

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 13, 2010

David R. Schanker
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. 2009AP1721-CR

Cir. Ct. No. 1993CF934454

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN JOSE CASTELLANO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. John Jose Castellano, *pro se*, appeals from an order denying his sentence modification motion. The circuit court concluded that Castellano's claims are procedurally barred. We agree and affirm.

BACKGROUND

¶2 Castellano pled guilty in 1994 to six felony offenses. The circuit court imposed a fifty-two-year aggregate sentence. Castellano successfully moved in 1999 to withdraw his guilty pleas. He then reached a plea agreement with the State and pled guilty in 2000 to one count of second-degree sexual assault of a child and three counts of sexual exploitation of a child. The circuit court imposed an aggregate forty-year sentence. Castellano appealed, and this court affirmed. *State v. Castellano*, No. 2001AP419-CR, unpublished slip op. (WI App. Jan. 28, 2002).

¶3 In 2003, Castellano filed a motion seeking postconviction relief on numerous grounds pursuant to WIS. STAT. § 974.06 (2003-04).¹ He also filed two “amendments” that supplemented his motion with additional claims for relief. After the circuit court denied his claims, Castellano filed a motion to reconsider that protested the adverse ruling and also raised additional grounds for relief. The circuit court denied the motion for reconsideration, and Castellano appealed. We affirmed. *State v. Castellano*, No. 2003AP3423, unpublished slip op. (WI App. Oct. 27, 2004).

¶4 In March 2008, Castellano filed a motion for sentence modification, arguing that during his sentencing in 2000, the circuit court improperly considered the remarks made by the sentencing court in 1994. He also claimed that while incarcerated he provided assistance to law enforcement warranting a reduction in

¹ All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

his sentence. The circuit court denied the motion and then denied Castellano's motion for reconsideration. Castellano did not appeal.

¶5 In June 2009, Castellano filed the motion for sentence modification underlying the instant appeal. In the motion, Castellano claimed that: (1) the circuit court erroneously exercised its sentencing discretion in 2000 by considering improper factors; (2) a United States Supreme Court case decided after his sentencing constitutes a new factor; (3) he was sentenced on the basis of inaccurate information because the circuit court described him as a "sex addict"; and (4) his postconviction counsel performed ineffectively by failing to challenge trial counsel's performance at sentencing. The circuit court entered an order on June 23, 2009, denying the claims, and this appeal followed.

DISCUSSION

¶6 Castellano first contends that the circuit court erroneously exercised its sentencing discretion in 2000 by considering remarks made by the court that sentenced him in 1994. This claim is barred because Castellano raised it in his 2008 motion for sentence modification. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶7 Castellano argues, however, that his claim is now based on a new factor, namely, a United States Supreme Court decision, *Shepard v. United States*, 544 U.S. 13 (2005). The term new factor refers to "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." *State v. Franklin*, 148

Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (citation omitted). A motion for sentence modification based on a new factor may be made at any time. *State v. Noll*, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895.

¶8 The *Shepard* decision is not a new factor. The decision guides the federal courts in determining whether certain defendants facing sentencing for possessing firearms qualify for enhanced sentences pursuant to 18 U.S.C. 924(e) (2000 ed. and Supp II) (the Armed Career Criminal Act). *Shepard*, 544 U.S. at 15-16. Castellano is unsuccessful, and largely incoherent, in his efforts to describe any connection between the decision in *Shepard* and his own sentencing hearing. Our review of the *Shepard* decision persuades us that it has no relevance to the instant case whatsoever.

¶9 Castellano next argues that he has identified a second new factor warranting sentence modification, namely, his assistance to law enforcement. *See State v. Doe*, 2005 WI App 68, ¶¶8-10, 280 Wis. 2d 731, 697 N.W.2d 101 (post-sentencing assistance to law enforcement may constitute new factor warranting sentence modification). The claim may not be addressed in the instant proceeding.

¶10 The 2009 postconviction motion underlying this appeal does not include a claim for relief based on Castellano's alleged assistance to law enforcement. Rather, Castellano raised the claim when he sought sentence modification in 2008. The circuit court denied the claim in orders entered in March and April 2008. Castellano did not appeal from those orders.

¶11 Castellano cannot challenge the 2008 final orders denying sentence modification within the context of his current appeal from the order entered in June 2009. An order denying sentence modification is a final order that may be appealed directly to this court. *See State ex rel. LeFebvre v. Israel*, 109 Wis. 2d

337, 343, 325 N.W.2d 899 (1982). Castellano’s instant appeal brings before this court only “prior nonfinal judgments, orders and rulings.” *See* WIS. STAT. RULE 809.10(4). Because the circuit court’s orders in 2008 were final orders that could be appealed, they are not prior nonfinal orders that can be addressed in an appeal from a later final order. *See State v. Drake*, 184 Wis. 2d 396, 400, 515 N.W.2d 923 (Ct. App. 1994).

