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DISTRICT I

November 25, 2025

To:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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New Lisbon, WI 53950-2000

You are hereby notified that the Court has entered the following opinion and order:

2024AP1724 State of Wisconsin v. Byron D. Mitchell (L.C. # 1995CF955289A)

Before Colón, P.J., Donald, and Geenen, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Byron D. Mitchell, pro se, appeals an order denying his motion for postconviction relief brought under WIS. STAT. § 974.06 (2023-24).[1] He alleges that his trial counsel was ineffective for failing to impeach a witness's trial testimony and for failing to object when the State and the trial court subsequently referenced that testimony.[2] The circuit court denied Mitchell's postconviction motion on the ground that his claims were procedurally barred. Based upon our

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

[2] We refer to the trial court when we discuss the actions and rulings of the judge who presided over Mitchell's trial and sentencing. We refer to the circuit court when we discuss the actions and rulings of the successor judges who presided over subsequent postconviction motions.

review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

In 1996, a jury found Mitchell guilty of first-degree intentional homicide by use of a dangerous weapon, attempted first-degree intentional homicide by use of a dangerous weapon as a party to a crime, and two counts of armed robbery as a party to a crime. The trial court imposed a life sentence for the homicide and an aggregate 80-year consecutive sentence for the other three convictions. With the assistance of appointed counsel, Mitchell pursued a no-merit appeal under ***Anders v. California***, 386 U.S. 738 (1967) and the procedures set forth in WIS. STAT. RULE 809.32. We affirmed. ***State v. Mitchell*** (***Mitchell I***), No. 1996AP2590-CRNM, unpublished op. and order (WI App July 8, 1997).

In 2016, Mitchell filed a postconviction motion on his own behalf, challenging the restitution that was imposed in this case. The circuit court denied the motion in a written order. Mitchell did not appeal.

In 2019, Mitchell, by counsel, petitioned this court for a writ of habeas corpus, alleging ineffective assistance of his appellate counsel. *See* ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992) (holding that "to bring a claim of ineffective assistance of appellate counsel, a defendant should petition the appellate court that heard the appeal for a writ of habeas corpus"). Mitchell alleged that his appellate counsel was ineffective in the proceedings underlying ***Mitchell I*** for filing a no-merit report instead of raising claims of error. As relevant here, Mitchell argued that his appellate counsel should have pursued claims that his trial counsel failed to impeach the testimony of M.G.—the victim of the attempted homicide and of one of the armed robberies—regarding the number of times that he was shot; and then failed to object to the

State's arguments referencing M.G.'s allegedly inaccurate testimony. Relatedly, Mitchell argued that his appellate counsel should have pursued a claim that he was sentenced on the basis of inaccurate information because the trial court's sentencing remarks reflected reliance on M.G.'s testimony and on the State's arguments about that testimony. We denied the petition. ***State ex rel. Mitchell v. Winkleski*** (***Mitchell II***), No. 2019AP1992-W, unpublished op. and order (WI App Sept. 18, 2020).

In August 2024, proceeding pro se, Mitchell filed the postconviction motion underlying the instant appeal. Citing ***Strickland v. Washington***, 466 U.S. 668 (1984), Mitchell claimed that he received ineffective assistance from his trial counsel. Specifically, Mitchell asserted that his trial counsel performed deficiently by failing to: (1) impeach M.G. regarding the number of times that he was shot; (2) object to the State's closing arguments regarding M.G.'s gunshot wounds; and (3) object at sentencing when the trial court relied on allegedly inaccurate information regarding the number and nature of M.G.'s gunshot wounds. Mitchell further asserted that his trial counsel's alleged deficiencies prejudiced his defense both at trial and at sentencing. *See* ***id.*** at 687 (holding that to prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense). The circuit court rejected the postconviction claims as procedurally barred, and Mitchell appeals.

A prisoner who has exhausted his or her direct appeal rights may raise constitutional and jurisdictional claims by motion filed under WIS. STAT. § 974.06. The opportunity to bring such claims is limited, however, because "[w]e need finality in our litigation." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, pursuant to the plain language of § 974.06(4), a person may not bring postconviction claims under § 974.06 if the

person could have raised the claims in a previous postconviction motion or on direct appeal unless the person states a "sufficient reason" for failing to raise or adequately address those issues earlier. ***Escalona-Naranjo***, 185 Wis. 2d at 184-85. Whether a person's claims are procedurally barred in any particular case is a question of law that this court reviews de novo. ***State v. Thames***, 2005 WI App 101, ¶10, 281 Wis. 2d 772, 700 N.W.2d 285.

"A no-merit appeal clearly qualifies as a previous motion under [WIS. STAT.] § 974.06(4)." ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124. Nonetheless, when we consider the preclusive effect of no-merit proceedings, our review includes an assessment of whether appellate counsel and this court followed the no-merit procedures and whether those procedures warrant confidence in their outcome. ***State v. Tillman***, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574.

