COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP660-CR **Cir. Ct. No. 2001CF3936**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL N. STREFF,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Paul N. Streff, *pro se*, appeals from orders denying his motions for postconviction relief and for reconsideration. Because the claims are barred, we affirm.

BACKGROUND

¶2 Streff pled guilty to one count of second-degree reckless homicide as a habitual offender. The circuit court imposed the maximum term of imprisonment. Streff filed a postconviction motion with the assistance of an attorney. He argued that his trial lawyer provided ineffective assistance by failing to challenge the search of his home. The circuit court denied the claim, and Streff appealed. We affirmed. ***State v. Streff***, No. 2003AP968-CR, unpublished slip op. (WI App Apr. 21, 2004) (***Streff I***).

¶3 Streff next filed a *pro se* motion for postconviction relief. He alleged that his trial lawyer performed ineffectively by failing to contest the allegation that he was a habitual offender and that the attorney who represented him during his direct appeal performed ineffectively in turn by failing to raise the issue. The circuit court denied Streff's claims, and we affirmed. ***State v. Streff***, No. 2004AP3190-CR, unpublished slip op. (WI App Nov. 23, 2005) (***Streff II***).

¶4 After we released our decision in ***Streff II***, Streff filed a motion for sentence credit, then a petition for a writ of *coram nobis*, and then a "motion for a *nunc pro tunc* hearing." The circuit court denied each request for relief.

¶5 Streff next filed the sequence of motions underlying the instant appeal. He brought a motion under WIS. STAT. § 974.06, challenging the search of his home, the determination that he was a habitual offender, and the effectiveness of his attorneys in regard to these issues. The circuit court denied the motion by order entered on March 3, 2009, stating that Streff raised the claims in prior litigation and could not raise them again. Ten days later, Streff brought motions seeking both sentence modification and sentence correction, grounding his claims for relief on his contention that he was improperly sentenced as a habitual

offender. Additionally, he moved for reconsideration of the circuit court's decision of March 3, 2009. On March 17, 2009, the circuit court denied Streff's pending claims, explaining that it would not entertain successive motions seeking the same relief. This appeal followed.[1]

DISCUSSION

¶6 We addressed the issues that Streff raises in his current litigation when we resolved Streff's prior appeals. In ***Streff I***, we concluded that Streff's home was not illegally searched and that Streff did not demonstrate ineffective assistance by his trial attorney in regard to the search. ***Id.***, No. 2003AP968-CR, unpublished slip op. at 8–9. In ***Streff II***, we concluded that Streff "was properly sentenced as a repeat offender." ***Id.***, No. 2004AP3190-CR, unpublished slip op. ¶6. Our decisions resolving these issues constitute the law of this case that must be followed in subsequent litigation. *See* ***State v. Casteel***, 2001 WI App 188, ¶15, 247 Wis. 2d 451, 459, 634 N.W.2d 338, 343. Accordingly, the decisions in ***Streff I*** and ***Streff II*** govern here. "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, 514 (Ct. App. 1991).

¶7 Streff, however, contends that he has advanced new issues, including claims that: (1) he received inadequate and improper notice of the habitual

[1] Streff's notices of appeal included his assertion that he appealed from a circuit court order entered in December 2008, denying Streff's motion for a *nunc pro tunc* hearing. We determined that Streff's appeal from the December 2008 order was untimely, and we dismissed that appeal for lack of jurisdiction. We concluded that our jurisdiction extends only to Streff's appeals from the orders of March 3, 2009, and March 17, 2009.

criminality allegation; and (2) his sentence as a habitual offender is unlawful and must be vacated pursuant to WIS. STAT. § 973.13. We have examined Streff's submissions in light of our prior decisions, and we do not agree that Streff has raised new issues. Rather, he has cited different statutes and formulated additional theories in support of the claims that we previously rejected. His "attempts to rephrase or re-theorize his previously-litigated challenge are of no avail." *See* ***Witkowski***, 163 Wis. 2d at 992, 473 N.W.2d at 515.

