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DISTRICT III

October 22, 2024

To:

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Circuit Court Judge
Electronic Notice

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

2023AP154 State of Wisconsin v. Kevin S. Maas (L. C. No. 2005CF59)

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).

Kevin Maas, pro se, appeals from an order that denied his postconviction motion under WIS. STAT. § 974.06 (2021-22)[1] without a hearing. 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 following grounds: (1) one of Maas's claims was previously litigated, (2) one of his claims was based upon conclusory allegations, (3) the record demonstrates that he is not entitled to relief on three of his claims, and (4) his remaining two claims are procedurally barred because he could have raised them earlier.

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

In April of 2002, Maas entered into a multi-jurisdictional plea agreement[2] regarding a charge of safe breaking in Menominee County, Michigan. As part of that agreement, Maas agreed to cooperate with a joint task force investigating a string of burglaries in multiple counties in Michigan and Wisconsin. In exchange (and in addition to promises made by Michigan authorities), the Marinette County District Attorney's Office agreed to recommend probation for any resulting Marinette County charges, with a year of conditional jail time to be served concurrently with the Michigan sentence. Maas then gave investigators a detailed statement in which he admitted to involvement in several 2001 burglaries that had been committed in Marinette County, Wisconsin.

Due to the misplacement of Maas's file, Maas was not charged with the Marinette County burglaries until March 17, 2005, by which time Maas had already completed the Michigan sentence. On August 10, 2005, Maas pled no contest to four counts arising from the Marinette County burglaries, with several additional burglaries being read in for restitution purposes. As a factual basis for the pleas, the circuit court relied upon the facts set forth in the complaint, which consisted almost entirely of the admissions Maas had made in his statement to the joint task force.

The circuit court allowed Maas to withdraw his no-contest pleas on October 7, 2005, because the passage of time before Maas was charged in Marinette County had eliminated the bargained-for possibility that Maas could serve any sentence or conditional jail time for the

[2] We use the term "plea agreement" because the parties do, without addressing whether "cooperation agreement" or some other term might be more applicable to the exchange of a statement for future prosecutorial concessions regarding as-yet-uncharged offenses.

Marinette County offenses concurrently with the Michigan sentence. The court viewed the prosecutorial delay as a potential breach of the prior multi-jurisdictional plea agreement and concluded, in any event, that the delay constituted a fair and just reason for plea withdrawal before sentencing.

On December 15, 2005, Maas moved to dismiss the charges altogether as an additional remedy for the alleged breach of the multi-jurisdictional plea agreement. In the alternative, Maas asked the circuit court to proscribe or suppress any use of the statement he gave to the joint task force pursuant to that agreement. While those motions were pending, the prosecutor faxed the circuit court a copy of a letter dated March 2, 2006 which was previously sent to defense counsel, seeking the court's approval of a revised plea agreement in which the parties would recommend that Maas only be ordered to pay restitution *without being required to serve any additional time in jail or on probation*. In a follow-up letter to the court dated March 16, 2006, the prosecutor noted that if the court granted Maas's suppression motion, the prosecutor was "not sure that there would be a viable case left for the prosecution. This would leave the State in the uncomfortable position of having to dismiss the pending charges." The prosecutor observed that the alternative would be to allow Maas to plead, as he had agreed to do (according to the proposed revised agreement), and to impose an order of restitution so that the victims could at least obtain restitution without having to file civil suits and the convictions would be on record.

At a hearing on March 17, 2006, following a forty-five minute off-the-record discussion between counsel, Maas, and the circuit court, Maas chose not to pursue his motions to dismiss the charges or suppress his statement. Instead, Maas agreed to "withdraw his withdrawal of [his]

pleas."[3] The court then accepted Maas's withdrawal of the withdrawal of his pleas and reinstated the no-contest pleas Maas had entered on August 10, 2005, without conducting an additional plea colloquy or mentioning the revised plea agreement that had been proposed by the parties just prior to the hearing, which was ostensibly the subject of the off-the-record discussion. The court stated that, due to the unusual circumstances of the case,[4] the court would be willing to follow the recommendations included in the original Marinette County plea agreement.

