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DISTRICT III

March 7, 2023

To:

Hon. Thomas J. Walsh
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
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David L. Lasee
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Juan Roberto Nieto 490558
Stanley Correctional Inst.
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Stanley, WI 54768

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

2020AP1403-CR State of Wisconsin v. Juan Roberto Nieto (L. C. No. 2004CF705)

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).

Juan Nieto, pro se, challenges a Department of Corrections (DOC) decision to collect restitution from his prison funds while he is serving the initial confinement portion of his sentence. Nieto contends the circuit court intended that he only be required to pay restitution while on extended supervision. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21 (2021-22).¹

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Nieto was convicted, following a jury trial, of kidnapping, attempted first-degree intentional homicide, and three counts of second-degree sexual assault with use of force, all as a party to the crime. The convictions stemmed from events that occurred twenty years ago, when Nieto and another man abducted a woman who refused to party with them when leaving a bar in Green Bay. After kidnapping the victim, the two men drove her in their pickup truck to a field outside of town, where they raped her multiple times, choked her until she blacked out, and then attempted to kill her by setting her on fire, after which she spent over two months in a hospital intensive care unit, requiring numerous surgeries.

At Nieto's sentencing hearing, the circuit court found "restitution is appropriate" but did not immediately set the amount of restitution that Nieto would be required to pay. The court imposed five consecutive sentences, resulting in a total of seventy years of initial confinement.² The court eventually ordered Nieto to pay restitution in the amount of \$258,357.69.

Nieto filed a postconviction motion, alleging numerous errors at trial, and he also asserted that his trial counsel was ineffective. We affirmed Nieto's conviction and the denial of his motion for postconviction relief. Nieto subsequently filed numerous other postconviction motions. In his fourth postconviction motion, which is the motion underlying the present appeal, Nieto requested an order prohibiting the DOC from collecting restitution until he was released to extended supervision. Addressing the merits of Nieto's motion, the circuit court found that it did

² Specifically, the circuit court imposed consecutive sentences on all counts consisting of ten years' initial confinement and fifteen years' extended supervision on the kidnapping count and each of the second-degree sexual assault counts, and thirty years' initial confinement and twenty years' extended supervision on the attempted first-degree intentional homicide count. The result was seventy years' initial confinement. The Honorable Mark A. Warpinski presided over the sentencing hearing. The Honorable Thomas J. Walsh presided over the postconviction motion.

not intend Nieto be required to pay restitution only while on extended supervision. Nieto now appeals.

Nieto's entire argument³—that the circuit court intended him to pay restitution only while on extended supervision—rests on the following comment by the court at the sentencing hearing:

I'm supposed to consider restitution as [the victim] has indicated the bills are at \$500,000 and counting. To that extent I think that restitution is appropriate and I think that whatever period of time that you are placed on extended supervision that it would have to be long enough for the payment of that restitution.

In its decision and order denying the present postconviction motion, the circuit court made clear that its concern was ensuring that Nieto pay as much restitution as possible. In other words, the court recognized that Nieto's earning capacity while in prison would be limited. Therefore, the court intended to place Nieto on extended supervision for a period long enough to ensure that Nieto had a realistic chance to pay off the restitution amount. The court did not intend to exempt Nieto from paying restitution while in prison, as Nieto contends, because such an interpretation would be inconsistent with the court's restitution concerns. The court explained in its decision denying Nieto's postconviction motion:

[T]he court was concerned about getting the restitution paid by the conclusion of extended supervision. If the trial court had wanted to EXCLUDE the payment of restitution during the time the defendant was in initial confinement it could have said so. This court finds no "inference" that defendant was not to make payments during his period of initial confinement, but rather the court was simply concerned that restitution would get paid by the conclusion of extended supervision. For these reasons, the defendant's motion is DENIED.

³ Nieto failed to file a reply brief to this court.

Although the record supports the circuit court’s conclusion that it did intend that Nieto be exempt from paying restitution during his initial incarceration, we find the court lacked competency to address Nieto’s restitution argument. We have held that the court, acting as the sentencing court, lacks the competency to address an allegedly improper distribution of funds by the DOC. See *State v. Williams*, 2018 WI App 20, ¶4, 380 Wis. 2d 440, 909 N.W.2d 177. In *Williams*, we explained that “[o]nce an inmate is sentenced to prison, he or she is under the control of the executive branch and must [first] address his or her objections to the internal operating procedure of the DOC.” *Id.* Then, if necessary, the inmate may seek review of the DOC’s decision by writ of certiorari to the circuit court. *Id.* The only issues properly before a criminal court are those “related to the criminal prosecution and such incidental or ancillary matters as [are] essential to carry out” the court’s functions.” See *State v. Minniecheske*, 223 Wis. 2d 493, 499-500, 590 N.W.2d 17 (Ct. App. 1998). Here, Nieto’s argument does not implicate or affect the validity of his judgment of conviction, and therefore the court lacked competency to address Nieto’s restitution argument.

Further, even if the circuit court had competency to decide the merits of Nieto’s claims, his argument is procedurally barred. Where a defendant’s claim for relief could have been raised in a prior postconviction motion, or on direct appeal, the claim is procedurally barred absent a sufficient reason for failing to previously raise it. See *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Nieto has not provided any reason, much less a sufficient reason, as to why he could not have raised this issue previously.

And to the extent it could be asserted that Nieto made a similar, but broader, argument in a previous postconviction motion, Nieto is prohibited from relitigating that claim. See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). In this regard, the record on

appeal reveals that Nieto filed a December 2016 postconviction motion requesting an order requiring the DOC to cease all deductions from his prison account to satisfy his court-ordered restitution obligation. Nieto alleged that the DOC was deducting the restitution payments “without proper Court ordered authority” because there was “no Judgment of Conviction on Record establishing a dollar amount for any restitution.” Nieto thus requested an order that the DOC was prohibited from collecting restitution from him. In the present appeal, Nieto challenges the DOC’s ability to collect restitution from his prison account while he is serving the initial confinement portion of his sentence. To the extent Nieto’s present argument is simply a repackaging of the argument he made in 2016, Nieto is barred by *Witkowski* from relitigating it.

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