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December 14, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2016AP345

State of Wisconsin v. Duane R. Bull (L.C. # 1994CF99)

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

Duane Bull appeals an order denying his motion for postconviction relief filed pursuant to WIS. STAT. § 974.06 (2013-14).¹ Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

In 1994, Bull pled no contest to five counts of second-degree sexual assault of a child. Bull was sentenced to five consecutive ten-year prison sentences. Represented by counsel, Bull

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

filed postconviction motions in which he moved to modify the sentence, argued that the public defender's response to his request for a new trial attorney had violated his constitutional rights, and argued that his trial counsel had been ineffective. The circuit court denied Bull's postconviction motions and this court affirmed. *State v. Bull*, No. 1996AP1127-CR, unpublished slip op. (WI App July 17, 1997).

In 2000, Bull filed a pro se WIS. STAT. § 974.06 motion for postconviction relief. After a non-evidentiary hearing, the circuit court denied the motion. Bull appealed and this court affirmed. *State v. Bull*, No. 2001AP0607, unpublished slip op. (WI App Jan. 10, 2002). The supreme court denied Bull's petition for review.

In 2015, Bull filed a second pro se WIS. STAT. § 974.06 motion for postconviction relief. The circuit court denied the motion without a hearing. Bull appeals.

The legal principles governing successive WIS. STAT. § 974.06 motions are well settled. Under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), a defendant must "raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." *See also* WIS. STAT. § 974.06(4). A defendant cannot raise an argument in a second postconviction motion that was not raised in a prior postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. *See Escalona-Naranjo*, 185 Wis. 2d at 181-82. And, under § 974.06(4), "[a]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived ... in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion," absent sufficient reason.

A hearing on a postconviction motion is required only when the defendant states sufficient facts that, if true, would entitle him to relief. *State v. Allen*, 2004 WI 106, ¶¶9, 14, 274 Wis. 2d 568, 682 N.W.2d 433. That inquiry is a question of law which we review de novo. *Id.*, ¶9. If the motion does not raise such facts, “or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.” *Id.*; see also *State v. Balliette*, 2011 WI 79, ¶50, 336 Wis. 2d 358, 805 N.W.2d 334 (circuit court has discretion to deny a motion without an evidentiary hearing if the record conclusively demonstrates that the movant is not entitled to relief).

Issues previously considered on direct appeal cannot be reconsidered on a motion under WIS. STAT. § 974.06. *State v. Brown*, 96 Wis. 2d 238, 241, 291 N.W.2d 528 (1980). Once an issue is litigated, it cannot be re-litigated in a subsequent proceeding. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

With these principles in mind, we turn to Bull’s latest WIS. STAT. § 974.06 motion and appeal. Our review of Bull’s motion and appellate brief reveals two primary concerns that Bull raises in numerous contexts.

Bull’s Psychological Evaluation

At Bull’s plea hearing, the State noted that Bull wanted to be evaluated at Mendota Mental Health Facility as part of the presentence investigation. The State indicated that it did not object to such an evaluation, and requested, “if it does take place, that it be done by Saul Levin who is a psychiatrist or a psychologist at Mendota Hospital who is an expert in sex offenses.” In response, Bull’s attorney advised the circuit court that the defense would be preparing its own

presentence report and requested that the defense be allowed to use Dr. David Minden as its expert. The court accepted the parties' requests, stating, "[t]he Court will also permit and entertain, if it can be arranged, that the evaluation at Mendota be conducted by Saul Levin as requested by the State and by Dr. Minden as requested by the defendant." Sentencing materials included an evaluation by Dr. Minden, but Bull was not evaluated by Levin; rather, Steven McGovern submitted a psychological evaluation of Bull.

Bull raises numerous arguments related to the substitution of McGovern for Levin. He contends that the substitution was done improperly and without notice and constituted a breach of the plea agreement. Bull also argues that McGovern was not qualified to perform an evaluation. Bull cannot raise these arguments. In his first WIS. STAT. § 974.06 motion, Bull also took issue with the submission of an evaluation by McGovern, rather than Levin. On appeal, we described the issue as "whether postconviction counsel should have raised issues concerning a defense presentence report and presentence psychological evaluation." *State v. Bull*, No. 2001AP607, unpublished slip op. at 2. Bull cannot relitigate this issue. *See Witkowski*, 163 Wis. 2d at 990.

Incomplete File

Bull argues that neither the attorney who represented him at sentencing nor his postconviction attorney had a complete file. This issue is also procedurally barred. In his first WIS. STAT. § 974.06 motion, Bull also argued that his attorneys did not have a complete file. On appeal, we described the issue as "whether postconviction counsel negligently failed to obtain all transcripts before representing [Bull] on his postconviction motions." *State v. Bull*, No.

2001AP607, unpublished slip op. at 2. Bull cannot relitigate this issue. *See Witkowski*, 163 Wis. 2d at 990.

Other Issues

Bull takes issue with various aspects of the litigation of the first WIS. STAT. § 974.06 motion. For example, he argues at length about the quality of the audio during the non-evidentiary hearing at which he appeared via audio from prison. He also argues that the circuit court erred when it denied him an evidentiary hearing on his first postconviction motion. Those arguments show the repetitive nature of Bull's litigation.

Bull also raises several claims of ineffective trial and postconviction counsel. Much of this argument is tied into his complaints about McGovern's evaluation and the completeness of counsels' files. To the extent that Bull raises any new complaints about counsels' performance, we see no reason why those complaints could not have been raised either on direct appeal or in his first WIS. STAT. § 974.06 postconviction motion. Bull cannot file successive challenges to the effectiveness of counsels' representation. As the supreme court stated in *Escalona-Naranjo*, 185 Wis. 2d at 185, "[w]e need finality in our litigation."

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals