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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. Sarah B. O'Brien
Circuit Court Judge
Electronic Notice

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

Sara Lynn Shaeffer
Electronic Notice

Michael Dean Brown, 97954
Oshkosh Correctional Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2022AP990-CR State of Wisconsin v. Michael Dean Brown (L.C. # 1997CF1201)

Before Kloppenburg, Fitzpatrick, and Nashold, 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 Dean Brown, pro se, appeals a circuit court order denying his postconviction motion filed pursuant to 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. We summarily affirm. *See* WIS. STAT. RULE 809.21.

Brown was convicted in 1997 of two counts of first-degree sexual assault of a child, described as Counts 1 and 3 in the criminal complaint. At a sentencing hearing held on January 27, 1998, the circuit court followed the parties' joint sentencing recommendation and

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

imposed a 30-year prison term on Count 1 and, on Count 3, withheld sentence and imposed a 30-year term of probation to run concurrently. Brown's probation was revoked in 2003. Brown was sentenced to 15 years of imprisonment, consecutive to the 30-year sentence Brown was already serving. Brown appealed, and this court summarily affirmed the decision of the circuit court.

In 2010, Brown filed his first WIS. STAT. § 974.06 motion, requesting that the circuit court modify his original 30-year probation term from concurrent to consecutive in nature. The circuit court denied the motion. Brown did not pursue an appeal. In 2022, Brown filed a second § 974.06 motion, arguing that both his original sentence and his sentence imposed after revocation were illegal. The circuit court denied the motion, and Brown filed the instant appeal.

Brown makes several arguments on appeal challenging his sentences. First, he argues that the 30-year probation term originally imposed by the circuit court on Count 3 did not include a withheld sentence and that, therefore, the judgment of conviction showing that his sentence was withheld contains a clerical error. This argument fails because it is clear from the transcript of the sentencing hearing that, although the court did not explicitly use the term "withheld," the court stated that it was following the parties' joint sentencing recommendation, the terms of which were stated on the record earlier in the hearing. The prosecutor stated that there was a joint recommendation for the maximum term of incarceration on Count 1 and, "[i]n regards to the second count, that you withhold sentence and place him on probation for 30 years concurrent with the 30 year prison sentence." In imposing the sentences, the court stated that it was "willing to follow the joint recommendation" and imposed on Count 1 "30 years in prison commencing forthwith" and, on Count 3, "30 years of probation concurrent." The judgment of conviction properly reflects that the sentence on Count 3 was "withheld" in favor of 30 years of probation to

run concurrently with the sentence imposed on Count 1. We reject Brown's argument that the circuit court's oral pronouncement of sentence conflicts with the written judgment of conviction.

Brown next argues that the probation term imposed on Count 3 was unauthorized or illegal because no withheld sentence was attached to it. Brown cites ***Prue v. State***, 63 Wis. 2d 109, 112, 216 N.W.2d 43 (1974), which provides that "when a person is convicted of a crime, the court, if it wishes to place the person on probation, can do either of two things: (a) [w]ithhold sentence, or (b) impose sentence and stay its execution." As explained above, the sentence imposed by the circuit court on Count 3 *was* ordered to be withheld. Accordingly, we reject Brown's argument that the probation term imposed on Count 3 was unauthorized or illegal.

Brown further argues that, under WIS. STAT. § 973.09(1)(a), the circuit court was only authorized to impose probation consecutive to, and not concurrent to, his prison term on Count 1. Brown argues that the original concurrent probationary term was, therefore, illegal. Brown's reading of § 973.09(1)(a) is incorrect. Section 973.09(1)(a) states that probation "*may* be made consecutive to a sentence on a different charge, whether imposed at the same time or previously." (Emphasis added.) Here, the court may have ordered Brown's probation term on Count 3 to be consecutive with the prison term on Count 1, but chose instead to impose the probation term to run concurrently. "[A] sentence with probation that is concurrent to a prison sentence on a different charge is permitted under [§] 973.09(1)(a)." ***State v. Aytch***, 154 Wis. 2d 508, 511-12, 453 N.W.2d 906 (Ct. App. 1990).

Brown raises three additional arguments in his brief: (1) the circuit court lacked jurisdiction, and the Department of Corrections lacked authority, to revoke his probation because he was in custody at the time he violated his probation, so the probation conditions did not apply

to him; (2) the circuit court was not authorized to impose a 15-year prison sentence consecutive to his 30-year prison sentence because, he asserts, the court "change[d]" the original sentence based on having second thoughts; and (3) he is entitled to sentence credit from October 1997 through July 13, 2004, for time spent in prison while on probation. The State responds that these three arguments are procedurally barred because they were never raised in Brown's first appeal or in his first WIS. STAT. § 974.06 postconviction motion. We agree, and we reject the arguments on that basis. "All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion." Sec. 974.06(4). If a defendant's grounds for relief "have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a [§] 974.06 motion" except if, in the case of the failure to previously raise or adequately raise the issue, the circuit court finds sufficient reason for such failure. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994).

Here, Brown did not offer any reason in his second WIS. STAT. § 974.06 motion or in his appellant's brief, much less a sufficient reason, for failing to raise these three issues in his earlier postconviction motion or his first appeal. It is not until the reply brief that Brown attempts to explain why he may have failed to raise these issues earlier. Brown alleges in the reply that he "could file a petition for postconviction relief in the circuit court; thereby asserting ineffective assistance of both trial and appellate counsel, referencing constitutional violations." We reject Brown's ineffective assistance of counsel argument on two bases. First, Brown fails to develop his ineffective assistance argument either legally or factually. This court need not consider arguments that are unsupported by adequate factual and legal citations or are otherwise undeveloped. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463, *abrogated on other grounds by* ***Wiley v. M.M.N. Laufer Fam. Ltd. P'ship***, 2011

WI App 158, 338 Wis. 2d 178, 807 N.W.2d 236 (lack of record citations); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped legal arguments). Additionally, because Brown raises the ineffective assistance of counsel argument for the first time in his reply brief, we decline to consider it. ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995) (an argument raised for the first time in the reply brief violates the Rules of Appellate Procedure and will not be considered).

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals