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DISTRICT III

October 29, 2024

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Outagamie County Courthouse
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You are hereby notified that the Court has entered the following opinion order:

2023AP1397 State of Wisconsin v. Ronald L. Kupsky (L. C. No. 2018CF686)

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).

Ronald Kupsky, pro se, appeals from an order denying his motion seeking postconviction relief from a criminal conviction following the affirmance of that conviction on a no-merit appeal. 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 on the ground that all of the issues Kupsky attempts to raise in his postconviction motion are procedurally barred by his prior no-merit appeal.

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

Kupsky was convicted of first-degree sexual assault of a child following a bifurcated trial in which a jury found him guilty of the charge and rejected his claim that he was not responsible due to mental disease or defect. Kupsky's appellate counsel filed a no-merit report addressing whether there were any issues of arguable merit related to: (1) Kupsky's waiver of his right to counsel; (2) the circuit court's decision to allow the State to introduce other-acts evidence; (3) jury selection; (4) the parties' opening statements and closing arguments; (5) the court's decision to allow the State to introduce the victim's prior consistent statements during the guilt phase of Kupsky's trial; (6) the jury instructions; (7) Kupsky's waiver of his right to testify during both phases of his bifurcated trial; (8) the sufficiency of the evidence to support the jury's verdicts during both phases of Kupsky's trial; and (9) the court's exercise of sentencing discretion.

Kupsky filed a response to the no-merit report addressing whether: (1) "the evidence was insufficient to support the jury's verdict during the guilt phase of his trial because the State failed to present evidence 'that the assault was done for the purpose of sexual gratification'"; (2) "his constitutional right to a speedy trial" was violated; (3) his "trial counsel was ineffective in his claim of mental defect" and "should have argued that [Kupsky] suffers from pedophilia—a qualified mental defect"; and (4) his sentence was excessive. This court found no arguable merit to any of the issues addressed by either counsel or Kupsky, and we affirmed the conviction.

Kupsky then filed the postconviction motion that is the subject of this appeal, asserting that: (1) the circuit court inadvertently failed to give the jury an instruction; (2) Kupsky was denied a speedy trial; and (3) the prosecutor failed to comply with discovery obligations by not timely disclosing to Kupsky a copy of his criminal record, the name and address of the victim and the investigating police officer, and the victim's statements. Kupsky asserted that he had not

raised the first and third claims earlier due to ineffective assistance of his counsel. The court denied Kupsky's motion without a hearing, concluding that it was unsupported by any factual or legal basis.

In this appeal, Kupsky contends that he was entitled to a hearing on the three claims addressed in his postconviction motion. The State responds that all of the issues raised in Kupsky's postconviction motion are procedurally barred under either ***State v. Witkowski***, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991), or ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

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. 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). A defendant is not entitled to relief on claims that are 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 postconviction motion is a question of law subject to de novo review. ***Id.***, ¶30.

Witkowski holds that a matter already litigated cannot be relitigated in subsequent postconviction proceedings. ***Witkowski***, 163 Wis. 2d at 990. Because we addressed the speedy trial issue in Kupsky's no-merit appeal, Kupsky is procedurally barred under ***Witkowski*** from relitigating that issue now.

Escalona-Naranjo holds that an issue that could have been raised in a direct appeal or in a postconviction motion under WIS. STAT. § 974.02 cannot be the basis for a subsequent

postconviction motion under WIS. STAT. § 974.06, unless there was a sufficient reason for failing to raise the issue earlier. ***Escalona-Naranjo***, 185 Wis. 2d at 185. The procedural bar of ***Escalona-Naranjo*** may be applied to a defendant whose direct appeal was processed under the no-merit procedure set forth in WIS. STAT. RULE 809.32, as long as the no-merit procedures were in fact followed and the record demonstrates a sufficient degree of confidence in the result. ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574.

State v. Kupsky, No. 2020AP779-CRNM, unpublished op. and order (WI App Nov. 29, 2022), reflects that the proper no-merit procedures were followed on Kupsky's no-merit appeal. Kupsky was afforded the opportunity to submit a response to counsel's report, and he did so. This court then engaged in an independent review of the record and concluded that there would be no arguable merit to the issues raised by counsel or the additional issues raised by Kupsky. Nothing in our current review of the record undermines our confidence in those conclusions.[2] We therefore conclude that ***Escalona-Naranjo*** may properly be applied to bar Kupsky's jury instruction and discovery claims.

Kupsky asserts ineffective assistance of his appellate counsel as a sufficient reason under ***Escalona-Naranjo*** to explain why he did not raise his jury instruction and discovery claims

[2] In ***State v. Fortier***, 2006 WI App 11, ¶¶24-27, 289 Wis. 2d 179, 709 N.W.2d 893, we reasoned that the failure of either counsel or this court to address an issue of "evident" merit led to the conclusion that the no-merit procedures had not been adequately followed to warrant confidence in the outcome of the appeal. The Wisconsin Supreme Court appears to have approved this logic when it noted that a defendant may not be barred from raising an issue that the court of appeals and appellate counsel "*should* have found." ***State v. Allen***, 2010 WI 89, ¶63, 328 Wis 2d 1, 786 N.W.2d 124. It is therefore implicit in our statement that we retain confidence in the outcome of the no-merit proceeding that we do not share the defendant's view of the merits of the issues which he now seeks to raise. To address in detail why that is the case, however, would undermine the judicial efficiency that is supposed to be achieved by applying the procedural bar of ***Escalona-Naranjo***.

earlier. When the viability of a defendant's WIS. STAT. § 974.06 motion hinges on a claim that appellate counsel was ineffective, the defendant must make allegations sufficient to establish both deficient performance and prejudice under the standard set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. Kupsky's allegations here are insufficient to show that his appellate counsel performed deficiently by failing to raise additional issues in a no-merit report, when this court also did not identify those issues as arguably meritorious upon our independent review of the record.

Furthermore, Kupsky fails to adequately explain why *he*, rather than appellate counsel, could not have raised the issues in his response to the no-merit report. Kupsky asserts that he did not have access to relevant case law, but his postconviction motion cited no case law in support of his jury instruction claim and it cited only the seminal case of ***Brady v. Maryland***, 373 U.S. 83 (1963), in support of his discovery claim. In any event, a defendant need not cite any legal authorities in a response to a no-merit report. A no-merit response is designed to provide a defendant untrained in law with an opportunity to raise any concerns about the proceedings in a nonformal manner.

In conclusion, we agree with the State that ***Witkowski*** and ***Escalona-Naranjo*** control the disposition of this appeal. Kupsky is procedurally barred from raising all three of the issues set forth in his postconviction motion.

Therefore,

IT IS ORDERED that the postconviction 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