton Enters., Inc. v. General Cas. Co.*, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). A motion for reconsideration should not be used to extend the time to appeal from a final order or judgment when the appellate time period has expired. *Id.* In determining whether successive motions contain the same issues, the test is “whether or not the issues presented in the postjudgment motion could have been reviewed on an appeal from the judgment itself.” *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 24, 197 N.W.2d 752 (1972).

From our review of the Record, it is now clear that Burks did not raise any new issues in his reconsideration motion. His original postconviction motion raised the issue of whether a *Machner* hearing was warranted on his claim that he received ineffective assistance of counsel. He alleged in his original motion that he believed his trial counsel failed to inform him that his statements to police could have been suppressed and that his counsel should have objected to his “illegal arrest” or insufficient information. For these claims, he cited to WIS. STAT. § 971.26, which addresses formal defects in, among other things, a “complaint or warrant,” and he cited WIS. STAT. § 971.31(2), which addresses making objections before trial to avoid waiving “defects in the institution of the proceedings, insufficiency of the complaint, information or indictment ... or the use of illegal means to secure evidence shall be raised before trial by motion or be deemed waived.” Sec. 971.31(2). Therefore, his claim to us that a warrant was not attached to the complaint is *not* new as it would fall within the allegations he made in his original motion.

Moreover, his reconsideration motion itself alleges that his subsequent filings merely “[s]upplement” his original motion and add information “to further demonstrate why an[] (evidentary) [sic] hearing should be held in the matter of ineffective assistance of counsel.”

Burks's reconsideration motion says: "This allowance would strengthen the original motion, making it not remain so (sparse) and non-factual based."

Burks does not have the right to appeal from the order denying his motion to reconsider because it presented the same issues the circuit court denied in the order Burks wanted the circuit court to reconsider. Thus, we do not have jurisdiction to review Burks's challenge to the August 6, 2021 order denying his motion to reconsider.⁵

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

⁵ Burks complains the circuit court failed to give him an answer to a document he filed on March 17, 2021, for a "request ... for an (Wis Stat) (889.09) certification [sic] of non-filing in regard's [sic] to the fact (No) Warrant or search & seizure/arrest warrant was ever filed in this case." WISCONSIN STAT. § 889.09 does not apply. That statute deals with presumptions that a document does not exist when, after a "diligent examination," an officer so certifies. *Id.* There was no legal requirement for the circuit court to respond to Burks's March 17th filing.

