COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP143 **Cir. Ct. No. 2002CF289**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELIJAH S. BROOKS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Elijah Brooks appeals an order denying his WIS. STAT. § 974.06[1] postconviction motion without a hearing. In the motion, Brooks

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

argued: (1) the judgment should be vacated because the court erroneously imposed a life sentence without the possibility of parole in reliance on Wisconsin's "two strikes" penalty enhancer when Brooks was charged under the "three strikes" law; (2) Brooks is entitled to a new trial based on numerous evidentiary errors; and (3) he is entitled to a new trial based on ineffective assistance of trial counsel.[2] Because we conclude the first issue is meritless and the second and third issues are procedurally barred, we affirm the order.

¶2 In 2003, Brooks was convicted of engaging in repeated acts of sexual assault of the same child, attempted sexual assault of a child, second-degree sexual assault of a child and possession of a firearm by a felon. In 2004, Brooks filed a motion for a new trial claiming ineffective assistance of trial counsel. The trial court denied the motion and this court affirmed that decision. In 2013, Brooks filed the present motion seeking a reduced sentence or a new trial. The circuit court denied the motion without a hearing, rejecting the argument regarding the court's use of the two strikes penalty enhancer on the merits, and concluding the other issues were barred by the rule against successive postconviction motions and appeals set out in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¶3 We consider the merits of Brooks' argument regarding the correct penalty enhancer because the State does not contest his assertion that this issue is not subject to the rule against successive postconviction motions and appeals. We

[2] In his reply brief, Brooks again argues an issue that was decided in his previous appeal, that he was prejudiced because the firearms charge was tried with the sex offenses. An issue previously addressed cannot be the basis of a new postconviction motion or appeal no matter how artfully it is rephrased. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

reject Brooks' assertion that the court improperly applied the two strikes penalty enhancer. The complaint charged Brooks as a "persistent repeater" under WIS. STAT. § 939.62(2m)(b). That statute creates two distinct ways for a person to be found a persistent repeater: (1) if the actor has been convicted of a serious felony on two or more separate occasions at any time preceding the serious felony for which he or she is presently being sentenced or (2) if the actor has been convicted of one serious child sex offense at any time preceding the date of the violation of the serious child sex offense for which he or she presently is being sentenced. The complaint for each of the sex offenses clearly invoked the two strikes provision by identifying Brooks' prior offense of second-degree sexual assault of a child in 1993:

> Furthermore, the defendant is a PERSISTENT REPEATER having been convicted of a serious child sex offense, Second Degree Sexual Assault of a Child, contrary to Section 948.02(2), Wisconsin Statutes, on or about October 15, 1993, in Milwaukee County, Wisconsin, which offense precedes the date of violation of the serious child sex offense indicated in the above-mentioned Count, and so the defendant is subject to life imprisonment without the possibility of parole or extended supervision, pursuant to Section 939.62(2m)(b), Wisconsin Statutes.

The complaint adequately informed Brooks of the basis for finding him a persistent repeater. He was charged and sentenced under the two strikes provision for defendants who have committed one prior serious child sex offense. Nothing in the record supports his underlying premise that he was charged under the three strikes penalty enhancer that applies to other serious felonies.

¶4 Brooks also contends the jury, not the sentencing court, should have determined whether he qualified as a persistent repeater. In ***Apprendi v. New Jersey***, 530 U.S. 466, 490 (2000), the Court specifically exempted "the fact of a prior conviction" from the factors that must be determined by a jury. The

sentencing court, not the jury, is allowed to determine the applicability of a defendant's prior conviction for sentence enhancement purposes when the necessary information concerning the prior conviction can readily be determined from an existing judicial record. ***State v. LaCount***, 2008 WI 5, ¶52, 310 Wis. 2d 85, 750 N.W.2d 780. Here, the record contains the October 15, 1993 judgment of conviction for second-degree sexual assault of a child.

¶5 Brooks' remaining arguments are barred by the rule against successive postconviction motions and appeals. His motion does not adequately explain his failure to raise these issues in his earlier postconviction motion and appeal. The motion must do more than merely identify an issue his postconviction motion and/or appellate counsel failed to raise and assume that it establishes ineffective assistance of counsel justifying another postconviction proceeding. Such an interpretation would vitiate the bar against successive postconviction motions and appeals set out in ***Escalona-Naranjo***. Brooks does not explain how his counsel's actions fall below an objective standard of reasonableness or how he would show deficient performance and prejudice. *See* ***State v. Balliette***, 2011 WI 79, ¶¶63-67, 336 Wis. 2d 358, 805 N.W.2d 334.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.