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DISTRICT III

April 4, 2023

To:

Hon. Beau Liegeois
Circuit Court Judge
Electronic Notice

Jacob J. Wittwer
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
Electronic Notice

Michael A. Shimmin 296643
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P.O. Box 3310
Oshkosh, WI 54903-3310

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

2021AP2002-CR State of Wisconsin v. Michael A. Shimmin
(L. C. No. 1997CF658)

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).

Michael Shimmin appeals from an order denying his second postconviction motion for sentence credit. 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 (2021-22).¹ We affirm on the grounds that the sole issue raised on appeal is procedurally barred.

In 1998, the circuit court sentenced Shimmin to 144 months in prison on a sexual assault charge (Count 1) and imposed a consecutive fifteen-year term of probation on another sexual

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

assault charge (Count 2). On November 5, 2007, within ninety days of Shimmin's release on parole on Count 1, the State petitioned to commit Shimmin as a sexually violent person under WIS. STAT. ch. 980, citing both Count 1 and Count 2 as predicate offenses. On November 26, 2007, the court entered an order finding Shimmin to be a sexually violent person and ordering him committed. On July 24, 2010, while Shimmin was still subject to the ch. 980 commitment, his sentence on Count 1 was discharged and his term of probation on Count 2 began. The court ordered Shimmin to be discharged from the ch. 980 commitment on April 16, 2018, while Shimmin was still on probation on Count 2.

The Department of Corrections revoked Shimmin's probation on Count 2 on December 14, 2018. On January 18, 2019, the circuit court imposed a sixteen-year prison sentence after revocation. Based upon the agreement of the parties, the court granted Shimmin 199 days of sentence credit, presumably for the time Shimmin had been in custody after committing the violations that led to his revocation.

Shimmin filed a pro se postconviction motion seeking additional sentence credit for the time he was committed under WIS. STAT. ch. 980 while on probation on Count 2. The circuit court denied the motion, and Shimmin appealed. This court dismissed Shimmin's appeal on October 11, 2019, based upon Shimmin's failure to pay the filing fee.

On October 5, 2021, Shimmin filed a second pro se postconviction motion, again seeking additional sentence credit for the time he was committed while on probation. The circuit court, with a new judge presiding, denied the motion on October 12, 2021, without waiting for a response from the State. The court denied the motion on the grounds that the prior judge had already decided the issue.

Shimmin now appeals the denial of his second postconviction motion for sentence credit. However, a matter already litigated in postconviction proceedings 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).

Shimmin contends that the State has forfeited the right to assert that his sentence credit claim is procedurally barred under *Witkowski* because the State did not raise the procedural bar in the circuit court. Shimmin misunderstands how the forfeiture doctrine works. This court generally will not consider issues raised *by an appellant* for the first time on appeal, so that we do not “blindsides [circuit] courts with reversals based on theories which did not originate in their forum.” *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶¶10-11, 261 Wis. 2d 769, 661 N.W.2d 476 (citation omitted). In contrast, as a matter of judicial efficiency, a *respondent* may advance for the first time on appeal any argument that would sustain the circuit court’s ruling. *Doe v. General Motors Acceptance Corp.*, 2001 WI App 199, ¶7, 247 Wis. 2d 564, 635 N.W.2d 7. Moreover, because forfeiture is a doctrine of judicial administration, we retain the authority to address an issue on appeal even if it has not been properly preserved. *State v. Counihan*, 2020 WI 12, ¶27, 390 Wis. 2d 172, 938 N.W.2d 530. Applying the *Witkowski* procedural bar here would not blindsides the circuit court, because the court itself applied the procedural bar. Therefore, we will not apply the forfeiture doctrine to the State’s procedural bar claim, as argued for by Shimmin.

Shimmin also argues that applying the *Witkowski* procedural bar would violate his right to due process. Specifically, he asserts that he was never provided a fair opportunity to present evidence that *Witkowski* should not apply because Shimmin’s trial attorney was ineffective for failing to raise the sentence credit issue at sentencing. This argument appears to confuse the

Witkowski procedural bar against successive litigation with the requirement under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), that a defendant must provide a sufficient reason for failing to consolidate all postconviction claims into a single proceeding. *See also* WIS. STAT. § 974.06(4). In other words, the procedural bar being applied here is not based upon Shimmin's failure to previously raise the sentence credit issue; it is based upon Shimmin's actual prior litigation of the sentence credit issue. Therefore, the adequacy of counsel's representation at Shimmin's sentencing is immaterial.

We conclude that *Witkowski* applies here. Shimmin is procedurally barred from relitigating the sentence credit issue previously raised and decided in his first postconviction motion.

Therefore,

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