COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1499 **Cir. Ct. No. 2007CF001644**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARMELO VAZQUEZ, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed*.

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

¶1 PER CURIAM. Carmelo Vazquez, Jr., *pro se*, appeals the order denying his WIS. STAT. § 974.06 (2013-14) postconviction motion.[1] Because Vazquez is attempting to relitigate a matter that has already been resolved and because his motion does not allege sufficient facts to entitle him to an evidentiary hearing, we affirm.

BACKGROUND

¶2 In March 2007, a complaint was filed charging Vazquez with one count of conspiracy to commit armed robbery, as a party to a crime, contrary to WIS. STAT. §§ 943.32(1)(b) & (2), 939.05, and 939.31 (2007-08). According to the complaint, between February 19, 2007 and March 18, 2007, Vazquez and Paul Asik committed a series of armed robberies. It was alleged that Vazquez assisted by driving Asik to and from the scenes of the crimes and by driving him to stolen vehicles that were used during the commission of the robberies. Vazquez allegedly shared in the proceeds of the robberies afterward.

¶3 Vazquez pled guilty to the charged offense and was sentenced to eleven years of initial confinement and ten years of extended supervision.[2]

¶4 A no-merit report was filed on Vazquez's behalf, which this court rejected. The appeal was dismissed.

¶5 Vazquez's counsel then filed a WIS. STAT. § 809.30 postconviction motion on Vazquez's behalf. Counsel argued that conspiracy to commit armed

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The Honorable William Sosnay accepted Vazquez's plea and sentenced him.

robbery, as a party to a crime, is a non-existent crime, which deprived the circuit court of jurisdiction.

¶6 After a hearing on Vazquez's postconviction motion, the parties entered into a stipulation, which provided that Vazquez had an arguable basis to seek to vacate his conviction and to dismiss the complaint on the grounds that it was jurisdictionally defective and void. The stipulation continued:

> The parties are willing to compromise in order to resolve this case and both parties request this court to approve this agreement. In exchange for voluntarily dismissing the post-conviction motion and not seeking a further appeal in this case, the State agrees that Mr. Vazquez's current sentence of eleven years confinement and ten years extended supervision be modified to eight years confinement and ten years extended supervision. All other components of Mr. Vazquez's sentence are to remain the same.

The circuit court subsequently signed an order modifying Vazquez's sentence in accordance with the stipulation.[3]

¶7 Less than a year later, in March 2011, Vazquez, *pro se*, moved for sentence modification arguing the existence of a new factor and that there was an erroneous exercise of sentencing discretion. The circuit court denied the motion. It ruled that Vazquez's new factor claims were nothing more than challenges to the circuit court's exercise of discretion and that such claims were untimely.

¶8 In May 2014, Vazquez, *pro se*, filed the WIS. STAT. § 974.06 postconviction motion that underlies this appeal. Once again, he sought to have his judgment of conviction vacated "on the grounds the Court was without subject

[3] The Honorable Dennis R. Cimpl signed the order.

matter jurisdiction when it impose[d] sentence because Vazquez[']s plea of guilty is statutorily invalid pursuant to WIS. STAT. § 939.72(2)."[4] Vazquez further asserted that the stipulation he entered into was not binding because he was threatened into accepting the three-year sentence modification or face harsher punishment if he appealed.

¶9 The circuit court denied Vazquez's motion explaining:

> The stipulation was signed by the defendant, and he therefore waived his right to seek further relief based on the same grounds on which the modification was based. Moreover, he filed a *pro se* motion to modify sentence on March 17, 2011[,] which set forth multiple abuse of discretion claims. Under the circumstances, he is also barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 16[8], 178[, 517 N.W.2d 157] (1994), from pursuing the current motion for postconviction relief.

(Footnote and underling omitted; italics added.)[5]

DISCUSSION

¶10 As set forth above, in his initial WIS. STAT. § 809.30 motion, Vazquez's counsel argued that conspiracy to commit armed robbery, as a party to a crime, is a non-existent crime, which deprived the circuit court of jurisdiction. By the stipulation he entered into, Vazquez agreed not to pursue a further appeal in this matter in exchange for the reduction in his confinement time. This resolved his claim that his conviction was for a nonexistent crime.

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[4] WISCONSIN STAT. § 939.72 provides: "**No conviction of both inchoate and completed crime.** A person shall not be convicted under both: ... **(2)** Section 939.31 for conspiracy and s. 939.05 as a party to a crime which is the objective of the conspiracy."

[5] The Honorable Glenn H. Yamahiro issued the decision and signed the order denying Vazquez's WIS. STAT. § 974.06 postconviction motion.

