COURT OF APPEALS DECISION DATED AND FILED

March 29, 2016

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. 2015AP431 **Cir. Ct. No. 2007CF1384**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN M. ANTHONY,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. John M. Anthony, *pro se*, appeals from trial court orders denying his WIS. STAT. § 974.06 (2013-14) motion for postconviction relief

and his motion for reconsideration.[1] Anthony presents numerous arguments in support of his claim that he should be allowed to withdraw his no-contest pleas.[2] We reject his arguments and affirm the orders.

BACKGROUND

¶2 Anthony was charged with one count of first-degree reckless homicide while armed in connection with the 2007 death of Prentice Barnes. The criminal complaint alleged that Anthony was driving a vehicle containing three passengers when he saw Myron McNutt driving a car in the opposite direction. Both men executed u-turns and stopped their vehicles about fifteen feet away from each other. The complaint states that McNutt told a detective that Anthony "extend[ed] his left hand and arm through the open front left driver's window … [and] fired one shot in the direction of Mr. McNutt with a dark colored semi-automatic pistol." The shot missed McNutt and struck Barnes, an innocent bystander who was seated in his own vehicle, killing him. Anthony drove away from the scene and was later apprehended.

¶3 The complaint further alleged that a man named Youantis Wright told police that he was the front seat passenger in the car Anthony was driving and

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

[2] Anthony has identified six primary issues and numerous subissues. To the extent we do not address a particular issue or subissue, we reject it because it is unpersuasive, undeveloped, inadequate, or raised for the first time on appeal. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285 (we do not decide undeveloped arguments); ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we do not decide inadequately briefed arguments); ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) ("As a general rule, this court will not address issues for the first time on appeal.").

that he saw Anthony fire the gun out of the window. The complaint also identified a witness who was walking down the street when he saw the two cars execute u-turns and then saw the driver of one car "shoot a gun outside of the driver's side window." Finally, the complaint asserted that the motive for the shooting was that Anthony was dating McNutt's cousin and that Anthony and McNutt had disagreements about how Anthony treated the woman. The woman told a detective that the two men had threatened each other in the past.

¶4 On the day of the scheduled jury trial, Anthony accepted a plea bargain pursuant to which he pled no contest to one count of second-degree reckless homicide while armed and one count of second-degree recklessly endangering safety, which reduced his total exposure from sixty-five years to forty years. The trial court accepted Anthony's no-contest pleas, found him guilty, and scheduled the case for sentencing. Prior to sentencing, Anthony filed a *pro se* motion seeking to discharge his trial counsel and withdraw his no-contest pleas on grounds that he had been coerced by his trial counsel to accept the plea bargain. Trial counsel was allowed to withdraw and Anthony hired new counsel to represent him. Anthony's new counsel filed a formal motion to withdraw the no-contest pleas.

¶5 The trial court conducted a hearing on the motion at which two of Anthony's prior attorneys, Anthony's girlfriend, and Anthony all testified. The trial court found that Anthony had not presented a fair and just reason for plea withdrawal and denied the motion. New counsel was appointed for Anthony. That attorney told the trial court at sentencing that Anthony maintained that he was not the shooter and that it was his front-seat passenger who reached across Anthony and fired the shot at McNutt. The trial court sentenced Anthony to a total

of twenty-two years of initial confinement and twelve years of extended supervision.

¶6 After sentencing, postconviction counsel was appointed for Anthony. After postconviction counsel informed Anthony that he intended to file a no-merit report, Anthony moved this court to allow him to discharge his counsel and proceed *pro se*. In response to an order from this court, Anthony submitted a letter to this court indicating that he understood the risks of proceeding *pro se* and asserting that he was capable of doing so. We granted the motion and extended the time for Anthony to file a postconviction motion.

¶7 Anthony's July 2009 postconviction motion was denied and he filed a *pro se* appeal. In a twenty-page decision, this court addressed Anthony's arguments that the trial court had erroneously exercised its discretion when it denied Anthony's pre-sentencing and post-sentencing motions to withdraw his pleas. *See* ***State v. Anthony***, No. 2009AP2171-CR, unpublished slip op. (WI App Oct. 13, 2010). Our discussion included an analysis of Anthony's claim that he was denied the effective assistance of trial counsel. We rejected Anthony's arguments and affirmed the judgment and order. Anthony filed a petition for review, which the Wisconsin Supreme Court denied on February 7, 2011.

