COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP519 **Cir. Ct. No. 1995CF954770A**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY GILMORE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Cory Gilmore, proceeding *pro se*, appeals an order that denied both his motion for postconviction relief under WIS. STAT. § 974.06

(2013-14),[1] and his common-law motion for sentence modification. Because Gilmore's motion under § 974.06 is procedurally barred and because he fails to demonstrate the existence of a new factor, we affirm.

BACKGROUND

¶2 In 1996, a jury found Gilmore guilty of two counts of armed robbery, one count of aggravated battery, and one count of substantial battery. The trial court imposed an indeterminate, aggregate sentence of fifty-four years in prison.[2] Gilmore pursued a *pro se* postconviction motion and then, with the assistance of counsel, he pursued a direct appeal under the no-merit procedures described in WIS. STAT. RULE 809.32. We affirmed. *See* ***State v. Gilmore***, 2002AP2511-CRNM, unpublished op. and order (WI App Sept. 16, 2003) (***Gilmore I***).

¶3 In February 2005, Gilmore filed a *pro se* postconviction motion under WIS. STAT. § 974.06 (2003-04). He claimed that the State presented false evidence at trial and that the sentencing court erroneously exercised its discretion and relied on inaccurate information. We affirmed the order rejecting his claims. ***State v. Gilmore***, No. 2005AP828, unpublished slip op. (WI App July 18, 2006) (***Gilmore II***). In September 2005, while the proceedings in ***Gilmore II*** were underway, Gilmore filed another *pro se* postconviction motion, alleging that new factors warranted sentence modification and that his sentence is unduly harsh and unconscionable. The trial court rejected his claims, and we affirmed. ***State v.***

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

[2] The Honorable John J. DiMotto presided over the trial and sentenced Gilmore.

Gilmore, No. 2005AP2671-CR, unpublished slip op. (WI App July 24, 2007) (***Gilmore III***).

¶4 In January 2014, Gilmore filed both a postconviction motion under WIS. STAT. § 974.06, and a common-law sentence modification motion. The trial court concluded that Gilmore's claims under § 974.06 were procedurally barred, and his sentence modification motion lacked merit. He appeals.

ANALYSIS

¶5 We begin with the allegations Gilmore pursued under WIS. STAT. § 974.06. He claims he was denied due process at sentencing when the State allegedly misrepresented the facts of his crimes by claiming his co-defendant pointed a gun at the victim. He further claims he was denied effective assistance of counsel at sentencing because his trial counsel failed to correct the allegedly inaccurate information the State presented.

¶6 After the time for a direct appeal has passed, a convicted person may raise constitutional and jurisdictional grounds for relief under WIS. STAT. § 974.06(1). The opportunity to bring postconviction motions under the statute, however, is not limitless. Section 974.06(4) requires a person to raise all grounds for postconviction relief in his or her original, supplemental, or amended motion. *See* ***id.***; *see also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). If a convicted person did not raise his or her grounds for postconviction relief in a prior postconviction proceeding, or if prior litigation resolved the person's claims, they may not become the basis for a subsequent postconviction motion under § 974.06 unless the person demonstrates a sufficient reason for failing to allege or adequately raise the claims in the prior proceeding. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. We independently determine whether

a convicted person has offered a sufficient reason for serial litigation. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668.

¶7 "A no-merit appeal clearly qualifies as a previous motion under [WIS. STAT.] § 974.06(4)." ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124. Accordingly, we apply the rule set forth in ***Escalona-Naranjo*** to a § 974.06 motion filed after a no-merit appeal if "the no-merit procedures (1) were followed; and (2) warrant sufficient confidence to apply the procedural bar." *See* ***Allen***, 328 Wis. 2d 1, ¶62.

