COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1501 **Cir. Ct. No. 1995CF954719**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN H. JONES, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Reversed and cause remanded*.

Before Curley, P.J., Fine[1] and Brennan, JJ.

[1] This opinion was circulated and approved before Judge Fine's death.

¶1 PER CURIAM. John H. Jones, Jr., *pro se*, appeals the order denying his postconviction motion for a restitution hearing.[2] He argues that the postconviction court erred when it concluded that his motion was procedurally barred.[3] We agree. Accordingly, we reverse and remand for proceedings consistent with this opinion.

BACKGROUND

¶2 Jones was convicted and sentenced in 1996 after a jury found him guilty of armed robbery as a party to a crime. The judgment of conviction specified that restitution was "[t]o be determined."

¶3 On February 20, 2002, Jones filed a postconviction motion alleging that a restitution order issued in 1998 was untimely because it was issued nineteen months after his sentencing hearing. Additionally, Jones argued that he was never notified about the hearing nor did he receive a copy of the restitution order.[4] He claimed that he only learned about the order after he filed a petition for writ of *habeas corpus* one month earlier. The postconviction court denied the motion

[2] The Honorable Michael J. Barron entered the judgment of conviction and issued the restitution order following the 1998 hearing. The Honorable M. Joseph Donald issued the orders that denied Jones's 2002 and 2014 motions to rescind the restitution order.

[3] Although this is not exactly how it is phrased, this is how we interpret Jones's argument on appeal. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384, 388 (1983).

[4] The docket entry related to the restitution hearing on April 23, 1998 reads:

> Defendant John Henry Jones not in court, defendant in custody. George N[.] Prietz appeared for the State of Wisconsin, for attorney Marcella DePeters. Deputy Court Clerk Lana L. Nelson. Defendant not produced from Dodge. Court finds information given by American Family Insurance sufficient. Order received, signed and filed for restitution in the amount of $3,274.89.

concluding that Jones's claim was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), given that Jones had filed two prior postconviction motions and two prior appeals where he potentially could have raised the issue. The postconviction court further noted that the crime for which Jones was convicted occurred in 1995 and concluded "[t]he only error alleged is that a restitution order was not signed within 60 days. At this juncture, vacating the restitution order would put form over substance." Lastly, the postconviction court held that Jones's claim was barred by laches.

¶4 Twelve years later, on May 19, 2014, Jones filed a new motion challenging the restitution order on largely the same grounds. He claimed that in April of 2014 he received a financial obligation form indicating that he owed restitution in the underlying case. The postconviction court concluded Jones was barred from re-raising this claim "for the same reasons" set forth in its 2002 order, which Jones did not appeal.

¶5 In a motion for reconsideration, Jones argued that he never received the postconviction court's 2002 order. According to Jones, from 2002 through 2006, there was another inmate with his name at the institution where he was serving his sentence. Jones speculated that the other inmate must have received his copy of the postconviction court's 2002 order. He further explained that he assumed the court had disregarded his motion as moot when he did not receive an order. Jones claimed that on February 24, 2002, he requested a copy of the restitution order and received a response from the records office indicating that it did not have a restitution order in Jones's file. Based on this, Jones asserted that he thought there was no further reason for follow-up with the postconviction court regarding the 1998 restitution order.

¶6 The postconviction court denied Jones's motion for reconsideration "[f]or the same reasons set forth" in its previous order.

DISCUSSION

¶7 The State submits that Jones's claim is procedurally barred. We disagree.

¶8 Whether Jones's claim is procedurally barred is an issue that is subject to our independent review. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175, 176 (Ct. App. 1997). "[C]laims that could have been raised on direct appeal or in a previous [WIS. STAT.] § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason for why the claims were not raised on direct appeal or in a previous § 974.06 motion." ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 22, 665 N.W.2d 756, 766.[5]

¶9 As the State points out, Jones's 2002 postconviction motion challenging restitution followed his direct appeal in 1997 and a collateral attack on his conviction in 1999. The State, however, gives short shrift to the reasons Jones offers for why he failed to appeal the order denying his 2002 postconviction motion prior to filing his 2014 postconviction motion.[6] Although he does not

[5] Although a WIS. STAT. § 974.06 motion is generally limited to claims of jurisdiction and constitutional magnitude, *see* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶19, 314 Wis. 2d 112, 123, 758 N.W.2d 806, 812, § 974.06(1) expressly permits a challenge that a sentence "was imposed in violation of the … laws of this state." Here, Jones asserts the restitution order failed to comply with WIS. STAT. § 973.20 in numerous ways.

[6] The State writes in its brief: "Importantly, Jones did not appeal the court's [2002] order. Instead, he waited 12 years and filed a new motion challenging the restitution order on largely the same grounds."

present these as sufficient reasons, this is how we interpret them. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 184, 517 N.W.2d at 163; *see also* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384, 388 (1983) ("A court presented with a prisoner's *pro se* document seeking relief must look to the facts stated in the document to determine whether the petitioner may be entitled to any relief if the facts alleged are proved.").

¶10 In reviewing Jones's postconviction motion and the motion for reconsideration that followed, "[f]irst, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review *de novo*. If the motion raises such facts, the circuit court must hold an evidentiary hearing." [7] *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437, 443 (citation omitted).

¶11 In Jones's submissions, he alleges errors related to the restitution determination that was made. He explains that he only first learned of the restitution order in 2002 and promptly filed a motion challenging it. He did not,

[7] As noted, we have taken into account the allegations set forth in Jones's motion for reconsideration. The State contends that the allegations that Jones did not receive the postconviction court's 2002 order (which are set forth in the motion for reconsideration) are not properly before us because Jones did not appeal the order denying his motion for reconsideration. Generally, however, an order deciding a motion for reconsideration is not separately appealable. *See* ***Silverton Enters., Inc. v. General Cas. Co.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154, 155 (Ct. App. 1988) ("No right of appeal exists from an order denying a motion to reconsider which presents the *same issues* as those determined in the order or judgment sought to be reconsidered." (emphasis added)). Here, although Jones presented supplemental information in his motion for reconsideration to give the postconviction court a more comprehensive view of what had transpired, the underlying issue has always been the same: whether WIS. STAT. § 973.20 was complied with when the court entered the 1998 restitution order. Therefore, Jones had no right of appeal from the order denying Jones's motion to reconsider, and the State does not otherwise explain why this court should not consider it.

however, receive a copy of the postconviction court's order denying his 2002 motion. Jones assumed that the court had disregarded his 2002 motion as moot because when he requested a copy of the restitution order, he was informed by the records office that there was not one in his file. It was not until 2014, when he received a financial obligation form indicating that he owed restitution, that he realized the issue still existed. At that point, he filed the motion that led to this appeal.

¶12 Based on the foregoing, we conclude that Jones has set forth sufficient reasons for failing to challenge the restitution order earlier. *See* WIS. STAT. § 974.06(4). Accordingly, the postconviction court erred when it concluded Jones's motion was procedurally barred.

¶13 We reverse and remand this matter to afford the postconviction court the opportunity to hold an evidentiary hearing to address the merits of Jones's claim that the court violated WIS. STAT. § 973.20 when it entered the 1998 restitution order. Whether a new restitution hearing will ultimately be warranted is a decision for the postconviction court to make following the evidentiary hearing.

By the Court.—Order reversed and cause remanded.

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