¶8 Moreover, any new claims that Streff seeks to raise are procedurally barred. A defendant must raise all grounds for postconviction relief in the defendant's first postconviction motion or in the defendant's direct appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 163 (1994); WIS. STAT. § 974.06(4). A defendant may not pursue claims in a subsequent appeal 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. ***Escalona-Naranjo***, 185 Wis. 2d at 181–182, 517 N.W.2d at 162. Streff appears to offer two reasons to justify his current litigation, but neither is sufficient.

¶9 Streff believes that, because he cites WIS. STAT. § 973.13 in support of his claim for relief, his litigation is not governed by the procedural bar imposed by ***Escalona-Naranjo***. He is wrong.

¶10 An exception to ***Escalona-Naranjo*** is applicable when a defendant properly invokes WIS. STAT. § 973.13 to seek relief from faulty repeater sentences. *See* ***State v. Mikulance***, 2006 WI App 69, ¶¶13–14, 291 Wis. 2d 494, 500–501, 713 N.W.2d 160, 163–164. The exception, however, does not apply here because Streff does not raise a viable claim under § 973.13. That statute, "as it pertains to

sentencing a repeat offender, applies only when the State fails to prove the prior conviction necessary to establish the habitual criminal status (by proof or by admission) or when the penalty given is longer than permitted by law for a repeater." ***Mikulance***, 2006 WI App 69, ¶18, 291 Wis. 2d at 502, 713 N.W.2d at 164. Streff does not and could not deny that during the plea hearing he personally acknowledged the felony conviction establishing his habitual offender status. *See* ***Streff II***, No. 2004AP3190-CR, unpublished slip op. ¶3 (discussing Streff's admission of his prior conviction). Further, Streff does not and could not contend that he received a penalty longer than permitted for a habitual offender.[2] Rather, Streff contends that he received inadequate and improper notice of the habitual criminality allegation. Section 973.13 has no application to such a contention. *See* ***Mikulance***, 2006 WI App 69, ¶18, 291 Wis. 2d at 502, 713 N.W.2d at 164.

¶11 Streff also argues that the alleged ineffective assistance of the attorney who represented him in the proceedings resolved by ***Streff I*** constitutes a sufficient reason for his current litigation. This court has observed that, in some circumstances, the ineffective assistance of a defendant's postconviction attorney may be sufficient to justify an additional motion for postconviction relief. *See* ***State ex. rel Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996). ***Rothering***, however, does not suggest that a defendant who

[2] The legislature classified second-degree reckless homicide as a Class C felony when Streff committed the offense in 2001. *See* WIS. STAT. § 940.06(1) (2001–02). Class C felonies at that time carried a fifteen-year maximum term of imprisonment, ten years of which could be imposed as initial confinement. WIS. STAT. §§ 939.50(3)(c), 973.01(2)(b)3. (2001–02). Under the 2001 statutes increasing penalties for habitual offenders, a maximum term of imprisonment greater than ten years could be increased by not more than ten years of confinement if the offender's prior conviction was for a felony. WIS. STAT. §§ 939.62(1)(c), 973.01(2)(c) (2001–02). The circuit court in this case required Streff to serve twenty years of initial confinement and five years of extended supervision, the maximum term of imprisonment permitted by the governing statutory scheme.

alleges ineffective assistance of a postconviction attorney may thereafter file a limitless number of postconviction motions.

¶12 We are satisfied that Streff has not demonstrated a sufficient reason for failing to raise all of his current claims in the many motions that he filed after we released our decision in ***Streff I***. Accordingly, his claims are barred.[3]

By the Court.—Orders affirmed.

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

[3] After briefing was completed in this matter, Streff filed a letter containing additional arguments in support of his contentions. We do not address issues raised for the first time in a reply brief because the opposing party has no opportunity to respond. *See* ***State v. Mata***, 230 Wis. 2d 567, 576 n.4, 602 N.W.2d 158, 162 n.4 (Ct. App. 1999). We decline to consider Streff's belated letter for the same reason.