¶8 Four years later, Anthony retained counsel, who filed a WIS. STAT. § 974.06 motion for postconviction relief on Anthony's behalf that also included a claim for plea withdrawal based on newly discovered evidence. The motion asserted that Anthony should be allowed to withdraw his no-contest pleas for three primary reasons: (1) Anthony was misinformed about party-to-a-crime liability and the sentence he would receive; (2) trial counsel and postconviction counsel provided ineffective assistance; and (3) newly discovered evidence provided a

basis for plea withdrawal. The trial court denied the motion in a written order. The trial court concluded that numerous claims in Anthony's motion were procedurally barred because he failed to raise them in his prior motion for postconviction relief. The trial court also concluded that there was no legal basis to seek relief based on allegations that postconviction counsel provided ineffective assistance by allegedly ignoring meritorious arguments, because Anthony discharged his postconviction counsel before a no-merit report could be filed and chose to represent himself. Finally, the trial court found that the alleged newly discovered evidence—an affidavit from a witness who claims he saw a passenger in Anthony's car shoot the gun—did not provide a basis for plea withdrawal.

¶9 Anthony subsequently filed a *pro se* motion for reconsideration, which the trial court also denied. Anthony now appeals, *pro se*.

DISCUSSION

¶10 At issue is whether the trial court erroneously exercised its discretion when it denied Anthony's postconviction motion without a hearing. Our supreme court has summarized the applicable legal standards:

> Whether a motion alleges sufficient facts that, if true, would entitle a defendant to relief is a question of law that this court reviews *de novo*. The [trial] court must hold an evidentiary hearing if the defendant's motion raises such facts. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing.

State v. Burton, 2013 WI 61, ¶38, 349 Wis. 2d 1, 832 N.W.2d 611 (italics added; citations and internal quotation marks omitted).

¶11 We begin our analysis with the claims in Anthony's postconviction motion relating to his understanding of his no-contest pleas and the alleged ineffective assistance of trial counsel and postconviction counsel. The trial court found that those claims were procedurally barred, and we agree.

¶12 WISCONSIN STAT. § 974.06 permits collateral review of a defendant's conviction based on errors of jurisdictional or constitutional dimension. ***State v. Johnson***, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981). However, it was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Thus, a prisoner who has had a direct appeal or another postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a "sufficient reason" for failing to raise it earlier. ***Id.*** A claim of ineffective assistance from postconviction counsel may present a "sufficient reason" to overcome the ***Escalona-Naranjo*** procedural bar. *See*, *e.g.*, ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Whether a procedural bar applies is a question of law. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶13 In this case, Anthony had a direct appeal. In his WIS. STAT. § 974.06 motion, the only reason Anthony offered for failing to make his arguments previously was that postconviction counsel performed ineffectively by failing "to see the obvious errors made by trial counsel" and proposing to file a no-merit report, rather than a postconviction motion or merits appeal. The flaw in Anthony's reasoning is that Anthony chose to discharge postconviction counsel and represent himself in postconviction and appellate proceedings. Thus, this

court did not have an opportunity to review the no-merit report or conduct the independent review of the record that is required when a no-merit report is filed. *See* ***Anders v. California***, 386 U.S. 738 (1967); WIS. STAT. RULE 809.32. Under these circumstances, having chosen to discharge postconviction counsel and represent himself in postconviction and appellate proceedings, Anthony cannot cite ineffective assistance of postconviction counsel as grounds for avoiding the ***Escalona-Naranjo*** bar.

¶14 We have reviewed the numerous motions filed in this case. Anthony's pre-sentencing motion, his 2009 postconviction motion, and his appeal all addressed numerous claims concerning Anthony's no-contest pleas and trial counsel's performance. Anthony's WIS. STAT. § 974.06 motion did not provide a "sufficient reason" for previously failing to raise issues he tried to advance in his § 974.06 motion. Therefore, like the trial court, we conclude that those issues in Anthony's § 974.06 motion are procedurally barred. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185.