At a sentencing hearing held on April 24, 2006, the circuit court followed the parties' joint recommendation (in accordance with the original, not the proposed revised plea agreement), withholding sentence and placing Maas on probation. Although Maas stated at the time of sentencing that he was undecided about appealing, and he made attempts to contact his attorney within the next twenty days, his attorney terminated his representation and did not file a notice of intent to pursue postconviction relief from the judgment of conviction.

Maas's probation was subsequently revoked due in part to threats Maas made against the district attorney and against the Honorable David Miron, Marinette County Circuit Court Branch 1, who had presided over the proceedings up to that point. At Maas's request, the case was reassigned before resentencing to Honorable Tim A. Duket, Marinette County Circuit Court

[3] Because the reinstated Marinette County plea deal differed significantly from the revised deal for which the parties had indicated they were going to seek the circuit court's approval, it appears one of two things likely happened during the forty-five-minute conference. Either the court rejected the proposed revised deal and then participated in the negotiations to reinstate the prior deal, or the court approved the revised deal but then both it and counsel failed to effectuate it, either with the defendant's acquiescence or due to a misunderstanding.

[4] The circuit court expanded upon those circumstances at the first sentencing hearing, stating that it had no reason to disbelieve the State's assessment that Maas was likely to have prevailed on the suppression motion.

Branch 2. A special prosecutor was also appointed. The circuit court, with Judge Duket then presiding, imposed consecutive terms of seven and one-half years' initial incarceration followed by three years' extended supervision on each of the four burglary counts.

Maas's newly appointed postconviction attorney filed a no-merit appeal from the revocation sentences, which this court affirmed on June 30, 2011. In his response to counsel's no-merit report, Maas attempted to raise two issues relating to the validity of his conviction—including a claim that his plea was involuntary due to the circuit court's participation in plea negotiations. We declined to address those issues, however, because we lacked jurisdiction over the original judgment of conviction on an appeal from the sentences imposed after revocation.

While the no-merit appeal was still pending, Maas attempted to file a pro se motion for plea withdrawal under WIS. STAT. § 974.06. Maas again alleged that his agreement to reinstate his guilty pleas was involuntary due to Judge Miron's participation in plea negotiations. Judge Duket declined to hear the motion or address its merits, however, on the dual procedural grounds that the circuit court lacked competency over the case while an appeal was pending and that Maas was represented by counsel at that time.

Over the following years, Maas filed a series of letters in the circuit court largely related to requests for transcripts and discovery of materials, including the statement that he made to the joint task force. Maas filed an appeal from the denial of one of his discovery requests, but he voluntarily dismissed that appeal.

On May 20, 2021, this court denied a petition for a writ of habeas corpus under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), in which Maas sought to reinstate his right under WIS. STAT. RULE 809.30 to seek postconviction relief from his original judgment of

conviction. Following two remands for evidentiary hearings held by the Honorable James Morrison (who had by then replaced Judge Duket in Branch 2), we concluded that Maas's claim that he had been denied a direct appeal due to ineffective assistance of counsel was barred by laches. During the remanded proceedings, Judge Morrison rejected a claim by Maas that Judge Morrison should recuse himself because he had previously represented Maas in a family law matter, noting that he had no recollection of Maas or his case and had no bias against him.

