COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP415
2014AP416
STATE OF WISCONSIN

Cir. Ct. Nos. 2008CF1591
2008CF2616

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE JAMES ANDERSON,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed*.

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

¶1 PER CURIAM. In these consolidated appeals, Jesse James Anderson, *pro se*, appeals the order denying his WIS. STAT. § 974.06 motion.[1] We affirm.

BACKGROUND

¶2 As set forth, in a prior opinion of this court:

> On July 15, 2008, Anderson entered pleas in two cases at a single hearing. In Milwaukee County Circuit Court case No. 2008CF1591, Anderson pled guilty to one count of possession with intent to deliver between fifteen and forty grams of cocaine as a second or subsequent offense and one count of possession of a firearm by a felon. A charge of possession with intent to deliver between 2500 and 10,000 grams of tetrahydrocannabinols (marijuana) was dismissed and read in. In Milwaukee Count Circuit Court case No. 2008CF2616, Anderson pled guilty to one count of second-degree recklessly endangering safe[t]y with use of a dangerous weapon, one count of possession of a firearm by a felon, and one count of felony bail jumping. On October 7, 2008, the circuit court imposed consecutive sentences totaling nineteen years' initial confinement and eleven years' extended supervision.

State ex rel. Anderson v. Humphreys, Nos. 2012AP29-W, 2012AP30-W, unpublished slip op. at 2 (WI App Sept. 25, 2012).

1. No-Merit Direct Appeal

¶3 Anderson's appointed postconviction/appellate lawyer moved for sentence modification based on assistance Anderson had given to police, but the motion was denied. The lawyer then filed a no-merit report to which Anderson

[1] Anderson appeals the denial of his WIS. STAT. § 974.06 motion, which was filed in both underlying cases and disposed of by the circuit court in both cases simultaneously. We ordered the appeals consolidated on March 17, 2014.

did not respond. We affirmed Anderson's conviction. *See* ***State v. Anderson***, Nos. 2010AP1680-CRNM, 2010AP1681-CRNM, unpublished slip op. (WI App Dec. 28, 2010). The Wisconsin Supreme Court denied Anderson's petition for review.

2. Knight petition [2]

¶4 Next, Anderson, *pro se*, filed a ***Knight*** petition. He argued that two errors occurred in the circuit court: (1) the State breached the plea agreement when it failed to make an agreed-upon sentencing recommendation; and (2) the circuit court failed to properly satisfy its plea-colloquy obligations because it did not ensure he understood the two elements of second-degree recklessly endangering safety. ***State ex rel. Anderson***, Nos. 2012AP29-W, 2012AP30-W, unpublished slip op. at 2-3. Anderson asserted that his appellate lawyer was ineffective for not raising these two issues in the no-merit report in order to bring them to this court's attention. *See* ***id.*** at 3.

¶5 After analyzing the merits of Anderson's claims, we concluded that appellate counsel could not be faulted "for failing to pursue these meritless issues." *See* ***id.*** at 4-6.

3. WISCONSIN STAT. § 974.06 motion

¶6 Nearly one year after we denied his ***Knight*** petition, Anderson, *pro se*, filed a WIS. STAT. § 974.06 motion alleging that his trial and postconviction lawyer gave him constitutionally deficient representation. He

[2] *See* ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

argued that his trial lawyer gave him deficient representation in two respects: (1) when he failed to object to the State's breach of the plea agreement; and (2) when he failed to object when the State provided inaccurate information at sentencing. Anderson argued that his postconviction lawyer gave him deficient representation when he failed to raise these issues in Anderson's initial postconviction motion.

¶7 The circuit court ultimately denied Anderson's motion. It concluded that Anderson was barred from raising the first claim because it was previously raised in his ***Knight*** petition and fully addressed by this court. The circuit court then concluded that Anderson's second claim lacked merit.

¶8 Anderson moved for reconsideration, and the circuit court denied that motion as well.

DISCUSSION

¶9 Anderson argues that the ***Knight*** petition he filed should not bar him from arguing that the State breached the plea agreement and that his trial and postconviction lawyers gave him deficient representation related to the breach. To clarify, it is not the previous act of filing a ***Knight*** petition that bars his claim, rather, it is Anderson's attempt to relitigate an issue that he previously raised and that this court fully addressed when it decided that petition. *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.").[3]

¶10 In his ***Knight*** petition, Anderson alleged that the State breached the plea agreement when it failed to make an agreed-upon sentencing recommendation. He claimed that his appellate lawyer gave him constitutionally deficient representation for not raising the issue in Anderson's no-merit appeal.

