COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP845 **Cir. Ct. No. 1999CF6351**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK L. GUMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed*.

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Mark L. Guman, *pro se*, appeals an order of the circuit court, denying his WIS. STAT. § 974.06 (2011-12)[1] motion without a

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

hearing. The circuit court concluded that Guman's motion was procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree with the circuit court, so we affirm the order.

¶2 In 2000, Guman was convicted upon his guilty plea to two counts of second-degree sexual assault with the threat of force, two counts of second-degree sexual assault of a child, and one count of kidnapping. He was sentenced to four consecutive, indeterminate, twenty-year terms of imprisonment for the sexual assaults. A consecutive, indeterminate, twenty-five-year term of imprisonment was imposed for the kidnapping, but stayed in favor of twenty-five years' probation. Guman did not have a direct appeal.

¶3 In 2005, Guman filed a *pro se* motion under WIS. STAT. § 974.06. The circuit court conducted a hearing on the motion but denied relief. Guman appealed, and this court affirmed. *See* ***State v. Guman***, No. 2007AP1205, unpublished slip op. (WI App May 6, 2008). In 2009, Guman filed a motion for sentence modification, which was denied. In 2010, Guman petitioned this court for a writ of *habeas corpus*, which was also denied.

¶4 On March 25, 2014, Guman filed the WIS. STAT. § 974.06 motion underlying this appeal, alleging various claims of ineffective postconviction counsel. Guman also claimed that he was incompetent during the original postconviction stage of his case. The circuit court denied the motion as procedurally barred by Guman's prior § 974.06 postconviction motion. Guman appeals.

¶5 WISCONSIN STAT. § 974.06(4) requires a prisoner to raise all grounds for postconviction relief in his or her original, supplemental, or amended motion or appeal. *See* ***Escalona***, 185 Wis. 2d at 185-86. "[C]laims that could

have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 motion absent a showing of a sufficient reason[.]" ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756.

¶6 The circuit court applied ***Escalona*** and ***Lo*** to deny Guman's motion. Guman asserts this was the wrong standard. Instead, Guman says, the circuit court should have applied the rule from ***State v. Debra A.E.***, 188 Wis. 2d 111, 523 N.W.2d 727 (1994). That case offered guidance on how counsel and the courts might deal with incompetent defendants during postconviction proceedings. *See* ***id.*** at 131-36.

¶7 Guman points to ***Debra A.E.***'s declarations that "[d]efendants who are incompetent at the time they seek postconviction relief should, after regaining competency, be allowed to raise issues at a later proceeding that could not have been raised earlier because of incompetency" and that "***Escalona*** will not bar an incompetent defendant from invoking [WIS. STAT. §] 974.06 after being restored to competency." *See* ***Debra A.E.***, 188 Wis. 2d at 135-36. Guman asserts that he was incompetent following his conviction in 2000, so ***Debra A.E.*** allows him to proceed with a § 974.06 motion now. Guman also contends that his postconviction incompetency provides a sufficient reason for not previously raising his ineffective-assistance claims against postconviction counsel.

¶8 Assuming without deciding that Guman really was incompetent following his conviction in 2000, he tells us in his reply brief that he was restored to competency by November 2001. Accordingly, ***Debra A.E.*** does not give Guman a "sufficient reason" for the current motion because he was by his own

admission competent when he made his first attempt at postconviction relief in 2005.[2] That is, Guman does not explain how his postconviction incompetency prevented him from raising his current issues in his 2005 motion. The circuit court therefore properly applied ***Lo*** and properly concluded that the current WIS. STAT. § 974.06 motion is procedurally barred by the prior § 974.06 motion.[3]

By the Court.—Order affirmed.

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

[2] In his postconviction motion, Guman argued that the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), did not apply because the bar is only applicable "where a criminal defendant actually filed a [WIS. STAT.] § 974.02 [postconviction] motion or pursued a direct appeal." *See* ***State v. Lo***, 2003 WI 107, ¶44 n.11, 264 Wis. 2d 1, 665 N.W.2d 756.

It is true that a defendant does not need a sufficient reason for filing an initial WIS. STAT. § 974.06 motion if there has not been a prior WIS. STAT. § 974.02 motion or a direct appeal. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶35, 849 N.W.2d 668. "But if the defendant did file a motion under § 974.02 or a direct appeal *or a previous motion under § 974.06*, the defendant is barred from making a claim that could have been raised previously unless he shows a sufficient reason for not making the claim earlier." ***Romero-Georgana***, 849 N.W.2d 668, ¶35 (emphasis added). Guman, because of his prior § 974.06 motion, still requires a sufficient reason for the current motion.

[3] Of course, we also note that any issues that Guman previously raised that have already been addressed cannot be relitigated. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").