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DISTRICT III

October 24, 2023

To:

Hon. Steven H. Gibbs
Circuit Court Judge
Electronic Notice

Abigail Potts
Electronic Notice

Nathan A. Liedl
Clerk of Circuit Court
Chippewa County Courthouse
Electronic Notice

Emyl S. Caver 358477
Stanley Correctional Inst.
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Stanley, WI 54768

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

2022AP1274-CR

State of Wisconsin v. Emyl S. Caver (L. C. No. 1999CF228)

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).

Emyl Caver appeals from an order denying his postconviction motion for sentence modification on a 2000 conviction for first-degree sexual assault with the use of a dangerous weapon and other related felonies. The motion alleged that Caver was improperly charged and sentenced as a repeat offender because the complaint did not specify the prior conviction upon which the repeater allegation was based. The circuit court denied the motion without a hearing after concluding that it was procedurally barred. 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.

A circuit court may properly deny a postconviction motion without a hearing if the defendant's claim is procedurally barred. *See State v. Romero-Georgana*, 2014 WI 83, ¶71, 360 Wis. 2d 522, 849 N.W.2d 668. Whether a defendant is procedurally barred from filing a successive postconviction motion is a question of law subject to de novo review. *Id.*, ¶30.

Here, the circuit court determined that Caver's motion for sentence modification was procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Under *Escalona-Naranjo*, no claim that could have been raised in a previously filed postconviction motion or on direct appeal can be the basis for a subsequent postconviction motion under WIS. STAT. § 974.06 unless the circuit court finds there was sufficient reason for failing to raise the claim in the earlier proceeding. *Escalona-Naranjo*, 185 Wis. 2d at 185 (interpreting § 974.06(4)). The court determined that Caver had filed multiple prior postconviction motions and had failed to show any sufficient reason why he had not earlier raised his challenge to the repeater penalty.

On appeal, Caver again fails to assert any reason why he did not raise his challenge to the repeater penalty in one of his prior postconviction motions. Instead, Caver contends: (1) under *State v. Flowers*, 221 Wis. 2d 20, 22-23, 586 N.W.2d 175 (Ct. App. 1998), any challenge to the validity of a repeater penalty is exempt from the procedural bar of *Escalona-Naranjo*; (2) the State forfeited the right to rely on a procedural bar by failing to raise the issue in the circuit court,

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

as in *State v. Avery*, 213 Wis. 2d 228, 248, 570 N.W.2d 573 (Ct. App. 1997); and (3) the court had discretion to hear his motion on the merits, notwithstanding the procedural bar, because he stated sufficient grounds to obtain a hearing under *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996), but the court failed to hold a hearing. None of these arguments are persuasive.

First, Caver misunderstands the holding of *Flowers*. In *Flowers*, we held that the procedural bar set forth in *Escalona-Naranjo* did not preclude a defendant whose sentence had been enhanced with an allegedly unproven repeater penalty from seeking relief under WIS. STAT. § 973.13 (which provides that sentences exceeding the maximum penalty authorized by law are void). *Flowers*, 221 Wis. 2d at 22-23. We explicitly noted, however, that our decision represented a narrow exception that applied only when the State had “neither proven nor gained the admission of the defendant about a prior felony conviction necessary to sustain the repeater allegation.” *Id.* at 30. Caver does not allege that the State failed to prove his prior conviction at the sentencing hearing, as required by WIS. STAT. § 973.12(1) and *State v. Zimmerman*, 185 Wis. 2d 549, 558-59, 518 N.W.2d 303 (Ct. App. 1994). Caver’s argument that the complaint failed to identify his prior conviction with sufficient detail to satisfy due process does not implicate § 973.13 and it therefore does not bring his claim within the narrow exception set forth in *Flowers*.

Second, *Avery* is also distinguishable. In *Avery*, we declined to apply *Escalona-Naranjo* where the State had not raised the issue of a procedural bar below. Our decision in that case was consistent with our general practice to refuse to consider issues raised 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). Here, however, the circuit court itself determined that Caver's current claim was procedurally barred by *Escalona-Naranjo*. Our consideration of the procedural bar issue therefore would not blindsides the court. In addition, we note there is another general rule that a respondent may advance for the first time on appeal any argument that would sustain the circuit court's ruling. *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds*, WIS. STAT. § 940.225(7). Taking both of these points into account, we decline to apply forfeiture to the State's arguments regarding *Escalona-Naranjo*.

Third, we disagree that the circuit court erroneously exercised its discretion by denying Caver's postconviction motion without a hearing. No hearing on a postconviction motion is required under *Bentley* when the record conclusively demonstrates that the defendant is not entitled to relief. *Bentley*, 201 Wis. 2d at 318. The court exercised its discretion here by explaining that Caver was not entitled to relief because his claim was procedurally barred. That decision was fully supported by Caver's failure to identify any reason why he had failed to raise his claim earlier.

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.

Samuel A. Christensen
Clerk of Court of Appeals