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June 12, 2017

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

2016AP1188-CR State of Wisconsin v. Scottie Baldwin
(L.C. # 2007CF002984)

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

Scottie Baldwin, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2015-16) motion on grounds that the motion is procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and from an order denying his motion for reconsideration.[1] We conclude at conference that this matter is appropriate for summary

[1] The Honorable Michelle Ackerman Havas issued the orders at issue on appeal. The Honorable Clare L. Fiorenza presided over Baldwin's 2008 jury trial and sentenced him.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

disposition. *See* WIS. STAT. RULE 809.21(1). We agree that Baldwin's § 974.06 motion is procedurally barred and, on that basis, we summarily affirm the orders.

In 2007, Baldwin was charged with multiple crimes in four separate criminal cases that were ultimately tried together. The jury found Baldwin guilty of four counts of bail jumping, three counts of disorderly conduct, three counts of intimidating a witness, and two counts of battery. He was subsequently sentenced to a total of twenty-two years and nine months of initial confinement and ten years of extended supervision.

Baldwin appealed his convictions on several grounds. Specifically, he challenged "two evidentiary rulings entered on the first day of his jury trial and the imposition of a DNA surcharge at sentencing." *See* ***State v. Baldwin***, 2010 WI App 162, ¶1, 330 Wis. 2d 500, 794 N.W.2d 769. We affirmed, *see* ***id.***, ¶2, and the Wisconsin Supreme Court denied Baldwin's petition for review.

In September 2012, Baldwin filed a *pro se* motion for sentence modification based on his assertion that he provided assistance in a homicide case that resulted in a conviction. After an evidentiary hearing—at which Baldwin was represented by counsel—the trial court denied the motion in a written order.

In January 2016, Baldwin filed a *pro se* motion entitled "Motion for Sentence Modification." (Some capitalization omitted.) The motion challenged eleven of Baldwin's convictions that included the habitual criminality enhancer. *See* WIS. STAT. § 939.62 (2007-08). The motion argued that sentence modification was appropriate based on an alleged new factor: "that all parties overlooked the statutorily erroneous imposition of the sentence[s]." Baldwin cited case law concerning the imposition of a penalty enhancer as extended supervision. Despite

referencing sentence modification in the motion, the conclusion of the motion requested resentencing:

> Defendant requests that this honorable court issue an order to *resentence* him on all relevant … convictions … bringing the sentences back in lock step with statutory and case law. Because as it stands, defendant[']s sentences for the misdemeanor convictions are more than the statutorily permitted [sentences].
>
> In addition, defendant seeks this honorable court to order that all corresponding … convictions … run concurrently to each other. Which would permit the defendant to receive the necessary programming within the Dept. of Corrections that will assist his rehabilitation.

(Emphasis added; some capitalization and underlining omitted.)

The trial court denied the motion in a written order, stating: "[T]he defendant filed a *pro se* motion for sentence modification seeking a resentencing hearing on the basis that the extended supervision portions of his misdemeanor sentences are excessive."[2] The trial court concluded that a published court of appeals decision, ***State v. Lasanske***, 2014 WI App 26, 353 Wis. 2d 280, 844 N.W.2d 417, was "wholly dispositive of the defendant's argument." Consequently, the order concluded, Baldwin's "motion for sentence modification (i.e. resentencing) is denied." (Capitalization and bolding omitted.) Baldwin did not appeal.

Two months later, Baldwin filed the postconviction motion that is at issue on appeal. The motion explicitly sought relief pursuant to WIS. STAT. § 974.06. It asserted that Baldwin's trial counsel provided ineffective assistance by not seeking to suppress certain evidence. The motion recognized that claims raised in a § 974.06 motion can be procedurally barred by

[2] The Honorable Jeffrey A. Wagner denied the January 2016 motion.

Escalona-Naranjo, but it argued that postconviction counsel's failure to raise the issue of trial counsel's ineffectiveness during the postconviction proceedings constituted a sufficient reason to avoid the procedural bar. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (a claim of ineffective assistance of postconviction counsel for not challenging the effectiveness of trial counsel may overcome the procedural bar of ***Escalona-Naranjo***).

The trial court denied the motion in a written order, without a hearing, concluding:

> [Baldwin's] attempt to overcome the procedural bar of ***Escalona-Naranjo*** fails because he has not provided a sufficient reason for failing to raise his current claims in his *pro se* litigation subsequent to his direct appeal, particularly his recent motion seeking resentencing filed on January 14, 2016. Although the defendant denominated the prior motion as a motion for sentence modification based upon the existence of a new factor, a review of that motion shows that it does not allege a new factor of any kind but rather an illegal sentence. Specifically, the defendant argued that the penalty enhancers were erroneously applied and asked to be resentenced "bringing the sentencing back in lock step with statutory law and case law."…
>
> At the time the defendant filed his prior motion, his only opportunity to assert a resentencing claim based on an excessive or illegal sentence was under WIS. STAT. § 974.06. Such claims cannot be raised as new factors. Although the defendant was careful in his prior motion not to cite to § 974.06, how a defendant denominates a motion is not controlling. The defendant raised a resentencing claim pursuant to [case law]. The court construes his arguments under § 974.06, and therefore, the instant motion is effectively the defendant's second motion for postconviction relief under the statute. Neither § 974.06 nor ***Rothering*** contemplates the filing of successive motions for relief, and therefore, to the extent that the defendant failed to raise his current postconviction claims in his prior postconviction motion, the court finds that they are procedurally barred under the rule of ***Escalona-Naranjo***.

(Citation format for WIS. STAT. § 974.06 altered.) Baldwin filed a motion for reconsideration, which the trial court denied.

Baldwin appeals. Whether a defendant's claim is procedurally barred by ***Escalona-Naranjo*** presents a question of law that we review *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

Baldwin challenges the trial court's conclusion that his WIS. STAT. § 974.06 motion is procedurally barred by his January 2016 motion. He argues that a sentence modification motion does not bar a subsequent § 974.06 motion. We agree. The issue is whether Baldwin's January 2016 motion was, in fact, a sentence modification motion.

Baldwin argues that his filing was properly labeled a sentence modification motion because in ***Lasanske***—the case the trial court cited when it denied Baldwin's January 2016 motion—the defendant also challenged the legality of his sentence and did so by "mov[ing] to correct or modify his sentence and amend his judgment of conviction."[3] *See* ***id.***, 353 Wis. 2d 280, ¶4. We disagree that ***Lasanske*** supports Baldwin's argument. The factual summary in the ***Lasanske*** decision mentioned in passing how Lasanake chose to characterize the relief he was seeking, but the case did not address whether the defendant's motion should have been labeled differently or whether the motion might bar future WIS. STAT. § 974.06 motions.

[3] As the State points out, Baldwin's appellate brief purports to quote language from ***State v. Lasanske***, 2014 WI App 26, 353 Wis. 2d 280, 844 N.W.2d 417. However, the quoted language does not appear in ***Lasanske*** or any other case we have located. ***Lasanske***'s only reference to the language Lasanske used to style his motion is that which we have quoted above.

We agree with the trial court that Baldwin's January 2016 motion was, in fact, a WIS. STAT. § 974.06 motion, despite how Baldwin chose to label it. *See* ***State ex rel. Hansen v. Circuit Court for Dane County***, 181 Wis. 2d 993, 996 n.2, 513 N.W.2d 139 (Ct. App. 1994) (Courts "'may look beyond the legal label affixed by the prisoner to a pleading and treat a matter as if the right procedural tool [had been] used.'") (citation omitted; brackets in original). Section 974.06(1) explicitly provides that one basis for filing a postconviction motion pursuant to that statute is when a defendant wishes to argue "that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack." *See* ***id.*** Baldwin's January 2016 motion explicitly argued that "the penalty enhancer portion of his sentences exceed the 25% minimum term of extended supervision, and therefore do not comply with the construction of [WIS. STAT. §] 973.01." In doing so, Baldwin was arguing that his sentences were "in excess of the maximum authorized by law." *See* § 974.06(1). Further, he asked the trial court to "resentence him" in order to "bring[] the sentences back in lock step with statutory and case law." Resentencing, rather than sentence modification, is the correct remedy for an invalid sentence. *See* ***State v. Wood***, 2007 WI App 190, ¶¶4-6, 305 Wis. 2d 133, 738 N.W.2d 81 ("In resentencing 'the court imposes a new sentence after the initial sentence has been held invalid.'") (citation omitted). For these reasons, we agree with the trial court that the January 2016 motion was a § 974.06 motion.

Baldwin presents an additional argument why his January 2016 WIS. STAT. § 974.06 motion should not bar his latest § 974.06 motion. He contends that his January 2016 motion could have been brought pursuant to WIS. STAT. § 973.13, which addresses excessive sentences, and therefore does not bar a subsequent § 974.06 motion. We are not persuaded. In ***State v. Flowers***, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998), the defendant filed a § 974.06

motion that raised a § 973.13 claim. *See* ***Flowers***, 221 Wis. 2d at 26. At issue on appeal was whether the defendant's § 974.06 motion—his fourth—was procedurally barred. *See* ***Flowers***, 221 Wis. 2d at 26-27. We concluded that the defendant's claim was not procedurally barred, adopting "a narrow exception to ***Escalona-Naranjo*** … only applicable when a defendant alleges that the State has neither proven nor gained the admission of the defendant about a prior felony conviction necessary to sustain the repeater allegation." *See* ***Flowers***, 221 Wis. 2d at 30.

Flowers does not provide a basis for Baldwin to overcome the procedural bar in this case. Unlike the defendant in ***Flowers***, Baldwin did not file several unsuccessful WIS. STAT. § 974.06 motions and then file another § 974.06 motion raising a WIS. STAT. § 973.13 claim. Instead, in January 2016 he filed a motion that he now contends *could have* raised a § 973.13 claim, and he subsequently filed a § 974.06 motion addressing trial counsel ineffectiveness. The narrow exception to ***Escalona-Naranjo*** recognized in ***Flowers*** does not apply here.

For the foregoing reasons, we agree with the trial court that Baldwin's WIS. STAT. § 974.06 motion is procedurally barred because he has not provided a sufficient reason for failing to raise his new claims in his January 2016 motion, which we have concluded was a § 974.06 motion. We affirm the orders denying Baldwin's motion and motion for reconsideration.

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals