COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1563 **Cir. Ct. No. 2004CF5178**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL DWAYNE WESTMORELAND,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Paul Dwayne Westmoreland, *pro se*, appeals orders denying his motions for reconsideration of an order denying postconviction

relief.[1] We affirm, albeit based on reasoning that differs from that offered by the trial court. *See* ***State v. King***, 120 Wis. 2d 285, 292, 354 N.W.2d 742, 745 (Ct. App. 1984).

BACKGROUND

¶2 We will not repeat the extensive recitation of facts outlined in our prior decisions resolving Westmoreland's direct appeal and the appeal that followed it. *See* ***State v. Westmoreland***, 2008 WI App 15, 307 Wis. 2d 429, 744 N.W.2d 919 (***Westmoreland I***), *review denied*, 2008 WI 40, 308 Wis. 2d 612, 749 N.W.2d 663; ***State v. Westmoreland***, 2009AP2288, unpublished slip op. (WI App Nov. 2, 2010) (***Westmoreland II***), *review denied*, 2011 WI 29, 332 Wis. 2d 279, 797 N.W.2d 524. For purposes of resolving this appeal, it suffices to restate only the following, which relates to Westmoreland's postconviction filings.

¶3 A jury found Westmoreland guilty of one count of first-degree intentional homicide while armed, two counts of first-degree recklessly endangering safety while armed, and one count of possession of a firearm by a felon.

> Several months after the trial concluded, Westmoreland's appointed appellate counsel filed a motion for postconviction relief, asserting only that Westmoreland's trial counsel provided ineffective assistance of counsel because she argued two inconsistent theories in her closing argument. The trial court denied the

[1] Due to judicial rotation, the Honorable Jeffrey A. Wagner entered the orders that are the subject of this appeal.

The Honorable Mel Flanagan presided over Westmoreland's trial, entered the judgment and entered the order denying Westmoreland's first postconviction motion. The Honorable Patricia D. McMahon entered the orders with respect to Westmoreland's second, third, and fourth postconviction motions, and entered the order denying his motion for reconsideration.

> motion, and Westmoreland appealed. We affirmed the trial court's decision denying the motion for postconviction relief, and the supreme court denied review.
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> On February 27, 2009, Westmoreland, now proceeding *pro se*, filed a second postconviction motion, in which he asked the trial court to vacate a DNA surcharge imposed during sentencing. The trial court denied the motion on March 3, 2009.
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> On April 29, 2009, Westmoreland, proceeding *pro se*, filed a third postconviction motion purportedly based on WIS. STAT. § 973.13 (2007-08), in which he asked the trial court to commute his sentences or amend the judgment of conviction. The trial court partially granted the motion on May 5, 2009.
>
> On June 11, 2009, Westmoreland, again proceeding *pro se*, filed a fourth postconviction motion—this time expressly filed pursuant to WIS. STAT. § 974.06. In the motion, Westmoreland claimed for the first time that: (1) the jury's first-degree intentional homicide verdict was not unanimous; (2) the trial court committed plain error when it allowed the jurors to pose questions to a witness; and (3) trial counsel was ineffective for failing to raise the issues. On June 15, 2009, the trial court, without addressing the merits of Westmoreland's claims, denied the fourth motion for postconviction relief, stating that the motion was barred by [***State v.***] ***Escalona-Naranjo***[, 185 Wis. 2d 168, 517 N.W.2d 157 (1994)].
>
> On July 7, 2009, Westmoreland filed a *pro se* motion, asking the trial court to reconsider its denial of his fourth postconviction motion on ***Escalona-Naranjo*** grounds. [On July 17, 2009, t]he trial court denied Westmoreland's motion to reconsider.

Westmoreland II, 2009AP2288, unpublished slip op. ¶¶8–12 (some citations and a footnote omitted). Westmoreland appealed the trial court's denials of his fourth motion for postconviction relief and subsequent motion for reconsideration. In affirming, this court held that Westmoreland had not stated a sufficient reason for failing to bring his claims in his first postconviction motion and consequently, concluded that Westmoreland's claims were procedurally barred by ***Escalona-Naranjo***. *See* ***Westmoreland II***, 2009AP2288, unpublished slip op. ¶1.