¶11 Notwithstanding the stipulation, in the underlying WIS. STAT. § 974.06 postconviction motion, Vazquez argued that because he was charged in this matter under both WIS. STAT. § 939.31 and § 939.05, the circuit court's acceptance of his guilty plea was statutorily invalid. He asserted: "A complaint which charges a defendant with crimes that are prohibited from conviction is jurisdictionally defective and void and the defect cannot be waived by a guilty plea; the court does not have jurisdiction."

¶12 We agree with the State's assessment that Vazquez's "current postconviction motion seeks to resurrect his challenge to the guilty plea based on the same arguments that were resolved by the stipulation" He is attempting to cast an old claim in a fresh light; however, "[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 (Ct. App. 1991). Consequently, this claim fails.

¶13 In an effort to avoid this conclusion, Vazquez now argues that the stipulation he entered into with the State is not binding because he was threatened into accepting the three-year sentence modification or face harsher punishment if he appealed.

¶14 The circuit court held that Vazquez was barred by ***Escalona*** from pursuing this argument because he could have raised it in his March 2011 motion to modify his sentence. Vazquez argues that his previous motion seeking sentence modification was not the vehicle for him to raise his current claims. *See* ***State v. Starks***, 2013 WI 69, ¶50, 349 Wis. 2d 274, 833 N.W.2d 146 ("[S]entence modification and § 974.06 motions are two separate forms of relief, such that the

filing of one does not preclude the filing of the other."). Regardless of ***Escalona***'s applicability, Vazquez's motion ultimately fails.[6]

¶15 Whether Vazquez's motion alleges sufficient facts to entitle him to an evidentiary hearing is a question of law we review *de novo*. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If the motion contains sufficient facts that, if true, show Vazquez is entitled to relief, the circuit court was required to hold a hearing. *See* ***id.*** If the motion does not raise such facts, if it presents only conclusory allegations, or if the record reveals that Vazquez is not entitled to relief, then the circuit court's decision to grant or deny a hearing was a discretionary matter. *See* ***id.***

¶16 The only support Vazquez offered for his claim that he was threatened into accepting the three-year sentence modification or face harsher punishment if he appealed was a letter he received from the Frank J. Remington Center at the University of Wisconsin Law School. The letter served as an update for Vazquez regarding the status of his case and included the following:

> Because you had a valid claim regarding the legality of your conviction, the prosecutor agreed to reduce your sentence from 11 years to 8 years incarceration. In exchange for reducing your sentence, you agreed to waive your appeal. [Your postconviction attorney] also told me that if you continued with your appeal to vacate your guilty plea, the prosecutor threatened to bring multiple armed robbery charges. Had you not waived your appeal, you would have likely received a sentence of greater than 11 years incarceration. Because you voluntarily waived your appeal, we will not be able to challenge your conviction.

[6] *See* ***State ex rel. Harris v. Milwaukee City Fire & Police Comm'n***, 2012 WI App 23, ¶9, 339 Wis. 2d 434, 810 N.W.2d 488 ("[W]e need not base our affirmance on the reasons relied upon by the [circuit] court.").

> I want to reiterate that waiving your appeal in exchange for a reduced sentence was a wise decision. You would have likely received a sentence greater than 11-years had you not waived your appeal. The prosecutor's mistake reduced your period of incarceration by three years.

¶17 The statements in the letter fall short of establishing that Vazquez was improperly threatened into signing the stipulation. To the contrary, it would seem that Vazquez was properly apprised of what he was facing if he decided not to enter into the stipulation. Based on the allegations in the complaint, which included statements made by Vazquez admitting his involvement in a number of armed robberies, the prosecutor seemingly could have recharged Vazquez, and he would have faced the possibility of lengthy sentences.

¶18 Vazquez contends that this amounted to a violation of his right to appeal, citing ***Alabama v. Smith***, 490 U.S. 794 (1989), and ***Blackledge v. Perry***, 417 U.S. 21 (1974). ***Smith*** involved the constitutionality of imposing a harsher sentence after a new trial and ***Blackledge*** dealt with vindictiveness by the prosecutor during postconviction proceedings. ***Smith***, 490 U.S. at 795; ***Blackledge***, 417 U.S. at 25-29. ***Smith*** does not apply to the circumstances presented here. And, beyond citing ***Blackledge***, Vazquez has not developed an argument as to its applicability. We need not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶19 We conclude that Vazquez's motion did not allege sufficient facts to entitle him to an evidentiary hearing.

By the Court.—Order affirmed.

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