¶8 Gilmore asserts in his opening brief that the due process and ineffective assistance of counsel claims he raises now should have been identified by appellate counsel or by this court during the no-merit appeal. The failure to address those claims during that appeal, he contends, reflects a defect in the no-merit process permitting further litigation under ***Allen***. We reject his contention. We previously assessed the adequacy of the no-merit procedures during the proceedings underlying ***Gilmore II***. We concluded "that the no-merit procedures were, in fact, followed in this case and that the record demonstrates a sufficient degree of confidence in the result." ***Id.***, No. 2005AP828, ¶7. We will not again consider the adequacy of the no-merit proceeding. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (matter once litigated may not be relitigated in a subsequent postconviction motion).

¶9 Gilmore next suggests that a trial court has "inherent power" to modify a sentence that was based on inaccurate information. Therefore, he says, he may challenge such a sentence without complying with WIS. STAT. § 974.06 and need not show a sufficient reason for serial litigation. Assuming without deciding that a trial court has the inherent power Gilmore describes, his argument

nonetheless fails for multiple reasons. First, he presented his claim under the authority of § 974.06, and therefore must comply with it. Second, an allegation that the sentencing court relied on inaccurate information raises a constitutional issue, *see* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1, and § 974.06 is the mechanism for a convicted offender to bring constitutional claims after the time for a direct appeal has passed, *see* ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. Third, a motion invoking the inherent authority of the trial court is procedurally barred when the defendant merely presents the same claim that was rejected in prior postconviction proceedings. *See* ***id.***, ¶¶72-77. In the proceeding underlying ***Gilmore III***, Gilmore claimed he was entitled to sentence modification because the trial court relied on the allegedly inaccurate information that his accomplice pointed a gun at the victim. *See* ***Gilmore III***, 2005AP2671-CR, ¶5. Gilmore is procedurally barred from invoking the trial court's inherent authority as a basis for again raising that claim.

¶10 Next, Gilmore contends he is entitled to bring additional claims because the trial court wrongly denied the motion he filed in September 2005. We reject this contention. We considered and affirmed the trial court's order denying Gilmore's September 2005 motion eight years ago in ***Gilmore III***, No. 2005AP2671-CR. We will not reexamine our decision now. *See* ***Witkowski***, 163 Wis. 2d at 990; *see also* WIS. STAT. RULE 809.82(2)(e) (twenty-day deadline for seeking reconsideration of our opinions cannot be extended).

¶11 Gilmore offers an additional justification for serial litigation in his reply brief. There, he claims that this court exceeded its jurisdiction during the no-merit appeal because, he says, we found facts when we resolved ***Gilmore I***. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980) (court of appeals is constitutionally granted appellate jurisdiction that does not confer the

right to find facts). Based on his view that we exceeded our jurisdiction, he believes our decision in ***Gilmore I*** is void, entitling him to reinstatement of his appellate rights and the opportunity to present additional claims.

¶12 We generally do not address issues raised for the first time in a reply brief. *See* ***State v. Marquardt***, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188. A void judgment, however, may be expunged at any time, and the right to expunge is not limited by statutory requirements governing appeals. *See* ***Home Bank v. Becker***, 48 Wis. 2d 1, 7, 179 N.W.2d 855 (1970). Therefore, we examine whether Gilmore's reply brief shows that ***Gilmore I*** is void.

¶13 "'If a court has the power, i.e., subject matter jurisdiction, to entertain a particular type of action, its judgment is not void.'" ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶14, 273 Wis. 2d 76, 681 N.W.2d 190 (citation omitted). This court had the power to entertain a no-merit appeal from the judgment of conviction in Gilmore's case. *See* WIS. STAT. RULE 809.32. Accordingly, our opinion and order in ***Gilmore I*** is not void. Gilmore's meritless allegations to the contrary provide no justification for serial litigation.

¶14 In sum, Gilmore fails to overcome the procedural bar to the motion he filed under WIS. STAT. § 974.06. The trial court therefore correctly denied the motion. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

¶15 We turn to Gilmore's claim that a new factor, namely, changes in parole policy, warrants sentence modification. A new factor is "'a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Whether a

fact or set of facts constitutes a new factor warranting sentencing relief is a question of law. ***Id.***, ¶33. If the facts do not constitute a new factor, a court need go no further in the analysis. ***Id.***, ¶38. If the defendant shows that a new factor exists, however, then the trial court has discretion to determine whether the new factor warrants sentence modification. *See* ***id.***, ¶37.

