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DISTRICT I

March 19, 2024

To:

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Circuit Court Judge
Electronic Notice

Hon. Glenn H. Yamahiro
Circuit Court Judge
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Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1004 State of Wisconsin v. Charles Wilson (L.C. # 1999CF5019)

Before White, C.J., Donald, P.J., and Geenen, J.

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).

Charles Wilson, *pro se*, appeals from an order denying his motions for postconviction relief. 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(1) (2021-22).[1] We affirm.

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

Background

In 2000, a jury found Wilson guilty of first-degree intentional homicide while using a dangerous weapon. As relevant for purposes of this appeal, following his conviction, Wilson filed a WIS. STAT. RULE 809.30 motion, two WIS. STAT. § 974.06 motions, and two appeals. We provide details relating to Wilson's postconviction filings below.

After his trial, Wilson raised five issues in a postconviction motion, three of which were challenges to trial counsel's effectiveness. The circuit court denied the motion without a hearing.[2] Wilson appealed the judgment of conviction and order. We rejected all of Wilson's claims on their merits and affirmed. *See* ***State v. Wilson*** **(*Wilson I*)**, No. 2001AP1028-CR, unpublished slip op. (WI App Jan. 29, 2002). The Wisconsin Supreme Court denied Wilson's petition for review.

In 2017, Wilson, *pro se*, filed a motion for postconviction relief under WIS. STAT. § 974.06. He alleged ineffective assistance of postconviction counsel for not raising the following claims: twenty-four challenges to the effectiveness of trial counsel; twenty claims of prosecutorial misconduct; twenty-two claims of circuit court error; and six claims of police misconduct. Additionally, he argued that he was entitled to a new trial in the interest of justice. The circuit court denied the motion without a hearing, concluding, in relevant part, that Wilson failed to sufficiently allege ineffective assistance of postconviction counsel because his underlying claims were conclusory and unsupported by argument.[3] Wilson appealed, and we

[2] The Honorable John J. DiMotto presided over Wilson's jury trial and issued the order denying Wilson's WIS. STAT. RULE 809.30 motion for postconviction relief.

[3] The Honorable Jeffrey A. Conen denied Wilson's WIS. STAT. § 974.06 motion.

affirmed. *See* ***State v. Wilson*** **(*Wilson II*)**, No. 2018AP95, unpublished op. and order (WI App Sept. 30, 2019). In doing so, we explained: "Here, we agree with the [postconviction] court that Wilson's postconviction motion is wholly and fatally conclusory: it is nothing more than an undeveloped list of purported errors." ***Id.*** at 4. The Wisconsin Supreme Court again denied Wilson's petition for review.

More than two years after our decision in ***Wilson II***, Wilson filed a motion titled "Successive Motion for Postconviction Relief Pursuant to Sec. 974.06(4) Stats." Wilson alleged ineffective assistance of postconviction counsel for not raising at least ten challenges to trial counsel's effectiveness. Wilson additionally alleged that: he had newly discovered evidence; the State, via a detective, withheld exculpatory evidence; and he is entitled to a new trial in the interest of justice. In a separate motion, Wilson sought sentence modification.

The circuit court denied both motions without a hearing. The court ruled that Wilson failed to provide a sufficient reason for not raising his latest challenge to postconviction counsel's effectiveness, and the underlying challenges to trial counsel's effectiveness, in his first WIS. STAT. § 974.06 motion. The court further held that all of Wilson's allegations were conclusory and undeveloped, he failed to meet any of the criteria for obtaining a new trial based on newly discovered evidence, his argument that he was entitled to a new trial in the interest of justice hinged on additional conclusory claims, and he failed to prove a new factor warranting modification of his mandatory life sentence. The court denied Wilson's motion for reconsideration. This appeal follows.

Discussion

We conclude that Wilson's claims fail because they are procedurally barred. Absent a sufficient reason, a defendant is procedurally barred from raising claims in a WIS. STAT. § 974.06 postconviction motion that could have been raised in a prior postconviction motion or appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 185-86, 517 N.W.2d 157 (1994). Whether a § 974.06 motion alleges the requisite sufficient reason for failing to bring available claims earlier is a question of law that this court independently reviews. ***State v. Romero-Georgana***, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668. We determine the sufficiency of a defendant's reason for circumventing ***Escalona-Naranjo***'s procedural bar by examining the "four corners" of the underlying postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433.

A claim brought under WIS. STAT. § 974.06 is also barred if it has been finally adjudicated during a previous appeal. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. "We need finality in our litigation." ***Id.*** at 185. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding 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).

The only reason Wilson offers to work around the procedural bar is the same reason he offered in his 2017 collateral challenge: ineffective assistance of postconviction counsel. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶36 ("In some instances, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal."). However, as the circuit court aptly explained in its written decision:

> Even if the court were to find that the allegations of ineffective assistance of postconviction counsel provide the defendant with a sufficient reason for failing to raise his current claims during his direct appeal, they do not excuse his failure to raise them during the subsequent WIS. STAT. § 974.06 proceedings, to the extent he did not do so then. Postconviction counsel cannot be deemed ineffective for *the defendant's* failure to raise these claims during the prior § 974.06 litigation.