¶12 Castellano states that he did not appeal from the orders entered in 2008 because his claim for sentence modification was unsupported by necessary evidence, and an appeal “would have been frivolous.” In effect, he concedes that the circuit court correctly denied his 2008 claims. He suggests that circumstances have changed, and he discusses the evidence he can offer now. Castellano did not, however, present his new evidence to the circuit court.

¶13 If Castellano can provide the circuit court with new information that may warrant sentence modification, he is free to do so by bringing an appropriate motion.² *See Noll*, 258 Wis. 2d 573, ¶12. This court, however, will not consider matters raised for the first time on appeal. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997); *see also Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981) (facts not included in the record before the circuit court will not be considered by this court).

¶14 We turn to Castellano’s claims that the circuit court sentenced him on the basis of inaccurate information and that his postconviction counsel

² We note that we do not opine as to the merits of any possible motion for sentence modification that Castellano might bring. We merely observe that his appellate briefs suggest that such a motion might be available to him.

performed ineffectively by failing to challenge his trial attorney's performance at sentencing. These claims are procedurally barred because Castellano did not offer a sufficient reason for failing to pursue them previously.

¶15 A defendant who is in custody under sentence of a court may challenge the sentence at any time on constitutional or jurisdictional grounds pursuant to WIS. STAT. § 974.06. *State v. Evans*, 2004 WI 84, ¶¶32-33, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. Castellano did not cite § 974.06 as the authority for any claim raised in his most recent postconviction motion, but courts must look beyond the label that a prisoner affixes to a *pro se* motion to determine whether the pleading states a claim for relief. See *bin-Rilla v. Israel*, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). Castellano's allegation that his attorneys performed ineffectively raises a constitutional claim, as does his allegation that the circuit court pronounced sentence in reliance on inaccurate information. See *State v. Ludwig*, 124 Wis. 2d 600, 606, 369 N.W.2d 722 (1985) (constitutional right to counsel is right to effective assistance of counsel); *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (defendant has a constitutional right to be sentenced upon accurate information). Therefore, these claims are cognizable under § 974.06. Nonetheless, they are barred in this case by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¶16 “We need finality in our litigation.” *Id.* at 185. Thus, a defendant must “raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion.” *Id.*

If a criminal defendant fails to raise a constitutional issue that could have been raised on direct appeal or in a prior § 974.06 motion, the constitutional issue may not become the basis for a subsequent § 974.06 motion unless the court ascertains that a sufficient reason exists for the failure either to allege or to adequately raise the issue in the appeal or previous § 974.06 motion.

State v. Lo, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756.

¶17 Ineffective assistance of postconviction counsel may constitute a sufficient reason for failing to raise claims in a first postconviction motion. *State ex. rel Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). *Rothering*, however, does not permit a defendant to raise an endless series of collateral claims. Castellano offers no reason, much less a sufficient reason, for failing to raise all of his constitutional claims when he filed his *pro se* postconviction motions in 2003 seeking relief under the authority of WIS. STAT. § 974.06. Accordingly, the claims are barred.³

¶18 In his reply brief, Castellano contends that the State implicitly conceded the merits of his substantive claims because it argued only that his claims are procedurally barred. We disagree. In appropriate cases, the State may address only the question of whether litigation is barred while requesting leave to file a supplemental brief addressing any substantive claims that this court may

³ Castellano asserts that we may not treat the instant litigation as a proceeding under WIS. STAT. § 974.06, because he did not cite that statute in his pleadings. In support of his position, he points to *United States v. Castro*, 540 U.S. 375 (2003). In *Castro*, the Supreme Court adopted a rule applicable when federal courts address certain *pro se* motions filed by inmates seeking *habeas corpus* relief under 28 U.S.C. § 2255. *Castro*, 540 U.S. at 383. Because *Castro* concerns the procedure for administering a federal statute in the federal courts, the case does not govern our application of § 974.06. See *State v. Gary M.B.*, 2004 WI 33, ¶17, 270 Wis. 2d 62, 676 N.W.2d 475 (“Wisconsin courts are not bound by decisions of the United States Supreme Court when federal law does not govern the dispute.”).

determine are available to the appellant. *See State v. Tillman*, 2005 WI App 71, ¶13 n.4, 281 Wis. 2d 157, 696 N.W.2d 574. This is such a case.

By the Court.—Order affirmed.

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

