COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP559 **Cir. Ct. No. 1997CF42**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHANE M. GRESSEL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Shane Gressel, pro se, appeals an order denying his WIS. STAT. § 974.06 (2011-12)[1] motion for postconviction relief. Gressel argues

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

he is entitled to plea withdrawal because the colloquy was deficient, he was "medicated" at the plea hearing, and his trial counsel was ineffective. We conclude Gressel's arguments have either already been litigated or are procedurally barred. The order is therefore affirmed.

BACKGROUND

¶2 In January 1997, the State charged Gressel with one count of party to the crime of first-degree intentional homicide and one count of attempted first-degree intentional homicide. The charges arose from allegations that Gressel had stabbed two members of a rival gang as part of a gang initiation, killing Jeffrey Neosh and severely injuring Damon Schwartz. Pursuant to a plea agreement, Gressel entered no contest pleas to reduced charges of first-degree reckless homicide and first-degree reckless injury, both counts as party to a crime. The court imposed indeterminate sentences of not more than forty years on the homicide conviction and not more than ten years on the reckless injury conviction.[2]

¶3 On direct appeal, Gressel's appointed counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32, concluding there was no arguable basis to challenge Gressel's convictions. The no-merit report addressed whether: (1) Gressel was competent to plead no contest or stand trial; (2) Gressel's statements to police should have been suppressed; (3) the plea procedures were adequate; and (4) the court properly exercised its sentencing discretion.

[2] Because the offenses were committed in January 1997, the court imposed an indeterminate sentence. "Truth-in-sentencing" revisions were enacted in 1998 and applicable to felonies committed on or after December 31, 1999. *See* 1997 Wis. Act 283, § 419.

¶4 Gressel filed a response raising twelve arguments in opposition to the report. Specifically, Gressel argued: (1) the police never advised him of his constitutional rights before taking his statements; (2) the proceedings violated Gressel's speedy trial rights; (3) the prosecution delayed discovery, and the discovery it furnished was incomplete; (4) the prosecution failed to charge Gressel within seventy-two hours; (5) the trial court should have scheduled a separate trial for Gressel; (6) the police coerced his statements; (7) the police failed to take Gressel's clothes as evidence, and those clothes may have exonerated him of the crimes if they contained no evidence of blood; (8) the police put Gressel through improper line-ups; (9) the surviving victim gave inconsistent statements on the stabbing; (10) a witness gave the police a statement while influenced by drugs; (11) the sentencing judge was prejudiced and erred by paying insufficient attention to pleas for leniency by Gressel, his lawyer and others; and (12) Gressel has grounds to modify his sentences to have them run concurrent instead of consecutive. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we concluded there was no arguable basis for appeal and summarily affirmed the judgment.

¶5 In 2002, Gressel filed a WIS. STAT. § 974.06 motion for plea withdrawal, claiming his pleas were not knowingly, intelligently and voluntarily entered because he was under the influence of a number of drugs at the time of his plea hearing. Gressel also claimed trial counsel was ineffective by failing to both inquire about Gressel's drug usage prior to the plea hearing and review the elements of the charged crimes with him. The circuit court denied Gressel's claim as procedurally barred. Gressel appealed, but that appeal was ultimately dismissed for Gressel's failure to file a brief.

¶6 In 2009, Gressel filed a motion for sentence modification, claiming his sentence was outside of the range authorized by law. The circuit court denied the motion and Gressel appealed. This court affirmed the denial of that motion. *See* ***State v. Gressel***, No. 2009AP2168-CR, unpublished slip op. (WI App Sept. 21, 2010).

¶7 In June 2011, Gressel filed the underlying WIS. STAT. § 974.06 motion for plea withdrawal, claiming his pleas were not knowingly, intelligently and voluntarily entered because the colloquy was deficient; he was "medicated" at the time of the plea hearing; and counsel was ineffective by failing to explain the elements of the crimes and the range of penalties. The motion was denied without a hearing and this appeal follows.

DISCUSSION

¶8 We conclude Gressel's claims are barred by WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Successive motions and appeals are procedurally barred unless the defendant can show a sufficient reason why the newly alleged errors were not previously raised. ***Escalona-Naranjo***, 185 Wis. 2d at 185. The bar to serial litigation may also be applied when the direct appeal was conducted pursuant to the no-merit procedures of WIS. STAT. RULE 809.32. ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574; *see also* ***State v. Allen***, 2010 WI 89, ¶¶35-41, 328 Wis. 2d 1, 786 N.W.2d 124. Absent a sufficient reason for doing so, a defendant may not raise issues in later proceedings that could have been raised in the no-merit proceeding if the no-merit procedures were followed and the court has sufficient confidence in the outcome of the no-merit proceeding to warrant application of the procedural bar. ***Allen***, 328 Wis. 2d 1, ¶62.

¶9 Gressel has not demonstrated that his no-merit appeal was procedurally inadequate, and our resolution of the no-merit proceeding carries a sufficient degree of confidence warranting application of the procedural bar. Although Gressel was not required to file a response to his counsel's no-merit report, he did. That response, like his first WIS. STAT. § 974.06 motion, did not raise his present claims that the plea colloquy was deficient or that counsel was ineffective by failing to explain the range of penalties. Because Gressel does not offer a sufficient reason for failing to raise these arguments earlier, they are procedurally barred. *See* ***Allen***, 328 Wis. 2d 1, ¶44.

¶10 With respect to Gressel's claims that the pleas were not knowingly, intelligently and voluntarily entered because he was medicated at the hearing and his counsel failed to explain the elements, these arguments were raised and rejected as procedurally barred in the context of his first WIS. STAT. § 974.06 motion. He cannot relitigate them now. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

By the Court.—Order affirmed.

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