¶16 In support of his new factor claim, Gilmore points to two changes in the law after his April 1996 sentencing. First, he cites amendments to WIS. ADM. CODE ch. PAC that he says eliminated provisions permitting early parole upon a showing that the inmate was serving a sentence substantially disparate from that usually imposed for the crime. *See* WIS. ADMIN. CODE §§ PAC 1.03(6) & 1.05(a) (May 1995); WIS. ADMIN. REG. No. 649 (January 2010). Second, he cites the repeal of WIS. STAT. § 304.06(1r) (1993-94), which mandated release on parole for eligible inmates who earned a high school diploma or its equivalent absent overriding considerations against such release.[3] *See* ***State ex rel. Hansen v. Circuit Court***, 181 Wis. 2d 993, 1000-01, 513 N.W.2d 139 (Ct. App. 1994); *see also* 1995 Wis. Act 444 (eff. July 9, 1996).

¶17 "In order for a change in parole policy to constitute a new factor, parole policy must have been a relevant factor in the original sentencing." ***State v. Franklin***, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989). Our supreme court has explained: "[i]f the court does base its sentence on the likely action of the parole

[3] Gilmore alleged multiple new factors in his sentence modification motion and argued that they all warranted sentence modification. He also alleged that the original sentencing court erroneously exercised its discretion. On appeal, he discusses only the claim that changes in parole policy constitute a new factor in his case. We deem abandoned any other claims presented in his sentence modification motion, and we do not discuss them. *See* ***Reiman Assocs. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (matters not briefed or argued are deemed abandoned).

board, [the court] has the power to protect its own decree by modifying the sentence if a change in parole policy occurs." ***Id.*** Before a trial court may modify a sentence based on alleged changes in parole policy, however, the defendant must show that "'the sentencing judge's *express* intent is thwarted by the promulgation of new parole policies contemporaneous or subsequent to the original imposition of sentence.'" ***Id.*** at 14 (citation omitted, emphasis in ***Franklin***).

¶18 To satisfy his burden under ***Franklin***, Gilmore cites the following sentencing remarks:

> I would hope that each of you [Gilmore and his co-defendant] while you are serving your sentence take advantage of—and you got to do it. They are not going to offer it to you. They are not going to spoon feed it to you. You have to take advantage of any programs that are available. You will be paroled to society in the future. Whether you come out a better person than you go in is within your control and your control alone. I hope that both of you can take advantage of programs. I hope that both of you can prove to the parole board that you have changed, and when you are there, that you have become better people than when you go in because that can have an impact on decisions made by the parole board.

¶19 These sentencing remarks include mention of parole, but they do not reflect that the trial court fashioned Gilmore's aggregate sentence in reliance on the provisions of WIS. ADMIN. CODE §§ PAC 1.03 & 1.05 (May 1995) or WIS. STAT. § 304.06(1r) (1993-94). Gilmore therefore does not show that the amendments to WIS. ADMIN. CODE ch. PAC or the repeal of § 304.06(1r) thwarted the sentencing court's express intent.

¶20 Moreover, nothing in the cited sentencing remarks reflects an express intent to key Gilmore's sentence to the likely actions of the parole board. Rather, the remarks reflect hope that Gilmore would take advantage of the

programs and resources available to him in prison and express the further hope that Gilmore would be able to prove at some point in the future that he was a better person than he was at the time of sentencing. We fully agree with the State's assertion that "such general encouragement and hopefulness do[] not demonstrate that the sentence was focused on anything more specific than the broad goal of rehabilitating confined individuals." Accordingly, the trial court correctly denied Gilmore's claim for sentence modification based on the alleged new factor of changes in parole policy.

By the Court.—Order affirmed.

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