Here, Mitchell argues that the no-merit procedures were not followed in his case, and therefore ***Mitchell I*** does not bar his current claims. We reject Michell's characterization of the no-merit procedures in ***Mitchell I***.

Our decision in ***Mitchell I*** reflects that we considered appellate counsel's no-merit report, which discussed sufficiency of the evidence and the trial court's exercise of sentencing discretion, and we conducted the independent review of the record that ***Anders*** requires. *See* ***Mitchell I***, No. 1996AP2590-CRNM at 2. Our decision reflects that we also acknowledged Mitchell's motion "to 'oppose'" the no-merit proceedings, even though Mitchell filed that document after the expiration of his deadline for responding to the no-merit report. ***Id.*** Moreover, we addressed the allegation that he raised in his submission, namely, that he could not file a meaningful response because he had not received a complete copy of the record. We noted

that appellate counsel had forwarded copies of the transcripts to Mitchell, but we nonetheless also sent copies of record documents to him. On our own motion, we extended his response deadline, and we reminded him that he needed only to alert us to issues that he believed were arguably meritorious. ***Id.*** at 3. Mitchell, however, did not file a response, and we therefore completed our analysis without input from him, ultimately concluding that "any further proceedings would lack arguable merit." ***Id.***

In light of the foregoing, we are satisfied that the no-merit procedures in ***Mitchell I*** warrant confidence in the outcome of that appeal. Accordingly, ***Mitchell I*** bars Mitchell from pursuing additional postconviction litigation absent a sufficient reason for failing to raise his claims earlier.

Mitchell next argues that he has a sufficient reason for bringing his current claims because, in ***Mitchell I***, neither his appointed appellate counsel nor this court identified the issues that he raises now. In support, he cites ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893. There, we permitted a postconviction motion following a no-merit appeal, concluding that the convicted defendant could not be faulted for relying on appellate counsel's assertion that an appeal lacked arguable merit when counsel and this court failed to recognize an arguably meritorious sentencing issue. ***Id.***, ¶27. ***Fortier*** does not assist Mitchell, however, because our supreme court limited ***Fortier*** in a way that precludes its application to Mitchell's claims. *See* ***Allen***, 328 Wis. 2d 1, ¶73. In ***Allen***, our supreme court held: "The existence of an arguably meritorious issue does not provide a sufficient reason for waiting many years to raise an issue that could have been raised earlier." ***Id.*** ***Allen***, not ***Fortier***, controls here.

The proceedings in the instant case reflect that Mitchell could have raised his current claims in the circuit court long before 2024. All of his current claims hinge on what he alleges was inaccurate information about the number of times that M.G. was shot and his resulting wounds. Mitchell, however, attended the 1996 trial. He heard M.G.'s testimony about the shooting and the State's arguments about that testimony. Mitchell also testified at trial on his own behalf, admitted that he shot M.G., and offered an explanation for doing so. Mitchell therefore would have known immediately about any alleged discrepancy between the evidence and argument that the State offered at trial in regard to the number of shots that M.G. sustained and the number of shots that Mitchell believed that he had fired. Accordingly, Mitchell cannot demonstrate a sufficient reason for serial litigation by showing that his current claims were overlooked by appellate counsel or by this court during the no-merit proceeding 27 years earlier. *See* ***Allen***, 328 Wis. 2d 1, ¶73.

Moreover, Mitchell's claims are barred, regardless of the reason that Mitchell offers for failing to raise those claims in ***Mitchell I*** or, for that matter, in his 2016 postconviction motion. When Mitchell petitioned this court for a writ of habeas corpus in 2019, he raised the same issues that he seeks to raise now. However, "[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).

In ***Mitchell II***, we addressed Mitchell's claims for relief based on trial counsel's alleged failures both to impeach M.G. about the number of times he was shot and to object to the State's arguments based on M.G.'s testimony. We held:

> if it had been suggested in the no-merit appeal that Mitchell's trial counsel was ineffective for not objecting to remarks made during

> opening and closing statements by the State and for not impeaching or objecting to [M.G.'s] testimony as to the number of times he was shot, this court would have concluded that there was no arguable merit to pursuing such claims.

Mitchell II, No. 2019AP1992-W, at 10. Similarly, upon consideration of Mitchell's contention that he was sentenced based on inaccurate information about the nature and extent of M.G.'s gunshot wounds, we held: "If it had been suggested in the no-merit appeal that Mitchell was entitled to resentencing on this basis, this court would have concluded that there was no arguable merit to such a claim." ***Id.*** at 8.

Because we considered the substance of Mitchell's current claims and rejected them as meritless in ***Mitchell II***, Mitchell cannot raise those claims in yet another collateral attack on his convictions. ***Witkowski***, 163 Wis. 2d at 990. Accordingly, Mitchell's current claims are procedurally barred. For all the foregoing reasons, we affirm.

IT IS ORDERED that the postconviction order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals