OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

April 16, 2019

To:

Hon. John A. Des Jardins
Circuit Court Judge
Outagamie County Courthouse
320 S. Walnut Street
Appleton, WI 54911

Barb Bocik
Clerk of Circuit Court
Outagamie County Courthouse
320 S. Walnut Street
Appleton, WI 54911

Daniel J. O'Brien
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Melinda J. Tempelis
District Attorney
320 S. Walnut Street
Appleton, WI 54911-5918

David J. Marshall 354701
Stanley Correctional Inst.
100 Corrections Drive
Stanley, WI 54768

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

2017AP2484 State of Wisconsin v. David J. Marshall (L. C. No. 2007CF609)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

David Marshall, pro se, appeals from an order denying WIS. STAT. § 974.06 (2017-18)[1] postconviction relief. 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.

---

[1] References to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

A grocery store security officer had been alerted about an incident at another store, and he summoned the police when he observed Marshall engaging in suspicious conduct. Marshall was carrying a coat on a warm July day, while he and a woman were randomly selecting items and placing them in a shopping cart. After placing many items in the shopping cart, Marshall left the cart unattended in the store and exited the building without purchasing anything. Marshall then entered a vehicle in the parking lot and moved the car to another parking spot next to a car and an unattended packed shopping cart. That cart belonged to a woman who was selling brats at the store for her daughter's Girl Scout troop. She had filled the cart with items from the brat sale and had gone back to retrieve more items.

Several police officers and store security watched as Marshall exited his vehicle and walked to the passenger side near the unattended shopping cart. Marshall then opened and closed the passenger door of his vehicle. The officers ran from the store to investigate because they believed Marshall had committed or was about to commit a crime. The officers were in full uniform as they approached the car, and they began yelling "Stop." An officer attempted to open the passenger door, and Marshall rapidly backed out of the parking spot as the officer continued to instruct Marshall to stop. Marshall continued to back up, forcing an officer to move out of the way to avoid being struck by the open door. Marshall then accelerated in the direction of the other officer, who believed Marshall was about to hit him or run him over. The officer drew his gun and fired three rounds at the vehicle, injuring Marshall. Marshall then fled the parking lot, but he was apprehended shortly thereafter.

A jury found Marshall guilty of two counts of second-degree recklessly endangering safety. After Marshall's sentencing, a newly appointed attorney filed a no-merit notice of appeal. Rather than proceeding with the no-merit appeal, Marshall fired his appointed attorney

and filed a pro se motion for direct postconviction relief, pursuant to WIS. STAT. RULE 809.30. He alleged his trial counsel was ineffective for not bringing a Fourth Amendment challenge to the attempted investigative detention by the police that precipitated his flight and the reckless endangerment of the officers who tried to stop him. Marshall also alleged that the officers lacked "probable cause" to stop him and he could therefore not be found guilty of endangering their safety when he attempted to flee. He also argued his attorney was ineffective for not impeaching the officers with allegedly inconsistent preliminary hearing testimony. Marshall further argued the prosecutor engaged in misconduct by allowing the officers to present inconsistent testimony.

The circuit court denied the motion without an evidentiary hearing, holding there was no basis for trial counsel to bring a Fourth Amendment challenge because the officers had reasonable suspicion that Marshall had committed or was about to commit retail theft, allowing them to attempt to detain him and investigate further. The court noted that police did not need probable cause to stop Marshall; they only needed a reasonable suspicion of wrongful conduct, and they were not required to rule out innocent behavior before initiating the detention. The police had ample suspicion after they witnessed Marshall's bizarre actions inside the store carrying a coat on a warm day in July and randomly putting objects into a cart but then leaving the store without that full cart. Marshall then pulled his car out of a parking spot, pulled it into another parking spot next to an unattended full shopping cart, and then got out of his car and walked toward that cart. The court stated:

> Given the suspicious behaviors the officers witnessed on the surveillance cameras, both inside and outside the store, they clearly had reasonable suspicion to temporarily detain [Marshall] and investigate his suspicious behavior. *See* [***State v.***] ***Anderson***, 155 Wis. 2d [77], 84, 454 N.W.2d [763], 766 [(1990)]. Additionally,

> when the uniformed officers attempted to detain [Marshall] and question him, he attempted to rapidly flee, which further justified the officers' conduct in attempting to detain [Marshall]. *See* ***id.*** at 87, 454 N.W.2d at 767-68.

