COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1639 **Cir. Ct. No. 2002CF6925**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL D. KING,

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. Daniel D. King, *pro se*, appeals an order that denied his petition for a writ of *habeas corpus* on the ground that his claims are procedurally barred. He also appeals the order that denied his motion for reconsideration. We affirm.

BACKGROUND

¶2 In 2003, the State filed an eleven-count information against King. As relevant here, the State charged King, as a party to a crime, with substantial battery in counts five and ten and with armed robbery in count eleven. The matter proceeded to trial. The jury found King guilty as charged in counts five, ten, and eleven and acquitted him of the eight other charges. The circuit court later vacated King's conviction for count five. For the two convictions remaining, the circuit court imposed consecutive sentences, namely, a ten-year term of imprisonment for count ten, and a thirty-five year term of imprisonment for count eleven. King pursued a direct appeal to this court with the assistance of appointed counsel. We affirmed. ***State v. King***, 2005 WI App 224, 287 Wis. 2d 756, 706 N.W.2d 181 (***King I***).

¶3 In 2010, King sought postconviction relief *pro se* in a motion that he styled as a request for sentence modification pursuant to WIS. STAT. § 973.13 (2009-10).[1] King's motion turned on the verdict form for count eleven, the count in which the State charged King with armed robbery. King alleged that, because the verdict form for count eleven omitted the word "armed" in describing the charged offense, the circuit court improperly imposed a sentence for that count in excess of the maximum term of imprisonment allowed for robbery. The circuit court concluded, however, that the jury found King guilty of armed robbery as charged in the information and denied relief. We affirmed. ***State v. King***, 2011AP319-CR, unpublished slip op. (WI App Mar. 20, 2012) (***King II***).

[1] The 2009-10 version of WIS. STAT. § 973.13 is identical to the current version. All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 King next filed the petition for a writ of *habeas corpus* that underlies this appeal. He alleged that his criminal convictions are constitutionally infirm and that his postconviction counsel afforded him constitutionally ineffective assistance by failing to raise various challenges to the effectiveness of his trial counsel. The circuit court concluded that King's claims are procedurally barred because he could have raised them in ***King II***. The circuit court also denied King's motion to reconsider, and he appeals.

DISCUSSION

¶5 "We need finality in our litigation." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Thus, WIS. STAT. § 974.06 compels an imprisoned offender to raise all constitutional and jurisdictional grounds for postconviction relief in his or her original, supplemental or amended motion. *See* ***id.***; *see also* ***Escalona-Naranjo***, 185 Wis. 2d at 185. If a convicted offender did not raise his or her grounds for postconviction relief in a prior postconviction proceeding, or if prior litigation resolved the offender's claims, they may not become the basis for a new postconviction motion under § 974.06 unless the offender demonstrates a sufficient reason for failing to allege or adequately raise the claims in the prior proceeding. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. A similar court-mandated rule governs a petition for a writ of *habeas corpus* filed in a postconviction setting. *See* ***State v. Pozo***, 2002 WI App 279, ¶9, 258 Wis. 2d 796, 654 N.W.2d 12. The writ is unavailable when the convicted offender could have raised his or her claims in a prior appeal but did not do so and does not offer a valid reason for that failure. ***Id.***

¶6 Here, King asserts that he did not bring his current claims in ***King I*** because his appointed postconviction counsel was ineffective for failing to raise

them. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (indicating that ineffective assistance of appointed counsel in postconviction proceeding may, in some circumstances, permit an additional postconviction proceeding). The State responds that the alleged ineffective assistance of King's postconviction counsel does not excuse King's own failure to bring his current claims when he pursued relief *pro se* in ***King II***.

¶7 King argues that he was not required to bring his current claims in the litigation underlying ***King II***. He contends that in ***King II*** he pursued sentence modification under the authority of WIS. STAT. § 973.13. That statute provides: "[i]n any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings." ***Id.*** King asserts that, because he relied on § 973.13 when he pursued relief in ***King II***, that litigation does not act as a bar to pursuing another set of postconviction claims. In support, he cites ***State v. Starks***, 2013 WI 69, 349 Wis. 2d 274, 833 N.W.2d 146. In ***Starks***, he says, the supreme court concluded that a sentence modification motion does not bar a later motion under WIS. STAT. § 974.06. *See* ***Starks***, 349 Wis. 2d 274, ¶49.