¶11 In concluding that this was a meritless issue, we explained that the State was not bound by the plea agreement to make any specific sentencing recommendation:

> Anderson did not enter a plea agreement in which the State agreed to make a specific recommendation. At the plea hearing on July 15, 2008, the State appeared by assistant district attorney Grant Huebner, who was filling in for

[3] We agree with the State's assessment that Anderson abandoned on appeal the second issue raised in his WIS. STAT. § 974.06 motion: that his trial lawyer gave him constitutionally deficient representation when he failed to object when the State provided inaccurate information at sentencing. In its decision, the circuit court addressed this claim *on its merits*:

> The defendant takes issue with the prosecutor's assessment of the manner in which the shooting occurred because he has another version of events. Based on the facts adduced by the State and the witnesses who would have testified, the court agreed with the State's assessment that the victims of the defendant's actions were retreating or running away at the time they were shot at. This does not constitute "inaccurate information." This is merely an interpretation of the facts as presented. The defendant has not set forth a reason for resentencing based on "inaccurate information."

Anderson submits that he has not abandoned this claim; rather, the appeal is not contesting the merits at this time and instead is challenging the circuit court's ruling that his claim was barred under ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991). As noted, however, the circuit court did not bar this claim under ***Witkowski***. If Anderson wanted to challenge the circuit court's decision addressing the merits, he should have briefed the issue. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues not briefed or argued on appeal are deemed abandoned).

> [assistant district attorney David] Robles. The agreement under which Anderson pled, the terms of which he acknowledged during the plea colloquy, called for both sides to be *free to argue* at sentencing. This "free-to-argue" term was memorialized on both plea questionnaire forms, which Anderson signed on July 14, 2008. Whatever alternate offers may have been made or contemplated prior to actual entry of the pleas and whatever confusion Robles may have expressed subsequent to the entry of Anderson's guilty pleas are irrelevant. It is clear that Anderson entered his pleas pursuant to an agreement that allowed the State to make any sentence recommendation it wanted. Anderson subsequently reaffirmed his understanding of the free-to-argue term at the sentencing hearing. The circuit court asked, "And Mr. Anderson, is it your understanding that both sides essentially can make whatever recommendation they see fit today to the court?" Anderson answered, "Yes." Thus, there was no basis for appellate counsel to raise a claim that the State violated the plea agreement.

State ex rel. Anderson, Nos. 2012AP29-W, 2012AP30-W, unpublished slip op. at 4-5.

¶12 In his WIS. STAT. § 974.06 motion, Anderson again alleged that the State breached the plea agreement when it failed to make an agreed-upon sentencing recommendation.

¶13 Anderson seeks to distinguish the claim made in in his ***Knight*** petition on the following basis: "[A]lthough Appellant may have touched on the plea agreement issue in the ***Knight*** petition, the petition was focused on appellate counsel's ineffectiveness specifically, not the plea agreement, post[]conviction counsel, and trial counsel's performance." This argument fails because, as the State succinctly points out, "[a]bsent a breach of the plea agreement by the State, Anderson's ineffective assistance of counsel claim fails regardless of whether the target is trial, postconviction, or appellate counsel."

¶14 Given that the issue of whether the State violated the plea agreement was previously addressed in our opinion resolving Anderson's ***Knight*** petition, the circuit court properly applied ***Witkowski*** in its decision denying Anderson's subsequent WIS. STAT. § 974.06 motion.

¶15 Anderson also claims that the circuit court improperly assumed that the no-merit procedure was followed when it stated in its order denying his WIS. STAT. § 974.06 motion: "Therefore, even if [Anderson] had filed a response to the no[-]merit report consisting of the two claims set forth in his 974.06 motion … there is not a reasonable probability the Court of Appeals would have reached any other conclusion." Contrary to Anderson's assertions, the circuit court did not refuse to examine the merits of his claims or deny his § 974.06 motion based on improper assumptions about the no-merit appeal process. As discussed above, the circuit court relied on ***Witkowski*** to bar Anderson's claim that the State breached the plea agreement. It simply appears to have been offering further support for its conclusion that denial was appropriate with its reference to the no-merit procedure.

¶16 Insofar as Anderson 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.—Order affirmed.

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