See WIS. CT. APP. IOP VI(5)(a) (Nov. 30, 2009) ("When the [circuit] court's decision was based upon a written opinion ... that adequately express[es] the panel's view of the law, the panel may incorporate the [circuit] court's opinion ... or make reference thereto, and affirm on the basis of that opinion."). Moreover, a number of Wilson's claims are iterations of the claims raised in his 2017 motion, and as such, they cannot be relitigated. *See* ***Witkowski***, 163 Wis. 2d at 990.

Even Wilson's newly discovered evidence claim cannot circumvent the procedural bar. Wilson claims to have discovered "after his conviction" that Terri Madison, the mother of his children, told a detective that $5,000 belonging to the victim was missing from the crime scene.[4] According to Wilson, the detective did not include that information in Madison's statement. In his motion, Wilson did not specify when he discovered this information. However, in his brief on appeal, Wilson submits that he learned of the purported omission in 2006.[5] By his own acknowledgment, Wilson was aware of this information when he filed his first WIS. STAT. § 974.06 motion in 2017. Consequently, this claim is procedurally barred.

[4] In his motion, Wilson does not develop an argument as to the significance of this evidence.

[5] According to his brief on appeal: "[W]hen Wilson received the discovery in August 2006, after reading Mrs. Madison's statement Wilson discovered that [the detective] did not include that information [about missing money belonging to the victim] in the statement." In his reply brief, Wilson elaborates: "Some of Wilson's Newly Discovered evidence claims were discovered when he read the discovery for the first time in 2006, and he [sic] 2013, when he purchased a copy of his trial transcripts from the attorney general's office." Even if Wilson first learned about the purported new evidence in 2013, this predated his first WIS. STAT. § 974.06 motion by four years.

Even if Wilson's claims were not barred, his "successive" motion suffered from the same shortcomings as his 2017 motion. Namely, it was wholly and fatally conclusory, resting only on a laundry list of purported errors without offering adequate explanation as to why the claims mattered. *See* ***Allen***, 274 Wis. 2d 568, ¶23 (sufficient postconviction motions will have alleged "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how"). A circuit court may deny a postconviction motion without a hearing if the motion presents only conclusory allegations or if the record otherwise conclusively demonstrates that the defendant is not entitled to relief. ***Id.***, ¶9. The court properly denied Wilson's motion without a hearing.

We further conclude that the circuit court properly denied Wilson's separately filed sentence modification motion. In order to prevail on a motion for sentence modification, a defendant must demonstrate both that a new factor exists and that the alleged new factor justifies sentence modification. ***State v. Harbor***, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828. The definition of a new factor is well-settled as "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Whether the evidence presented by the defendant constitutes a new factor is a question of law that we review independently. ***Harbor***, 333 Wis. 2d 53, ¶33.

Once again, we agree with and adopt the circuit court's summation of Wilson's new factor claims and explanation for why they fail:

> The defendant's motion for sentence modification picks up where his postconviction motion left off. In it, he alleges that the presentence investigator was biased against him, that the court made an incorrect statement about parole eligibility, and that his

> attorney conceded guilt at sentencing and made other inappropriate statements. None of these claims alleges a veritable new factor as defined in ***Rosado***[, 70 Wis. 2d at 288]…. The defendant cannot package his postconviction arguments as new factors in order to overcome ***Escalona***'s procedural bar[.]
>
> Finally, the defendant states that he has been a model prisoner, that he has been employed throughout his incarceration, and that he uses his prison wages to help his children financially. These factors are commendable; however, all inmates are expected to demonstrate prosocial behavior. Evidence of this nature is not a reason for a court to modify sentence. ***State v. Prince***, 147 Wis. 2d 134, 136[,] 432 N.W.2d 646 (Ct. App. 1988).

See WIS. CT. APP. IOP VI(5)(a).

Lastly, Wilson asserts that he is entitled to a new trial pursuant to WIS. STAT. § 752.35. Section 752.35 generally "does not permit us to go behind a [WIS. STAT. §]974.06 order to reach the judgment of conviction." ***State v. Allen***, 159 Wis. 2d 53, 56, 464 N.W.2d 426 (Ct. App. 1990). Moreover, "[w]e exercise our authority to reverse in the interest of justice ... sparingly and only in the most exceptional cases." ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469. For the reasons we have detailed, this is not such a case.[6]

[6] This court notes in passing that the State incorrectly argues that Wilson's appeal is untimely. Appeals of WIS. STAT. § 974.06 proceedings are governed by the procedures for civil appeals, *see* § 974.06(6) and WIS. STAT. RULE 809.30(2)(L), and a timely notice of appeal is a jurisdictional prerequisite, *see* WIS. STAT. RULE 809.10(1)(e). The pertinent timelines are set forth in WIS. STAT. § 808.04(1). Under § 808.04(1), a notice of appeal must be filed within ninety days of the entry of a final judgment or order, except that the deadline is shortened to forty-five days "if written notice of the entry of a final judgment or order is given within 21 days of the final judgment or order as provided in [WIS. STAT. §]806.06(5)[.]" Notice of entry refers to a separate written document, other than the order, which is served by a party after a final order is entered, and which contains the date of entry of that final order. *See* § 806.06(3); ***Soquet v. Soquet***, 117 Wis. 2d 553, 557, 345 N.W.2d 401 (1984). Here, the State does not point to any notice of entry that it served on Wilson; therefore, the deadline to appeal was not shortened to forty-five days.

Therefore,

IT IS ORDERED that the order is summarily affirmed. *See* 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