On October 21, 2022, after having finally obtained his sought discovery, Maas filed a new WIS. STAT. § 974.06 motion, which is the subject of this appeal. Maas sought to withdraw his pleas again, this time on the grounds that: (1) Maas's first appointed trial attorney, DeShea Morrow, provided ineffective assistance of counsel by failing to investigate or consider whether the State had breached the multi-jurisdictional plea agreement before recommending that Maas enter no-contest pleas; (2) Maas's third appointed trial attorney, Timothy Blank, provided ineffective assistance by failing to object to an ex parte discussion between the prosecutor and the circuit court about the proposed revised Marinette County plea agreement; (3) Blank further provided ineffective assistance by failing to obtain a ruling on the suppression motion and allowing the reinstatement of Maas's original pleas rather than having Maas enter new pleas pursuant to the proposed revised plea agreement; (4) Blank provided ineffective assistance of postconviction or appellate counsel by failing to file a notice of intent to seek postconviction relief on Maas's behalf; (5) the court erred by failing to conduct an additional plea colloquy before reinstating Maas's no-contest pleas; (6) the reinstatement of the original Marinette County plea agreement should not have been allowed because that agreement was negotiated by the district attorney who was subsequently replaced by a special prosecutor; and (7) Judge Miron's participation in the plea negotiations rendered Maas's pleas involuntary. In an accompanying

letter, Maas further asked that his case be reassigned to the Honorable Jane Sequin—who had replaced Judge Miron in Branch 1—because Judge Morrison might "become a material witness in the proceedings," due to his having presided over the remanded proceedings on the ***Knight*** petition.

After both Judge Sequin and Judge Morrison denied the request to transfer the case, the circuit court denied the WIS. STAT. § 974.06 motion without a hearing. The court noted that it had held "at least two extensive hearings on the matters covered again in [Maas's] current motion and has determined that no grounds for relief have been shown."

In this appeal, Maas contends: (1) his WIS. STAT. § 974.06 motion should have been heard in Branch 1 rather than Branch 2 because Judge Morrison had previously represented Maas and because he could be a material witness; (2) the circuit court erred by determining that the claims in the § 974.06 motion had been previously litigated; and (3) the court erred when it determined that the allegations in the § 974.06 motion were insufficient to warrant a hearing. The State responds that Maas has forfeited any argument related to Judge Morrison's prior representation of Maas, Judge Morrison is not a material witness to any of the claims in the § 974.06 motion, and the court properly determined that Maas's claims were previously litigated or otherwise insufficient to warrant a hearing. In the alternative, the State contends that Maas could have raised his current claims in prior proceedings. We address each claim in turn.

1. Recusal

As a procedural matter, we note that Maas has neglected to properly preserve either of his recusal claims against Judge Morrison by failing to raise the prior representation issue in the letter to the circuit court accompanying his WIS. STAT. § 974.06 motion and by failing to raise

the "material witness" issue before this court until his reply brief. *See* ***State v. Hayes***, 167 Wis. 2d 423, 425-26, 481 N.W.2d 699 (Ct. App, 1992) (we need not address issues that were not preserved in the circuit court); ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989) (we need not address issues raised for first time in reply brief). Even if we were to excuse these forfeitures, Maas has not demonstrated that Judge Morrison was required to recuse himself under either theory.

With respect to Judge Morrison's prior representation of Maas, that fact is not a ground for automatic statutory disqualification and Maas has not developed any argument that would establish that such representation creates objective bias. *See* WIS. STAT. § 757.19(2). Additionally, a determination that a judge is subjectively biased can only be made by the judge himself or herself. ***State v. McBride***, 187 Wis. 2d 409, 414-15, 523 N.W.2d 106 (Ct. App. 1994). Here, Judge Morrison explained that he had no recollection of his prior representation of Maas and had no bias against him.

With respect to Judge Morrison having presided over the remanded ***Knight*** proceedings, "[t]he fact that the [circuit] court, in a technical sense, 'witnesses' the actions of the jurors, the testifying witnesses, the lawyers and the parties does not transform the [circuit] court into a 'material witness' pursuant to [WIS. STAT.] § 757.19(2)(b)." *See* ***State v. Hampton***, 217 Wis. 2d 614, 620, 579 N.W.2d 260 (Ct. App. 1998). Judge Morrison was not present during any of the proceedings where the pleas were entered, withdrawn, or reinstated.

