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DISTRICT II

September 18, 2024

To:

Hon. Phillip A. Koss
Circuit Court Judge
Electronic Notice

Michele Jacobs
Clerk of Circuit Court
Walworth County Courthouse
Electronic Notice

John Blimling
Electronic Notice

Kyle T. Helgeland
N277 Thunderbird Rd.
Genoa City, WI 53128

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

2023AP1358 State of Wisconsin v. Kyle T. Helgeland (L.C. #2014CF65)
2023AP1362 State of Wisconsin v. Kyle T. Helgeland (L.C. #2017CF289)

Before Neubauer, Grogan and Lazar, 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).

Kyle T. Helgeland, pro se, appeals from an order denying postconviction relief. Helgeland sought vacation of two judgments of conviction for operating a motor vehicle while intoxicated (OWI) as fifth and sixth offenses. 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.

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

In 2015 and 2018, Helgeland pled guilty to OWI as fifth and sixth offenses. The charging documents leading to the 2018 conviction stated that Helgeland had previously been convicted of five operating while intoxicated offenses. As relevant to this appeal, the Presentence Investigation Report prepared in conjunction with sentencing in the 2018 case noted that Helgeland's fourth offense stemmed from a reckless driving offense in Illinois that occurred on November 30, 2012, during which Helgeland refused to submit to a Breathalyzer test. Because Helgeland refused to take a breath test, this offense was factored in to the number of times he received an OWI. In the 2018 case, the circuit court sentenced Helgeland to forty-two months of initial confinement and five years of extended supervision.

In 2018, 2019, and 2020, Helgeland filed three pro se motions related to his 2018 conviction, contending that the Illinois reckless driving conviction should not have counted for purposes of OWI sentence enhancement under WIS. STAT. § 343.307(1)(d). The circuit court denied Helgeland's motions on the grounds that the reckless driving conviction was properly counted because it included a refusal to submit to chemical testing, an implied consent violation. We summarily affirmed the last circuit court's decision on March 16, 2022. ***State v. Helgeland***, No. 2021AP567-CR, unpublished op. and order (WI App Mar. 16, 2022).

In rejecting Helgeland's prior appeal challenging the counting of his 2014 Illinois conviction for purposes of his 2018 sixth OWI offense, we noted that Helgeland had previously "raised this exact issue three times with the postconviction court" and that the argument was therefore procedurally barred under ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). ***Helgeland***, No. 2021AP567-CR, at 3. We further explained that "WIS[.] STAT. § 343.307(1)(d), as relevant

here, provides that a court 'shall count' '[c]onvictions under the law of another jurisdiction that prohibit[] a person from refusing chemical testing,' i.e., an implied consent violation. *See* WIS. STAT. § 343.305(10)." ***Helgeland***, No. 2021AP567-CR, at 3 (second alteration in original). Lastly, we explained that an implied consent violation for refusing a breath test is a countable offense. ***Id.*** at 4.

In December 2021, Helgeland again moved pro se for postconviction relief, now arguing that counting his refusal is unconstitutional under ***State v. Forrett***, 2021 WI App 31, 398 Wis. 2d 371, 961 N.W.2d 132, *aff'd as modified*, 2022 WI 37, 401 Wis. 2d 678, 974 N.W.2d 422. The circuit court denied Helgeland's motion without an evidentiary hearing. The court explained that Helgeland's motion was insufficiently pled because counting a refusal to submit to a breath test is not unconstitutional, and Helgeland failed to show that the conviction was based on his refusal to submit to a warrantless blood draw. Indeed, the court noted that Helgeland admitted he was "revoked in 2012 for his refusal to submit to both the breath test and the blood draw." This appeal follows.

On appeal, Helgeland renews the arguments he made in his postconviction motion, again arguing that the circuit court erroneously counted his Illinois conviction when rendering his sentence. We conclude that Helgeland has not established that the court erred in denying his motion, for multiple reasons.

First, Helgeland's challenge as it relates to his 2018 conviction, no matter how reframed, may not be litigated again. As explained in Helgeland's prior appeal, "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***Witkowski***, 163 Wis. 2d at 990. And, as further explained in

Helgeland's prior appeal, an implied consent violation for refusing a breath test is a countable offense. Accordingly, the issue is procedurally barred.

Moreover, Helgeland chose to plead guilty to the OWI charges and therefore waived any constitutional challenge. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (stating that a guilty plea generally "waives all nonjurisdictional defects, including constitutional claims" (citation omitted)).

Additionally, Helgeland's legal argument is simply wrong: an implied consent violation for refusing a breath test is a countable offense. *See* ***State v. Forrett***, 2022 WI 37, ¶8, 401 Wis. 2d 678, 974 N.W.2d 422 (explaining that a warrantless breath test is permissible as a reasonable search incident to an arrest but a warrantless blood draw is not). As the circuit court noted, Helgeland failed to show that the 2014 Illinois revocation was based on his refusal to submit to a warrantless blood draw. Quite the opposite, in fact: the motion acknowledged on its very first page that the Illinois conviction involved his refusal "to submit to chemical testing [of] both breath and blood." Because Helgeland's motion did not allege sufficient material facts to show that he was entitled to relief, the court properly denied his claim without an evidentiary hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

Finally, we note that Helgeland has failed to respond to the State's brief, which raised each of the above grounds to affirm the circuit court's order. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession). Accordingly, we reject Helgeland's challenge.

Therefore,

IT IS ORDERED that the order of the circuit court 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