COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1697 **Cir. Ct. No. 1996CF891**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL SVEUM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Michael Sveum appeals from an order denying his latest motion seeking relief from a 1996 conviction for stalking and related offenses. Sveum's current claim is that he ought to be allowed to withdraw his

pleas because counsel failed to convey the terms of a last-minute plea offer to him. We affirm for the reasons discussed below.

BACKGROUND

¶2 This is the tenth time we have had an appeal or writ before us arising out of this same case,[1] and we will not repeat here all of the facts and procedural history that we have set forth before. Instead, we will pick the story up on May 15, 2007, when the circuit court held an evidentiary hearing on Sveum's preceding postconviction motion. The issue at that hearing was whether Sveum ought to be allowed to withdraw his pleas because counsel had given him bad legal advice regarding one or more of the elements of the charges the State would need to prove at trial.

¶3 During the course of that hearing, Sveum's trial counsel, Bill Ginsberg, testified that he was "as sure as [he] could remember" that the last plea offer the State made was for four months in jail as a condition of probation. However, after Sveum commented that he did not recall Ginsberg ever relaying such an offer to him, Ginsberg further testified:

> I don't have my file. I don't have my notes, I could be completely wrong on that. I don't know if [the D.A.] in his file shows that. I seem to—I feel like I've been walking around all these years thinking like I had an offer for four months jail at the last minute right before we picked the jury that we passed on. Now, maybe it was in the context of—you know, this middle offer talks about a year in jail,

[1] The previous nine cases were 1997AP2185-CR, 1998AP2433-W, 1999AP2437, 2001AP230, 2001AP1819-CRNM, 2001AP3332, 2005AP2646, 2007AP537-W and 2007AP1846. This list of prior postconviction appellate activity does not include two leaves to appeal also filed with this court and various writs filed with federal courts and the Wisconsin Supreme Court.

> no Huber for two months, last ten months EMP. So maybe it was [in] the context of arguing when you could start getting your Huber release or when you could get EMP. Maybe it was he finally came down and said *I'll give you EMP after four months* so maybe it was only four months of the jail with work release before you could get out on electronic monitoring. That['s] coming back now, and I could be wrong.
>
> ….
>
> My recollection of four months now, remembering how we were talking about no Huber, some Huber, no EMP, some EMP, so four months sticks in my mind, and it may have been—also we had some sentence credit, 69 days. So maybe my recollection was at some point there was a deal that maybe after four months you might have—you might have either been on the bracelet or might have been on the street or something to that extent. So that's just as much clarification as I can add to that.

(Emphasis in transcript to reflect a quote.)

¶4 Later in the hearing, Sveum testified that counsel's testimony was the first time Sveum had heard anything about a plea offer of four months. Sveum noted that he did not know "if that was actually offered," but said that he would have accepted a plea if such an offer had been relayed to him. Sveum subsequently argued to the court:

> And any testimony regarding the four months, if the court believes that, I don't know. I'm telling you that he never offered me that. If it's true, that in itself is ineffective assistance of counsel because counsel has a right to inform his client of any plea offer. He never informed me of that.

¶5 The trial court concluded that counsel had not provided bad legal advice to Sveum, and denied his plea withdrawal motion without addressing whether counsel had failed to relay a plea offer to Sveum.

¶6 On December 1, 2008, Sveum filed his present motion seeking to withdraw his pleas based upon counsel's failure to convey a plea offer to him. He

alleged that counsel had not conveyed to him either an offer of probation with four months conditional jail time or an offer of jail time with eligibility for electronic monitoring after four months. Sveum further alleged that either offer described by counsel at the hearing on May 15, 2007, represented a "greater benefit" than the three offers which had been previously communicated to him, and that if counsel had conveyed such a new offer to him, Sveum would have accepted it.

¶7 The trial court denied Sveum's latest plea withdrawal motion without a hearing on the grounds that it had already been litigated at the hearing on May 15, 2007. Sveum appeals.

