COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1781 **Cir. Ct. No. 2003CF5521**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HERSHEL RAMONE MCCRADIC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Affirmed*.

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

¶1 PER CURIAM. Hershel Ramone McCradic, *pro se*, appeals a circuit court order denying his second WIS. STAT. § 974.06 postconviction motion without a hearing. Because McCradic is revisiting issues decided in a prior appeal, we affirm the order.

¶2 In March 2004, McCradic entered an ***Alford*** plea to one count of repeated acts of sexual assault of the same child, a violation of WIS. STAT. § 948.025(1) (1999–2000).[1] At the time of the offense, a violation of § 948.025(1) was a Class B felony punishable by up to sixty years' imprisonment. *See* WIS. STAT. § 939.50(3)(b) (1999–2000). In exchange for McCradic's plea to the single count, the State agreed not to pursue eight individual counts of second-degree sexual assault of a child, each of which was a Class BC felony punishable by up to thirty years' imprisonment. *See* WIS. STAT. § 948.02(2) (1999–2000); § 939.50(3)(bc) (1999–2000). Additionally, the State agreed to recommend a sentence of no more than fifteen years' initial confinement, leaving the extended supervision term to the trial court. In April 2004, the trial court sentenced McCradic to thirty-five years' initial confinement and ten years' extended supervision.

¶3 Postconviction/appellate counsel was appointed but did not pursue either postconviction or appellate relief. McCradic petitioned this court for a writ of *habeas corpus*, but the petition was denied because McCradic had not exhausted all of his remedies in the circuit court. In September 2009, McCradic filed a *pro se* WIS. STAT. § 974.06 motion for relief, seeking resentencing or plea withdrawal. The circuit court denied the motion without a hearing. McCradic appealed, claiming among other things that he had not been sufficiently apprised of the penalties he faced, making his plea unknowing. Based on his reading of the statutes, McCradic thought a different felony classification should have applied to

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). An ***Alford*** plea is a plea wherein a defendant pleads guilty but maintains his or her innocence. *See* ***State v. Garcia***, 192 Wis. 2d 845, 851 n.1, 532 N.W.2d 111. 113 n.1 (1995).

his offense. We examined the applicable statutes and explained why, ultimately, the Class B designation was correct. *See* ***State v. McCradic***, No. 2009AP2669, unpublished slip op. at ¶¶13–16 (WI App Sept. 8, 2010). We also addressed and rejected several additional claims.

¶4 In June 2012, McCradic filed a second *pro se* postconviction motion. He alleged that trial counsel was ineffective for failing to advise him that the trial court was not bound by the State's fifteen-year initial confinement recommendation. McCradic also alleged that postconviction counsel was ineffective for not identifying and pursuing the ineffective-assistance claim against the trial lawyer. The circuit court denied the motion without a hearing. It noted that there was no basis for alleging ineffective assistance of postconviction counsel: McCradic had raised the issues regarding the non-binding nature of the plea bargain himself, though both the circuit court and this court rejected his challenge on the merits. The circuit court thus noted that McCradic's motion could not be used to raise issues disposed of in a prior appeal. The circuit court further noted that any ineffective-assistance claims should have been raised in the 2009 postconviction motion and, because they were not, they were barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¶5 On appeal, McCradic asserts that: (1) his plea was not knowing, intelligent, or voluntary because he did not understand the felony class he was pleading to or the attendant penalties; (2) trial counsel failed to object to a breach of the plea bargain; (3) McCradic was attempting to get clarification at his plea hearing but the trial court cut him off because it had a lunch appointment; (4) "[a]t sentencing … it states, 'second degree sexual [assault] of child, rather than 2nd degree repeated acts[;]" and (5) he is "entitled to resentencing or some form of

relief, based upon the fact that the trial court agreed to correct and amend the judgment of conviction[.]"

¶6 The issues in McCradic's appellate brief extend far beyond the scope of his postconviction motion. Thus, to the extent that any of McCradic's issues were not raised in the most recent postconviction motion, we ordinarily would not review them on appeal. *See* ***State v. Rogers***, 196 Wis. 2d 817, 826, 539 N.W.2d 897, 900 (Ct. App. 1995) ("[A] party seeking reversal may not advance arguments on appeal which were not presented to the [circuit] court.").

¶7 However, McCradic also does not raise any issue in this appeal that was not already addressed in the prior appeal. "A matter once litigated may not be relitigated … 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).

¶8 We previously explained why repeated sexual assault of a child was properly categorized as a Class B felony, punishable by up to sixty years' imprisonment.[2] *See* ***McCradic***, No. 2009AP2669, unpublished slip op. at ¶¶13–16. We also previously explained that the Record "conclusively demonstrates McCradic knew the maximum penalty he faced."[3] ***Id.***, ¶14.

[2] In the current appeal, McCradic appears to place some importance on the fact that the underlying sexual assaults were only punishable by thirty years' imprisonment, while the charge to which he pled carried a maximum of sixty years' imprisonment. However, McCradic appears to forget that he was facing eight separate second-degree sexual assault charges, for a total possible exposure of 240 years' imprisonment. Thus, his plea reduced his maximum possible imprisonment term by seventy-five percent.

[3] We also explained why McCradic's claims of an involuntary plea because of violations under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), did not warrant relief.

¶9 We previously explained that the Record shows the trial court advised McCradic that it was not bound by the plea bargain, and that McCradic acknowledged that fact. ***Id.***, ¶17. To the extent that McCradic is now claiming a breach of the plea bargain by the State rather than the trial court, he does not identify the nature of the breach. To the extent that McCradic is attempting to invoke a federal rule to bind the trial court to the plea bargain's terms, *see* FED. R. CRIM. P. 11(c)(5)(B) (trial court must "advise the defendant personally that the court is not required to follow the plea agreement *and give the defendant an opportunity to withdraw the plea*") (emphasis added), McCradic cites no authority to establish that the rule has been adopted in Wisconsin.[4]

¶10 We previously explained that the trial court did not prevent McCradic from obtaining clarification because of a lunch appointment. Rather, the trial court directed counsel to stop speaking to McCradic at the same time as the court. ***McCradic***, No. 2009AP2669, unpublished slip op. at ¶19.

¶11 We previously explained that the error McCradic refers to when complaining that "[a]t sentencing … it states, 'second degree sexual [assault] of child, rather than 2nd degree repeated acts,'" actually occurs on the cover page of the transcript. The charge description was placed there by the court reporter when she prepared the transcript; it does not give rise to a claim of error. ***Id.***, ¶20.

¶12 Finally, we also previously explained that McCradic is not entitled to relief simply because the circuit court, in response to his first motion, ordered a

[4] McCradic cites to FED. R. CRIM. P. 11(e)(4), a rule that does not currently exist. In any event, McCradic cites to the federal rule for the first time in his reply brief, so we alternatively need not consider it. *See* ***State v. Mata***, 230 Wis. 2d 567, 576 n.4, 602 N.W.2d 158, 162 n.4 (Ct. App. 1999) ("We do not address issues raised for the first time in a reply brief.").

correction to the judgment of conviction. The correction related to a mere scrivener's error as to the statute and charge description. *See* ***id.***, ¶21.

¶13 Accordingly, the circuit court properly denied McCradic's second postconviction motion without a hearing.[5]

By the Court.—Order affirmed.

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

[5] We do not address the circuit court's application of the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), to McCradic's claims because we conclude that the issue preclusion bar of ***State v. Witkowski***, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991), sufficiently disposes of the appeal.