



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 IV

June 15, 2023

To:

Hon. Michael A. Haakenson
Circuit Court Judge
Electronic Notice

Nicholas DeSantis
Electronic Notice

Amanda Nelson
Clerk of Circuit Court
Rock County Courthouse
Electronic Notice

Matthew S. Pinix
Electronic Notice

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

2022AP511

State of Wisconsin v. James Monroe Humphrey
(L.C. # 2010CF1361)

Before Kloppenburg, Fitzpatrick, and Graham, 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).

James Humphrey appeals an order denying his postconviction motion that was filed under WIS. STAT. § 974.06 (2021-22).¹ 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. We affirm on the ground that his claims are procedurally barred.

In 2011, Humphrey pled guilty to, and was convicted of, one count of first-degree reckless homicide. In 2012, Humphrey filed a habeas corpus petition in this court that we

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

construed as claiming that his postconviction counsel was ineffective by closing his direct appeal file without having provided Humphrey with sufficient information to make a knowing, voluntary, and intelligent waiver of his right to counsel. We denied the petition.

In 2016, Humphrey filed another habeas petition in this court. He argued that his postconviction counsel was ineffective by not filing a postconviction motion under WIS. STAT. RULE 809.30 on several issues. Among those issues, Humphrey argued that counsel should have filed a motion to withdraw Humphrey's plea on the ground that the plea colloquy did not include an advisory that an attorney may discover defenses or mitigating circumstances which a layperson might not otherwise find. Another issue he raised was that the State breached the plea agreement in its sentencing argument.

In a 2017 order, we concluded that Humphrey's second habeas petition was barred because he did not explain why he failed to raise these issues in his first habeas petition.

In 2020, Humphrey filed a postconviction motion in the circuit court under WIS. STAT. § 974.06. The court denied the motion after an evidentiary hearing. This appeal is from that order.

On appeal, Humphrey argues that his postconviction counsel was ineffective by not filing a postconviction motion arguing: (1) that the plea colloquy failed to inform him that an attorney may discover defenses or mitigating circumstances which a layperson might not otherwise find, or (2) that the State breached the plea agreement in its sentencing argument.

In response, the State asserts that these are the same claims that we held, in 2017, that Humphrey was barred from filing in his second habeas petition in this court. The State argues that we should again hold that they are procedurally barred.

In reply, Humphrey does not dispute that these are the same claims he raised in 2016, and he does not dispute that a procedural bar legally applies to these claims. Instead, he argues only that the State forfeited the procedural bar argument in this appeal by not making it in the circuit court, and instead allowing that court to hold an evidentiary hearing and rule on the merits.

Humphrey's argument relies on *State v. Van Camp*, 213 Wis. 2d 131, 569 N.W.2d 577 (1997). There, the court held that the State, as respondent on appeal, had waived its chance to argue that the defendant's postconviction motion was inadequate because the State did not make that argument in the circuit court. *Id.* at 144-45. However, there is nothing about that opinion that requires us to reach the same conclusion in every similar case.

In *Van Camp*, the court noted that, if the State had challenged the sufficiency of the defendant's motion in the circuit court, the defendant would have had a chance to cure the alleged pleading defect, a chance he would not have had when the argument was raised for the first time on appeal. *Id.* at 144. Here, there is no similar disadvantage that Humphrey can point to from consideration of the procedural bar issue for the first time on appeal. He asserts that the State's delay has "constrained Humphrey's opportunity to meaningfully respond to a brief [that is, in his appellate reply brief] that, by rule, must be very short." While this is true, we note that the reply brief was approximately 650 words short of the limit and still offered not even a short substantive legal argument that a procedural bar does not apply here.

For these reasons, we conclude that Humphrey's postconviction motion was properly denied.

IT IS ORDERED that the order appealed from is summarily affirmed under 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