

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1564

Cir. Ct. No. 2008CF4549

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY ERIC GIBSON,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Timothy Eric Gibson, *pro se*, appeals from an order of the circuit court that denied his postconviction motion without a hearing. As the issue has already been litigated in a prior appeal, we affirm.

¶2 In September 2008, Gibson was charged with two counts of robbery with the threat of force. He pled guilty to both counts and was given consecutive sentences totaling fourteen years' initial confinement and ten years' extended supervision. In July 2009, he filed a postconviction motion for resentencing, which was denied. His appointed counsel filed a no-merit appeal. We directed counsel to file a supplemental report and address whether Gibson might have been sentenced on inaccurate information. We noted that, although Gibson had pled guilty to robbery, the circuit court in its sentencing comments made multiple references to *armed* robbery. Counsel moved to dismiss the appeal and extend the time for filing a new postconviction motion so that she could pursue the issue we identified. We granted the request. *See State v. Gibson*, No. 2009AP1866-CRNM, unpublished slip op. & order (WI App June 28, 2010).

¶3 A new postconviction motion was filed in September 2010. After a hearing, the circuit court denied the motion in November 2010. The circuit court explained that it had an independent recollection of the sentencing, that it knew Gibson was being sentenced for robbery, and that it had simply misspoken when it referred to “armed robbery,” so Gibson had not been sentenced based on inaccurate information. Gibson appealed. This court rejected Gibson’s argument that the circuit court’s explanation was insufficient and summarily affirmed. *See State v. Gibson*, No. 2010AP2894-CR, unpublished slip op. & order (WI App Jan. 9, 2012).

¶4 In June 2014, Gibson filed the underlying postconviction motion, pursuant to WIS. STAT. § 974.06 (2013-14).¹ He claimed that trial counsel was

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

ineffective for failing to timely object to the circuit court’s statements about armed robbery and that postconviction counsel was ineffective for failing to raise an issue of trial counsel’s ineffectiveness. The circuit court denied the motion, noting that a § 974.06 motion cannot be used to raise issues that were already adjudicated and that *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991), prohibits relitigating issues that have simply been repackaged.

¶5 On appeal, Gibson reiterates the claims he made in his circuit court motion—that trial counsel should have objected to the circuit court’s comments about armed robbery and that postconviction counsel should have claimed ineffective assistance of trial counsel. Gibson also highlights the fact that in the previous appeal, the State argued that Gibson had forfeited the right to challenge the circuit court’s sentencing comments by failing to contemporaneously object.

¶6 First, in affirming the denial of Gibson’s 2010 postconviction motion, we did not invoke forfeiture against him. Instead, we noted the circuit court’s explanation that it simply misspoke and we concluded that, given this explanation, Gibson had not been sentenced on inaccurate information.

¶7 Second, the circuit court was correct to cite *Witkowski*: “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *Id.* at 990; *see also* WIS. STAT. § 974.06(4) (“Any ground finally adjudicated ... may not be the basis for a subsequent motion” absent sufficient reason.). Fundamentally, Gibson has the same “inaccurate information” argument now that he did in his first appeal, only rephrased as ineffective assistance of counsel.

¶8 Further, in order for counsel to be ineffective, the attorney must perform deficiently and the deficiency must cause prejudice. *See Strickland v.*

Washington, 466 U.S. 668, 687 (1984). A claim that postconviction counsel was ineffective for not challenging trial counsel’s performance must demonstrate that trial counsel actually was ineffective. See *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶9 As any contemporaneous challenge to the circuit court’s comments would have been rejected with the same explanation of misstatement, trial counsel was not ineffective for failing to make such a challenge. See *State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987). If trial counsel was not ineffective, then postconviction counsel was not ineffective for not challenging trial counsel’s performance. See *id.* Thus, the circuit court properly denied the WIS. STAT. § 974.06 motion without a hearing. See *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (“[I]f the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.”).

By the Court.—Order affirmed.

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