¶4 On May 1, 2013, Westmoreland filed a *pro se* motion for reconsideration of the trial court's orders of June 15, 2009, and July 17, 2009. He argued that an unpublished decision of this court supported his position that a motion to vacate a DNA surcharge does not bar a subsequent WIS. STAT. § 974.06 motion. While acknowledging that our decision in ***Westmoreland II*** "may have been technically sound," he argued that but for the trial court's erroneous ruling, his appeal "would not have been vulnerable to that procedural default." Westmoreland sought to have his § 974.06 motion reviewed on the merits.

¶5 The trial court denied the motion after concluding that the unpublished decision carries no precedential value and further distinguishing it.

¶6 On May 22, 2013, Westmoreland filed a *pro se* motion for reconsideration of the trial court's denial of his May 1, 2013, motion. Westmoreland cited additional case law to support his argument that DNA surcharge motion does not bar a subsequently filed WIS. STAT. § 974.06 motion. He also reiterated his argument that a motion under WIS. STAT. § 973.13 likewise does not bar a subsequently filed § 974.06 motion.

¶7 The trial court denied this motion as well.

ANALYSIS

¶8 The orders that are the subject of this appeal resulted from Westmoreland's filing of two motions for reconsideration—motions that sought reconsideration of the same orders we affirmed in ***Westmoreland II***.

¶9 As in ***Westmoreland II***, Westmoreland largely focuses his attention on what he contends was the trial court's erroneous application of ***Escalona-Naranjo***'s procedural bar based on his filing of a motion to vacate a DNA

surcharge and a motion to correct an excessive sentence. Even if this is true, unfortunately for Westmoreland, the same problem that plagued him in ***Westmoreland II*** plagues him now.

¶10 In ***Westmoreland II***, we explained:

> Here, while Westmoreland spends a great deal of time and energy arguing why his previous *pro se* postconviction motions, which he claims were both filed under WIS. STAT. § 973.13, do not bar his current claims, he fails to address why he could not have raised these claims in his first postconviction motion filed by his appellate counsel.

Westmoreland II, 2009AP2288, unpublished slip op. ¶15. Although Westmoreland alleged his postconviction counsel was ineffective in the underlying WIS. STAT. § 974.06 motion, he did not brief the issue on appeal in ***Westmoreland II***.[2]

¶11 In this appeal, Westmoreland continues to assert that the trial court erred in its application of ***Escalona-Naranjo***'s procedural bar. His essential challenge remains the same as it was in ***Westmoreland II***.

¶12 A successive postconviction motion may not be used to resurrect a previously rejected issue *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (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."). We previously held that Westmoreland's claims were

[2] In our decision, we wrote: "Westmoreland does not go so far in his reply brief as to allege that his postconviction counsel acted ineffectively in failing to raise these issues [argued on appeal], and we will not construct his arguments for him." ***State v. Westmoreland***, 2009AP2288, unpublished slip op. ¶16 (WI App Nov. 2, 2010) (***Westmoreland II***).

procedurally barred because he failed to state a sufficient reason for failing to bring them in his first postconviction motion. ***Westmoreland II***, 2009AP2288, unpublished slip op. ¶1. We will not consider this issue again.

¶13 In an effort to avoid this outcome, Westmoreland claims that the interests of justice and equal protection require a merits-based review of his WIS. STAT. § 974.06 motion. He submits:

> The § 974.06 motion filed in the trial court asserted that postconviction counsel was ineffective for not raising the identified issues in his direct appeal. When the trial court erroneously denied the motion due to the two previously filed motions, the appellant appealed those decisions to this court. The appellant assumed that the court would address the reasoning given in the lower court and if overturned, the motion would need to go back below for a merits[-]based review, including the sufficient reason given in the original § 974.06 [motion]. It was the appellant's belief that since the claim of postconviction counsel ineffectiveness that was the basis of his sufficient reason had not been reviewed in the trial court, this court would not address it. This was reasonable given his *pro se* status and the fact that this is a court of review. Instead, the court failed to address the decisions given below and found that the motion was barred for not raising the claim of postconviction [counsel's] ineffectiveness in this court. That decision should not prevent this court from addressing the validity of the erroneous decisions of the trial court.

We disagree with Westmoreland's assessment of the reasonableness of his approach in ***Westmoreland II***.

¶14 Insofar as Westmoreland requests that we exercise power of discretionary reversal pursuant to WIS. STAT. § 752.35, we conclude that this is not the case to do so. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797, 802 (1990) (emphasizing that our power of discretionary reversal is reserved for only the exceptional case).

By the Court.—Orders affirmed.

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