¶15 On appeal, Anthony implicitly recognizes that his motion was procedurally barred, but he argues that the trial court was not required to apply waiver to his arguments and should not have done so because Anthony was not competent to represent himself in postconviction/appellate proceedings and "this resulted in a manifest injustice to Anthony, a miscarriage of justice, and a fraud upon the court." He argues that this court erred in 2010 when it allowed him to represent himself because Anthony was relying on other prison inmates to help him with his filings and because this court did not order an evidentiary hearing concerning Anthony's request to represent himself. These arguments were not raised in Anthony's WIS. STAT. § 974.06 motion or motion for reconsideration and are not properly before this court on appeal, so we will not address them.

See ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (we do not address issues raised for the first time on appeal).

¶16 The next issue we consider is Anthony's claim that newly discovered evidence justifies plea withdrawal. In his motion, Anthony argued that an affidavit from a man named Antonio Tatum constituted newly discovered evidence that justifies plea withdrawal. In that affidavit, Tatum states that after visiting a corner store, he "saw some guys from the neighborhood that I knew arguing with each other out the window of their vehicles." The affidavit further indicates that Tatum saw a man he identified as "Juan" sitting in the car with Anthony and that Tatum saw "Juan reach out the window past [Anthony] and fire a shot with a black hand gun in [McNutt's] direction." The affidavit states that after the gunshot, both cars sped away.

¶17 "After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The trial court has discretion to decide whether to allow plea withdrawal under the manifest injustice standard and on appeal, this court will reverse only if the trial court has failed to properly exercise its discretion. ***Id.*** One way to establish that a manifest injustice has occurred is to produce newly discovered evidence. ***Id.*** ***McCallum*** explained:

> For newly discovered evidence to constitute a manifest injustice and warrant the withdrawal of a plea the following criteria must be met. First, the defendant must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant proves these four criteria by

> clear and convincing evidence, the [trial] court must determine whether a reasonable probability exists that a different result would be reached in a trial.

Id. at 473.

¶18 Although in this case the trial court did not explicitly cite ***McCallum***, it implicitly found that Anthony had not met his burden of proof. For instance, the trial court noted that Anthony did not indicate "when he discovered this independent witness." The postconviction motion states that Anthony was not aware that Tatum was a witness to the shooting at the time Anthony filed his WIS. STAT. § 974.02 postconviction motion prior to his direct appeal, but the motion and affidavit do not indicate *when* or *how* Anthony later became aware of Tatum's potential testimony.[3] Anthony's motion did not offer any facts demonstrating that he "was not negligent in seeking evidence." *See* ***McCallum***, 208 Wis. 2d at 473.

¶19 The trial court found that "the affidavit is comprised of conclusions and gross speculation." The trial court explained:

> The eyewitness has provided an affidavit stating what he saw, but it only establishes that another person in the car with the defendant may have fired a gun in the direction of the victim. From what is contained in the affidavit, it is unknown who the identity of this person was other than someone named "Juan." … In addition, the affiant assumes that the victim was hit by a bullet from "Juan's" gun, whereas he did not actually see the victim get hit…. The affidavit also does nothing to eliminate the defendant's party to a crime liability … because even if the defendant could show that someone else reached across him and did the shooting, his exposure would have been the same as the shooter's given that he once admitted being in the vehicle and actually driving the vehicle from which the shot was

[3] In his motion for reconsideration, Anthony stated: "Tatum first informed Anthony that he was an eyewitness in 2014, after Anthony's Direct Appeal was concluded." Anthony provided no additional details of how he came to learn Tatum's story.

> fired and making a U-turn so the actual shooter could take the shot.

¶20 We agree with the trial court: the affidavit was insufficient to demonstrate that "a reasonable probability exists that a different result would be reached in a trial." *See* ***id.*** The motion did not even attempt to explain how Tatum's testimony would persuasively refute information from three witnesses identified in the criminal complaint (McNutt, Wright, and a man who was walking down the street), all of whom told detectives that the driver of the vehicle (Anthony) fired the gun out of the driver's side window. Similarly, the motion did not explain why, in light of the conflicting stories from Tatum and the other three witnesses, Anthony would have chosen to go to trial rather than plead no contest to reduced charges. Also, as the trial court noted, the affidavit does not eliminate the possibility that both "Juan" and Anthony fired guns. Given the deficiencies of the affidavit and motion, the trial court did not erroneously exercise its discretion when it denied the motion without a hearing. *See* ***id.***; ***Burton***, 349 Wis. 2d 1, ¶38.