2. Previous litigation

Maas's fourth claim in his current WIS. STAT. § 974.06 motion—i.e., that Blank provided ineffective assistance by failing to file a notice of intent—was previously litigated in his ***Knight***

petition. Our conclusion that the claim was barred by laches is binding on future proceedings in this case and precludes Maas from raising the issue again. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (a matter already litigated cannot be relitigated in subsequent postconviction proceedings "no matter how artfully the defendant may rephrase the issue").

Maas attempted to raise the seventh claim in his WIS. STAT. § 974.06 motion—i.e., that Judge Miron's participation in the plea negotiations rendered Maas's reinstatement of his pleas involuntary—in both his first attempted § 974.06 motion and his no-merit proceeding. The claim was not actually litigated on its merits in either proceeding, however, for procedural reasons. The circuit court refused to entertain the first attempted § 974.06 motion because it was raised pro se at a time when Maas was represented and had an appeal pending, and this court refused to address the claim in the no-merit proceeding because it was outside the scope of our jurisdiction on an appeal from the sentences imposed after revocation of Maas's probation.

Neither the circuit court nor the State has identified any point in the record where any of the other five claims in the current WIS. STAT. § 974.06 motion were either raised by motion or ruled upon. We therefore conclude that only Maas's fourth claim was procedurally barred as having been previously litigated.

3. Sufficiency of allegations in the postconviction motion

In order to obtain a hearing on a postconviction motion, a defendant must allege material facts sufficient to warrant the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. In the context of a claim of ineffective assistance of counsel, that standard means the facts alleged would, if true, establish both that counsel provided deficient

performance and that the defendant was prejudiced by that performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. In the context of plea withdrawal, a circuit court's participation in plea negotiations conclusively establishes that the plea was involuntary. ***State v. Williams***, 2003 WI App 116, ¶16, 265 Wis. 2d 229, 666 N.W.2d 58. No hearing is required, though, when the defendant presents only conclusory allegations or when the record conclusively demonstrates that he or she is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Nonconclusory allegations should present the "who, what, where, when, why, and how" with sufficient particularity for the court to meaningfully assess the claim. ***Allen***, 274 Wis. 2d 568, ¶23.

Here, the record conclusively demonstrates that Maas is not entitled to relief on the first claim in his WIS. STAT. § 974.06 motion—i.e., that Morrow provided ineffective assistance by failing to investigate or consider whether the State had breached the multi-jurisdictional plea agreement—because Maas could not demonstrate the prejudice element. The pleas Maas entered while represented by Morrow were subsequently vacated. Morrow was no longer representing Maas when Maas agreed to the reinstatement of those pleas, by which time Maas was plainly aware of the alleged breach, and Morrow's failure to investigate it was no longer of consequence.

The allegations regarding the second claim in the WIS. STAT. § 974.06 motion—i.e., that Blank provided ineffective assistance by failing to object to an ex parte discussion between the prosecutor and the circuit court about the proposed revised plea agreement—are too conclusory to warrant a hearing. Aside from the fact that Maas has not provided any evidence (such as docket entries, affidavits, or subsequent references in the transcripts) that the alleged ex parte meeting requested by the prosecutor actually occurred, he has not identified any discussion that

might have happened during that meeting that would not have been cured by the subsequent in-chambers discussion of the same topic, at which both Maas and Blank were present.

Next, the record also conclusively demonstrates that Maas is not entitled to relief on the fifth claim in his WIS. STAT. § 974.06 motion—i.e., that the circuit court erred by failing to conduct an additional plea colloquy before reinstating Maas's no-contest pleas. By withdrawing the withdrawal of his no-contest pleas, Maas returned to the point in time where those pleas had already been accepted based upon an adequate colloquy. There was no requirement for a second colloquy when no second set of pleas was entered.