The circuit court also rejected Marshall's claim that his counsel was ineffective for not impeaching the officers with inconsistent statements. The court further held that the officers had not engaged in outrageous conduct and that Marshall failed to prove prosecutorial misconduct. We affirmed the circuit court order on direct appeal. *See* ***State v. Marshall***, No. 2011AP106-CR, unpublished slip op. (WI App Jan. 31, 2012). Our supreme court subsequently denied a petition for review.

Marshall then filed his first WIS. STAT. § 974.06 motion, which the circuit court denied, and we summarily affirmed. Marshall then filed a postconviction discovery motion, seeking the surveillance video from the grocery store where the incident occurred. Marshall also filed a companion § 974.06 motion, his second such motion. After a hearing was held, the circuit court denied the § 974.06 motion as well as the motions for reconsideration and discovery. The court held that all of Marshall's challenges were litigated and, if not, he failed to provide a sufficient reason for not litigating them previously. The court reiterated that probable cause was not the standard for a stop, and that the officers could conduct a temporary investigatory stop if they had reasonable suspicion that wrongful activity might be afoot. The court also stated, "I think you're trying to get another kick at the cat many times over." The court held the motion was untimely as it should have been raised on direct appeal or in a prior postconviction motion, and that Marshall did not provide a sufficient reason for failing to do so previously. The court also denied reconsideration because the issues either were, or should have been, raised previously. The court further found Marshall "cited nothing that's newly discovered, absolutely nothing …."

Marshall attempted to appeal from these orders, but his notice of appeal erroneously stated that he was appealing from the 2009 judgment of conviction. We issued an order dismissing the attempted appeal from the judgment of conviction because the deadlines for appealing had long since passed. Marshall now appeals again, but his notice of appeal continues to identify it as a direct appeal from the 2009 judgment of conviction.

As we explained in our order dismissing Marshall's previously attempted appeal from the 2009 judgment of conviction, the time for filing a direct appeal from the judgment "has long since expired." Nevertheless, Marshall's current notice of appeal still states that this appeal is directly from the 2009 judgment of conviction. It is thus untimely. *See* WIS. STAT. § 808.04(3) and RULE 809.30(2)(h)-(j). Marshall's pro se status does not exempt him from complying with the rules of appellate procedure merely because he chose to proceed on both direct and collateral review without counsel. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶27 n.5, 338 Wis.2d 114, 808 N.W.2d 155.

But even if we disregard Marshall's defective notice of appeal from the judgment of conviction and construe it as an appeal from the circuit court's orders denying his most recent WIS. STAT. § 974.06 and reconsideration motions, his challenges are procedurally barred. A defendant is barred from pursuing claims in a subsequent proceeding that could have been raised in an earlier postconviction motion or direct appeal unless the defendant provides a "sufficient reason" for not raising the claims previously. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-86, 517 N.W.2d 157 (1994). Marshall may not present new twists on rejected challenges. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). To the extent Marshall continues to assert that some of his claims are "new," we reiterate that he has not

provided a "sufficient reason" to excuse his failure to litigate these claims in any of his previous challenges.

Simply put, Marshall presents nothing more than a regurgitation of his previously rejected claims that his trial counsel was ineffective for failing to present a Fourth Amendment challenge to the stop; for not better impeaching the police witnesses; and for not arguing prosecutorial misconduct. Indeed, the principal focus of Marshall's appellate brief is on the already rejected claim that his Fourth Amendment rights were violated because the police lacked sufficient reason to detain him, and that prosecutorial misconduct misled the circuit court. His claims were squarely rejected in prior challenges, and Marshall is barred from attempting to litigate them again.[2]

Finally, Marshall argues he is entitled to discretionary reversal in the interest of justice. This is also an argument Marshall was required to raise earlier. But in any event, Marshall may not raise this claim because WIS. STAT. § 974.06 can only be used to raise constitutional or jurisdictional challenges, neither of which are at issue here. *See* ***State v. Nickel***, 2010 WI App 161, ¶7, 330 Wis. 2d 750, 794 N.W.2d 765.

Upon the foregoing,

IT IS ORDERED that the orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

[2] We admonish Marshall that continued attempts to collaterally challenge his conviction may result in this court exercising its inherent authority to impose appropriate sanctions, including but not limited to imposing restrictions on future filings. *See* WIS. STAT. RULE 809.25(3)(c)2.; ***State v. Casteel***, 2001 WI App 188, ¶¶23-27, 247 Wis. 2d 451, 634 N.W.2d 338.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals