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DISTRICT I

January 10, 2023

To:

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Circuit Court Judge
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Clerk of Circuit Court
Milwaukee County Safety Building
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John D. Flynn
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Shane C. McCarthy
449 N. Hine Avenue
Waukesha, WI 53188

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

2020AP1572

State of Wisconsin v. Shane C. McCarthy (L.C. # 2005CF21)

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

Shane C. McCarthy, *pro se*, appeals from orders of the circuit court that denied his “petition for writ of habeas corpus” and his motion for reconsideration. 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 The orders are summarily affirmed.

In December 2004, McCarthy pulled up alongside and attempted to solicit a prostitute who was actually an undercover police officer. The officer gave a signal, and other officers

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

approached McCarthy's vehicle and instructed him to step out. McCarthy fled at a high rate of speed, and officers gave chase. McCarthy crashed into a wooden post and a police call box and became stuck. As officers attempted to arrest him, he managed to free his vehicle and flee again, nearly running over another officer. McCarthy subsequently ran a stop sign and collided with two vehicles, injuring the seven people therein. A toxicology report revealed cocaine in McCarthy's blood stream.

An information charged McCarthy with second-degree recklessly endangering safety, three counts of "injury by intoxicated and or other drug use of a vehicle" causing great bodily harm, and prostitution. In 2006, a jury convicted McCarthy on the three injury counts. McCarthy appealed.

In his direct appeal, McCarthy argued that the trial court had erroneously denied his motion to dismiss certain charges based on the destruction of evidence. *See State v. McCarthy*, No. 2008AP398-CR, unpublished slip op. ¶3 (WI App Sept. 17, 2009). Specifically, McCarthy complained about the destruction of the vehicle he was driving; he wanted to test the brakes on the car to support his defense that the brakes had failed. However, the car, which McCarthy had borrowed, had been badly damaged in the accidents, towed to a city lot, and later destroyed after the owner was unable to prove title. *See id.* We conducted a due process analysis, concluded that the vehicle had only been potentially exculpatory and that the record did not support a finding of bad faith, and determined that there had been no due process violation. *See id.*, ¶¶4-5.

In July 2018, McCarthy filed a WIS. STAT. § 974.06 motion for relief. This motion again raised issues related to the destruction of McCarthy's vehicle. The circuit court denied the motion as procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d

157 (1994) (holding that a defendant must raise all grounds for postconviction relief in his or her first postconviction motion and/or direct appeal). McCarthy appealed. We summarily affirmed. See *State v. McCarthy*, No. 2018AP1540, unpublished op. and order (WI App Oct. 1, 2019).

In July 2020, McCarthy filed the document underlying this appeal, which he labeled as a “petition for writ of habeas corpus[.]” In this document, McCarthy alleged that the State had lied when it told the court and McCarthy that the vehicle had been destroyed on December 22, 2004, as McCarthy claimed he had “newly discovered evidence [that] clearly shows that the vehicle was not destroyed until April 10, 2005.” He asserted that the prosecutor’s misinformation constituted a due process violation under *Brady v. Maryland*, 373 U.S. 83 (1963), and that due process required a new trial. The circuit court construed this petition as a second WIS. STAT. § 974.06 motion and denied it as procedurally barred by *Escalona*. McCarthy appeals.

McCarthy first complains that the circuit court erred when it construed his petition for a writ of habeas corpus as a WIS. STAT. § 974.06 motion. As an initial matter, we note that courts are not bound by the label placed on papers. See *bin-Rilla v. Israel*, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). However, it is ultimately irrelevant whether McCarthy’s filing was more properly a petition for habeas corpus or a § 974.06 motion. The claim that destruction of the car violated due process was raised and rejected in McCarthy’s direct appeal and in his first § 974.06 motion, so further litigation of that topic is barred no matter how McCarthy attempts to reframe it. See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (“A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.”); see also *State v. Pozo*, 2002 WI App 279, ¶9, 258 Wis. 2d 796, 654 N.W.2d 12 (“[A] petition for writ of habeas corpus will not be granted

where ... the petitioner asserts a claim that was previously litigated in a prior appeal[.]” (Citation omitted)).²

Upon the foregoing, therefore,

IT IS ORDERED that the orders are 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

² Although McCarthy claimed his allegations involve “newly discovered evidence,” his appellant’s brief has no discussion of the newly discovered evidence standard. We decline to consider undeveloped arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992); *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

We also note that a valid newly discovered evidence claim, which can be brought by ordinary motion, would not be appropriately raised in a writ petition; habeas corpus relief is available only when other remedies are not available. *See State ex rel. Fuentes v. Court of Appeals*, 225 Wis. 2d 446, 451, 593 N.W.2d 48 (1999).