¶8 The State does not discuss King's argument that ***Starks*** permits his current litigation. Instead, the State addresses whether King's litigation is permitted by ***State v. Flowers***, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998). There, an offender filed three postconviction motions under WIS. STAT. § 974.06, then filed a fourth postconviction motion seeking a reduced sentence on the ground that the State had failed to prove the allegation that he was a repeat offender within the meaning of WIS. STAT. § 939.62. *See* ***Flowers***, 221 Wis. 2d at 22-25. We construed the offender's fourth postconviction motion as one filed

under WIS. STAT. § 973.13. ***Flowers***, 332 Wis. 2d at 26. We entertained the offender's claim, concluding that it warranted an exception to the procedural bar imposed by ***Escalona-Naranjo***. *See* ***Flowers***, 221 Wis. 2d at 30. As we subsequently emphasized, the exception recognized in ***Flowers*** is narrow and applies only when a convicted person seeks relief from a sentence on the ground that he or she has been wrongly sentenced as a repeat offender. *See* ***State v. Mikulance***, 2006 WI App 69, ¶¶13-14, 16, 291 Wis. 2d 494, 713 N.W.2d 160.

¶9 Both ***Starks*** and ***Flowers*** are inapplicable here. Each of those cases permits some sentence modification motions notwithstanding the procedural bar to serial litigation imposed by ***Escalona-Naranjo*** and its progeny. King claims that his current litigation fits within the ***Starks*** exception to the procedural bar because in ***King II*** he pursued sentence modification pursuant to WIS. STAT. § 973.13. He is wrong. The claim underlying ***King II*** was not a sentence modification motion pursuant to § 973.13, but rather, a claim cognizable under WIS. STAT. § 974.06.

¶10 The claim that King pursued in ***King II*** turned on a theory that the form of the verdict shows that he stands convicted of robbery. The judgment of conviction, however, reflects that King stands convicted of armed robbery, as alleged in count eleven of the information. Thus, King's claim in ***King II*** was really a constitutional attack on a defective verdict form. Indeed, King did not deny that the motion underlying ***King II*** raised a constitutional claim. To the

contrary, his reply brief in this court affirmatively asserted that he raised an issue "of a constitutional magnitude."[2]

¶11 Because King raised a constitutional claim in ***King II***, the State asked this court to bar his claim in that proceeding on the ground that he was pursuing a WIS. STAT. § 974.06 motion without stating a sufficient reason for serial litigation. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. We acknowledged the State's argument, but we elected to resolve King's request for relief on different grounds. *See* ***King II***, No. 2011AP319-CR, ¶3 n.2. Specifically, we concluded that King forfeited his claim when he failed to raise it at trial during the instruction and verdict conference. *See* ***id.***, ¶4.

¶12 Additionally, we relied on, *inter alia*, ***State v. Hansbrough***, 2011 WI App 79, ¶17, 334 Wis. 2d 237, 799 N.W.2d 887. *See* ***King II***, No. 2011AP319-CR, ¶¶5, 7. In ***Hansbrough***, we determined that failure to provide a jury with appropriate verdict forms is a constitutional error, but one subject to harmless error analysis. *See* ***id.***, 334 Wis. 2d 237, ¶¶10, 18 & n.2. Applying ***Hansbrough***, we concluded in ***King II*** that failure to include the word "armed" in the verdict form for count eleven was a harmless error and that King was properly convicted of armed robbery. *See* ***King II***, No. 2011AP319-CR, ¶7.

¶13 Because the claim in ***King II*** was a constitutional challenge to the procedure resulting in King's conviction for armed robbery, King could not use WIS. STAT. § 973.13 as the procedural mechanism for his litigation. *See*

[2] "Generally, a court may take judicial notice of its own records and proceedings for all proper purposes. This is particularly true when the records are part of an interrelated or connected case, especially where the issues, subject matter, or parties are the same or largely the same." ***Johnson v. Mielke***, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970).

Mikulance, 291 Wis. 2d 494, ¶19. Section 973.13 is not an available tool for pursuit of such claims. *See* ***Mikulance***, 291 Wis. 2d 494, ¶19. Rather, WIS. STAT. § 974.06 governed King's challenge.[3] *See* ***State v. Henley***, 2010 WI 97, ¶¶52-53, 328 Wis. 2d 544, 787 N.W.2d 350 (stating that § 974.06 is the primary mechanism for an incarcerated defendant to pursue postconviction relief on constitutional grounds).

¶14 The litigation in ***King II*** thus constitutes a procedural bar to the postconviction claims King raises now unless he presents a sufficient reason for failing to raise his current claims in that earlier proceeding. *See* ***Pozo***, 258 Wis. 2d 796, ¶9. He offers no reason, erroneously insisting instead that ***King II*** does not result in a procedural bar. Because King does not present a sufficient reason for serial litigation, his current claims are barred.[4]

By the Court.— Orders affirmed.

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

[3] Of course, the label that King selected for his first round of *pro se* litigation did not control the outcome of the proceedings in ***State v. King***, 2011AP319-CR, unpublished slip op. (WI App Mar. 20, 2012) (***King II***). We look beyond the label that a *pro se* prisoner applies to his or her litigation to determine if relief is warranted. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983).

[4] Because we conclude that King's current claims are barred, we do not reach his arguments that the errors he alleges entitle him to a judgment of acquittal rather than some other relief. *See* ***State v. Armstead***, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998) (we do not decide claims that depend on hypothetical facts).