¶21 Anthony raises several other issues on appeal that we will briefly address. Anthony argues that when the trial court decided Anthony's 2009 postconviction motion and when this court affirmed Anthony's conviction, both courts erroneously analyzed an affidavit by James McNutt, the brother of Myron McNutt, which Anthony submitted in support of his 2009 postconviction motion. *See* ***Anthony***, No. 2009AP2171-CR, unpublished slip op., ¶¶28-29. This issue was litigated in Anthony's prior appeal and may not 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.").

¶22 Next, Anthony argues that this court, in its 2010 decision affirming his conviction, and the trial court in its order denying the WIS. STAT. § 974.06 motion, both "erred in applying party to a crime liability." (Bolding and capitalization omitted.) We disagree. Anthony was not charged as a party to the crime, did not plead no contest as a party to the crime, and was not convicted as a party to the crime. The discussion of Anthony's potential liability as a party to the crime first arose at the pre-sentencing motion hearing in 2009. Anthony's trial counsel testified that when counseling Anthony about whether to accept the plea bargain, she told him that his claim he was not the actual shooter would not affect his ultimate liability, because he admitted executing the u-turn, lowering the window, and "letting [the shot] happen." In our 2010 decision, we referred to trial counsel's discussion only once, acknowledging trial counsel's discussion with Anthony prior to the plea hearing: "Because, as a party to the crime, Anthony's exposure would be the same, [trial counsel] attempted to explain to Anthony that the State's offer was in his best interest." *See* ***Anthony***, No. 2009AP2171-CR, unpublished slip op., ¶20. We did not conclude that Anthony had been convicted as a party to the crime.

¶23 The trial court's brief discussion of party-to-a-crime liability in its 2015 order denying Anthony's WIS. STAT. § 974.06 motion was not erroneous. As detailed above, the trial court noted that Tatum's affidavit did not eliminate Anthony's liability as a party to the crime, even if "Juan" was the shooter. We read the trial court's statement as recognizing that the affidavit and motion did not adequately explain why Anthony would have chosen to proceed to trial rather than accept responsibility for reduced charges—or why the result at a trial would have

been different—given the fact that he could still be liable as one who intentionally aided and abetted the commission of a crime.[4] *See* WIS. STAT. § 939.05. On appeal, Anthony stresses that he was never charged as a party to the crime, which is true. However, if he had chosen to proceed to trial, the State could have sought to amend the information to include party-to-a-crime liability prior to or even at trial.[5] *See* WIS. STAT. § 971.29(2) ("At the trial, the court may allow amendment of the complaint ... to conform to the proof where such amendment is not prejudicial to the defendant."); *see also* ***State v. Nicholson***, 160 Wis. 2d 803, 805, 467 N.W.2d 139 (Ct. App. 1991). The trial court's discussion of party-to-a-crime liability underscores the fact that Anthony's motion did not adequately explain why he would have chosen to proceed to trial and how the result would have been different after a trial.

¶24 For the foregoing reasons, we affirm the trial court's orders denying Anthony's WIS. STAT. § 974.06 motion, including his claim concerning newly discovered evidence, and his motion for reconsideration.

By the Court.—Orders affirmed.

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[4] On appeal, Anthony asserts that he would not be guilty as a party to the crime because he "NEVER admitted to driving and making a U-turn for the purpose of allowing the shooter to take a shot." This court need not resolve this factual question. Anthony chose to plead no-contest to two crimes rather than litigate the facts concerning the shooting and we will not allow him to try his case in an appellate brief nine years later. His attempts to withdraw his pleas were denied prior to sentencing (after an evidentiary hearing), after sentencing, on direct appeal, and in the most recent postconviction proceedings. For reasons outlined above, Anthony is not entitled to plea withdrawal or a trial.

[5] In his appellate brief, Anthony acknowledges that the State could have amended the charge prior to trial, but he disagrees that the State could have sought to amend the charge during trial. He is incorrect. *See* WIS. STAT. § 971.29(2).

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