STANDARD OF REVIEW

¶8 We review a circuit court's decision to deny a plea withdrawal motion without an evidentiary hearing under the de novo standard, independently determining whether the facts alleged would establish the denial of a constitutional right sufficient to warrant the withdrawal of the plea as a matter of right. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 139-40, 569 N.W.2d 577 (1997); ***State v. Bentley***, 201 Wis. 2d 303, 308, 548 N.W.2d 50 (1996). We also independently review whether claims are procedurally barred. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

DISCUSSION

¶9 We begin our discussion with the threshold question whether Sveum's current claim is procedurally barred. Constitutional claims that could have been raised on a prior appeal or postconviction motion cannot be the basis for

a subsequent postconviction motion under WIS. STAT. § 974.06 (2007-08)[2] unless there was sufficient reason for failing to raise the claim earlier. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). In addition, a party may not relitigate matters previously decided, no matter how artfully rephrased. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991); *see also* ***State v. Rohl***, 104 Wis. 2d 77, 96, 310 N.W.2d 631 (Ct. App. 1981).

¶10 Contrary to the circuit court's view, we conclude that the issue of whether trial counsel failed to convey a plea offer to Sveum was not actually litigated at the hearing on May 15, 2007. Although Sveum did point out at that hearing that he was unaware of any new four-month plea bargain being offered shortly before trial, the circuit court noted on several occasions that the purpose of the hearing was to determine whether counsel had provided Sveum with bad legal advice, and it limited its ruling to that issue. Thus, the court did not make any factual findings or credibility determinations regarding whether any new plea offer was actually made or what it entailed, whether counsel did or did not convey such an offer to Sveum, or whether such an offer would have altered Sveum's decision to go to trial.

¶11 We further reject the State's contention that Sveum could or should have litigated the issue of counsel's alleged failure to convey a plea offer at the May 15 hearing. Sveum alleged that he first learned about the purported new plea offer during the hearing. Sveum therefore had no reasonable opportunity to investigate either the factual or legal basis for the issue prior to the hearing, and it

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

would be fundamentally unfair to require him to have advanced the claim on the spot. We conclude that the timing of counsel's disclosure during a hearing on another topic about a possible new plea offer that had not been conveyed to Sveum provided sufficient reason why Sveum did not raise the issue prior to his present motion.

¶12 We next proceed to consider whether the allegations in Sveum's present motion were sufficient to warrant a hearing. We accept the general proposition that counsel's failure to convey a plea offer to a defendant would constitute deficient performance justifying plea withdrawal if the defendant also showed he would have accepted the offer. The problem for Sveum is that such a claim must be premised on specific factual allegations regarding the plea offer and counsel's failure to convey it.

¶13 Here, the only facts Sveum provided to support his claim that there was an additional plea offer that trial counsel failed to convey to him came from counsel's testimony at the prior hearing. That testimony, however, was equivocal. Counsel twice acknowledged that he might be wrong about there having been an offer for four months of jail time as a condition of probation, and he also could not recall with any degree of confidence whether there might instead have been an offer to recommend Sveum be deemed eligible for electronic monitoring after four months. He pointed out that he did not have his notes or the case file. Sveum did not provide a subsequent affidavit from trial counsel stating that counsel had been able to review the file or to recall with any greater certainty after the hearing whether there had in fact been an additional plea offer made, and if so, what it entailed. Nor did Sveum point to any outside materials documenting such an offer. In fact, Sveum acknowledges in his appellate brief that trial counsel

provided Sveum with a complete copy of his case file after trial and it contained no documentation of any last-minute plea offer from the State.

¶14 In sum, if all Sveum could provide at a new hearing would be the same or substantially similar testimony that counsel provided at the last hearing, there would be an insufficient evidentiary basis for the court to determine that there had actually been any new plea offer on the table, much less what it entailed. Thus, Sveum has failed to allege facts which, if true, would entitle him to relief, and his motion was properly denied without a hearing.

By the Court.—Order affirmed.

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