COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2013AP2519
2013AP2520

Cir. Ct. Nos. 2001CF5276
2001CF5340

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK P. SHARP,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: STEPHANIE G. ROTHSTEIN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Patrick P. Sharp appeals from orders denying his motion to withdraw his guilty pleas and denying his motion for reconsideration. We agree with the circuit court that the plea withdrawal motion is procedurally barred, so we affirm the orders.

BACKGROUND

¶2 In October 2001, the State filed two criminal complaints against Sharp, each charging one count of second-degree sexual assault based on allegations that Sharp had sexual contact with two girls who had not yet attained the age of sixteen.[1] Each charge included an habitual offender enhancer based on a prior felony drug conviction. Sharp pled guilty to both offenses. The circuit court sentenced him to seven years' initial confinement and ten years' extended supervision on each count, to be served consecutively.

¶3 Sharp appealed. His attorney filed a no-merit report in December 2002. Sharp filed a response, counsel filed a supplemental report, and Sharp filed a reply. In January 2004, this court affirmed the judgments of conviction. *See* ***State v. Sharp***, Nos. 2002AP2114-CRNM & 2002AP2115-CRNM, unpublished slip op. & order (WI App Jan. 16, 2004).

¶4 In July 2006, Sharp filed a *pro se* postconviction motion, alleging his plea was not knowing, intelligent, and voluntary because the circuit court had failed to inform him about the sexual gratification element of a sexual contact charge during the plea colloquy. When a defendant is charged with sexual assault by sexual contact, rather than intercourse, the contact must be intentional and for either the defendant's arousal or gratification or the victim's degradation or humiliation. *See* WIS. STAT. § 948.01(5); *see also* ***State v. Jipson***, 2003 WI App

[1] Although charged in both instances as sexual contact, in each case Sharp was alleged to have placed his penis into the victim's vagina. In Milwaukee County Circuit Court case No. 2001CF5340, the information subsequently alleged that Sharp had committed the assault through sexual intercourse.

222, ¶9, 267 Wis. 2d 467, 473–474, 671 N.W.2d 18, 21.[2] The circuit court denied the motion as barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¶5 On appeal, rather than apply ***Escalona***, we addressed Sharp's motion on its merits. We explained that Sharp, by alleging a defect in the plea colloquy, was seeking relief under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and WIS. STAT. § 971.08. *See* ***State v. Sharp***, Nos. 2006AP2500 & 2006AP2501, unpublished slip op. at 2 (WI App Dec. 4, 2007). However, it was not enough for Sharp to allege an error in the colloquy; he was also required to allege—in his motion, not his brief—that he failed to understand the information that he should have been given during the plea colloquy. *See* ***ibid.*** (citing ***State v. Howell***, 2007 WI 75, ¶27, 314 Wis. 2d 350, 367–368, 734 N.W.2d 48, 57, and ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 588, 682 N.W.2d 433, 443). Sharp had not so alleged, so we determined that the circuit court had properly denied the motion.

¶6 In March 2009, Sharp filed a *pro se* petition for a writ of *habeas corpus* in this court, pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). We perceived Sharp's primary argument to be "that appellate counsel was ineffective in not noticing and raising" the supposed plea colloquy error in some fashion. *See* ***State ex rel. Sharp v. Grams***, Nos. 2009AP667-W and 2009AP668-W, unpublished slip op. & order at 3 (WI App Oct. 15, 2009). We rejected his petition, first because it was unsupported by any objective

[2] ***State v. Jipson***, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18, was decided *after* counsel filed the no-merit report in Sharp's appeals, but ***Jipson*** relied on ***State v. Bollig***, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199, which had been decided well before.

documentation, like the plea colloquy transcript. *See* ***ibid.*** Second, we concluded the issue was procedurally barred. *See* ***ibid.*** Third, a ***Knight*** petition challenges the effective assistance of appellate counsel and requires the petitioner to show deficient performance by counsel and prejudice from that deficiency. *See* ***State ex rel. Kyles v. Pollard***, 2014 WI 38, ¶¶47–48, 354 Wis. 2d 626, 645–646, 847 N.W.2d 805, 814–815. Sharp, however, had not shown prejudice because he had made only a conclusory allegation that, had he known of the gratification element, he would have rejected any plea bargain and gone to trial. *See* ***Sharp v. Grams***, Nos. 2009AP667-W & 2009AP668-W at 5.

¶7 Before this court's decision on Sharp's ***Knight*** petition was released, he filed a *pro se* motion for sentence modification in the circuit court. The circuit court denied the motion because some of Sharp's claims did not belong in a motion for sentence modification, one claim was untimely, and other claims were barred by both ***Escalona*** and ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574, because of Sharp's failure to raise the issues in his no-merit responses. Sharp appealed the denial of that order, and we summarily affirmed. *See* ***State v. Sharp***, Nos. 2010AP34-CR & 2010AP35-CR, unpublished slip op. and order (WI App Mar. 1, 2011).

¶8 In August 2013, with the assistance of retained counsel, Sharp filed the current postconviction motion. He again alleged that the plea colloquy was defective because he had not been advised of the purpose element to sexual contact. This time, he also alleged that he was unaware of the element at the time of the plea. He requested an evidentiary hearing. The circuit court denied the motion. It explained that Sharp had already raised this issue in 2006 and 2009, making the current issue barred by ***Escalona*** or ***Tillman***. The circuit court also

described the issue as "previously raised and litigated." Sharp moved for reconsideration, but was rebuffed, so Sharp commenced the current appeals.

DISCUSSION

¶9 The issue here is whether Sharp's postconviction motion is sufficient to entitle him to a hearing on his plea withdrawal motion, which the circuit court construed as a motion under WIS. STAT. § 974.06. If the motion raises sufficient material facts which, if true, show that the defendant is entitled to relief, the circuit court must hold a hearing. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 369, 805 N.W.2d 334, 339; *see also* ***Allen***, 2004 WI 106, ¶9, 274 Wis. 2d at 576, 682 N.W.2d at 437. If the motion does not allege sufficient facts, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *See* ***Allen***, 2004 WI 106, ¶9, 274 Wis. 2d at 576, 682 N.W.2d at 437.

¶10 All grounds for relief under WIS. STAT. § 974.06 "must be raised in a petitioner's original, supplemental, or amended motion." *See* ***Escalona***, 185 Wis. 2d at 181, 517 N.W.2d at 192. "[I]f the defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis" for a new § 974.06 motion "*unless* the court ascertains that a 'sufficient reason' exists" for the failure to allege or sufficiently raise the issue in a prior motion. *See* ***Escalona***, 185 Wis. 2d at 181–182, 517 N.W.2d at 162. "[A] prior no merit appeal may serve as a procedural bar to a subsequent postconviction motion and ensuing appeal which raises the same issues or other issues that could have been previously raised." ***Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d at 171–172, 696 N.W.2d at 581. Whether a procedural bar

applies is a question of law. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175, 176 (Ct. App. 1997).

¶11 Sharp contends that he has a sufficient reason for raising this issue now, despite his prior opportunities: specifically, that neither appellate counsel nor this court recognized the deficient plea colloquy during the no-merit process. *See* ***State v. Fortier***, 2006 WI App 11, ¶23, 289 Wis. 2d 179, 190, 709 N.W.2d 893, 898. That explanation might have provided a sufficient reason for Sharp to proceed with his first collateral challenge in 2006 by explaining why the issue was not raised in the preceding appeals, but this is Sharp's *fourth* attempt at relief since those no-merit appeals. ***Fortier*** cannot be used to explain Sharp's failure to adequately raise his plea colloquy issue in his 2006 and 2009 motions.

¶12 Perhaps so aware, Sharp also suggests that his *pro se* status and inexperience in the law constitute a "sufficient reason" as to why he has not adequately raised the plea colloquy issues before now. It should go without saying, however, that Sharp's inexperience does not constitute a "sufficient reason." Thus, Sharp's current WIS. STAT. § 974.06 motion is procedurally barred by at least his prior postconviction challenges in 2006 and 2009, if not also by his original appeals.

¶13 Moreover, Sharp has already litigated his defective plea colloquy issue. "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, 514 (Ct. App. 1991). Sharp raised, and lost, this issue in both his 2006 postconviction motion and his 2009 ***Knight*** petition. Though Sharp lost in those instances, at least in part because his motion was insufficiently pled and his petition was inadequately

supported, ***Witkowski*** and ***Escalona*** simply do not permit repetitive claims for relief on the same issue. The time to refine the claim is before filing the first motion, not after several rejections by the courts.

By the Court.—Orders affirmed.

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