Finally, the record also conclusively demonstrates that Maas is not entitled to relief on the sixth claim in his WIS. STAT. § 974.06 motion—i.e., that the reinstatement of the original Marinette County plea agreement reintroduced a conflict of interest with the district attorney who was subsequently replaced by a special prosecutor. The district attorney was no longer handling the case when Maas withdrew the withdrawal of his pleas. Any potential conflict of interest was cured when the non-conflicted special prosecutor endorsed the reinstatement of the prior plea agreement.

That leaves the third and seventh claims in Maas's WIS. STAT. § 974.06 motion—i.e., that Blank provided ineffective assistance by failing to obtain a ruling on the suppression motion and by allowing the reinstatement of Maas's original pleas rather than having Maas enter new pleas pursuant to the proposed revised plea agreement and that Judge Miron's participation in the plea negotiations rendered Maas's pleas involuntary. We conclude that these interrelated claims are neither conclusory nor defeated by the record.

Maas has identified specific points in the record showing that both the special prosecutor and the circuit court acknowledged that the motion to suppress Maas's statement to the joint task force was likely to have succeeded and that, without that statement, the State would had to have dismissed the case for lack of evidence. Maas has alleged that he came to the March 17, 2006 hearing believing that he would be obtaining a ruling on the motion to suppress his statement and that Blank elected to change strategies "at the last minute" without conferring with Maas.

It is difficult to discern any strategy, let alone a rational reason, aside from the circuit court's participation in the off-record discussion, that Maas would forgo the likely dismissal of his case in favor of reinstating a plea deal in which he would subject himself to the potential of forty years' initial confinement plus twenty years' extended supervision and substantial restitution. Thus, absent a procedural bar, Maas would be entitled to a hearing on his third and seventh claims.

4. Previous opportunities to raise issues

No claim that could have been raised in a previously filed postconviction motion or direct appeal can be the basis for a subsequent motion under WIS. STAT. § 974.06 unless the court finds there was a sufficient reason for failing to raise the claim in the earlier proceeding. WIS. STAT. § 974.06(4); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). The State asserts that Maas could have raised any claims that were not previously litigated in his first attempted § 974.06 motion, in his discovery motion, or in his ***Knight*** petition.

We disagree that Maas could have raised his third or seventh claims in either his first attempted WIS. STAT. § 974.06 motion or his ***Knight*** petition. As we have discussed, the circuit court refused to even entertain Maas's first attempted § 974.06 motion given the status of the

case at that time. As a practical matter, then, the postconviction motion that is the subject of this appeal was Maas's first actually litigated motion under § 974.06. The ***Knight*** petition was limited to the question of whether Maas had been afforded ineffective assistance of *appellate* counsel. We would not have had jurisdiction to consider claims relating to the validity of the underlying conviction in the context of the ***Knight*** petition.

We agree with the State, however, that ***State v. Kletzien***, 2011 WI App 22, ¶11, 331 Wis. 2d 640, 794 N.W.2d 920, requires a defendant to include all available postconviction claims in a postconviction discovery motion absent a sufficient reason for failing to do. Here, by the time Maas filed his postconviction discovery motion, he had all of the knowledge necessary to raise his claims relating to counsel's failure to obtain a ruling on the suppression motion or to object to the reinstatement of the original pleas, rather than the entry of new pleas pursuant to a revised plea agreement, as well as to the circuit court's participation in plea negotiations. Indeed, Maas had already twice attempted to raise the question of the court's involvement in the plea negotiations by that time. Maas has offered no reason, let alone a sufficient one, for his failure to include his third and seventh claims in his discovery motion. Therefore, those two remaining claims are also procedurally barred, and the court could properly deny them without a hearing.

Upon the foregoing,

IT IS ORDERED that the order denying Kevin Maas's postconviction motion under WIS. STAT. § 974.06 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