COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP344-CR **Cir. Ct. No. 2009CF5831**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL PHONISAY,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: FREDERICK C. ROSA, Judge. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 PER CURIAM. Paul Phonisay, *pro se*, appeals an order denying his motion for sentencing relief and an order denying reconsideration. We conclude that his claims are procedurally barred, and we affirm.

Background

¶2 Phonisay was one of three men who robbed the owners of a restaurant and burglarized the restaurant owners' home. Phonisay pled guilty to one count of robbery by use of force while using a dangerous weapon and one count of burglary, both as a party to a crime. The circuit court imposed consecutive sentences totaling fourteen years of initial confinement and five years of extended supervision. Phonisay pursued a no-merit appeal, and we affirmed. *See* ***State v. Phonisay*** (***Phonisay I***), No. 2011AP2589-CRNM, unpublished op. and order (WI App Sept. 21, 2012).

¶3 Phonisay next filed a series of *pro se* requests for sentencing relief: (1) a letter on January 18, 2013, seeking eligibility for prison treatment programs; (2) a motion on June 10, 2013, for concurrent instead of consecutive sentences; (3) another motion on June 10, 2013, seeking credit for presentence custody; (4) a motion on July 11, 2013, to reconsider the decisions denying his June 10, 2013 motions; (5) a letter on January 17, 2014, requesting clarification of the terms of his court-ordered financial obligations; (6) a motion on January 22, 2014, to vacate the DNA surcharge imposed at sentencing under WIS. STAT. § 973.046(1g) (2009-10);[1] and (7) a motion on May 13, 2014, for sentence modification alleging the existence of new factors. The circuit court denied each of his claims.[2]

[1] All subsequent references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Phonisay pursued an appeal of the orders denying his June 10, 2013 motions, but we dismissed the appeal when he failed to file his appellate brief. *See* ***State v. Phonisay*** (***Phonisay II***), No. 2013AP1549-CR, unpublished op. and order (WI App Dec. 12, 2013).

¶4 On January 4, 2016, Phonisay filed the first of the two motions underlying the instant appeal, again asserting that new factors warranted sentence modification. To support the claim, he alleged that the sentencing court "reli[ed] on inaccurate information," namely that: (1) he dined at the victim's restaurant prior to the robbery; and (2) the money found in his jacket pocket when he was arrested constituted robbery proceeds. The circuit court denied the motion, concluding it was procedurally barred. The circuit court next denied his motion to reconsider, and this appeal followed.

Discussion

¶5 "A new factor is one that was 'not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶57, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Phonisay's 2016 postconviction motion does not allege new factors within the meaning of ***Harbor***. At the time of sentencing, Phonisay plainly knew whether he had eaten at the victim's restaurant and whether the money found in his jacket pocket constituted his share of the robbery proceeds. Accordingly, he did not "unknowingly overlook" these facts. Therefore, they cannot serve as new factors warranting sentence modification, even if they were not known to the circuit court. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673 (information known to the defendant at the time of sentencing is not a new factor).

¶6 As the circuit court accurately determined, what Phonisay actually presented was not a new factor claim, but rather a claim that he was sentenced on the basis of inaccurate information. An allegation that alleges a violation of the

due process right to be sentenced on the basis of accurate information raises a constitutional claim. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. WISCONSIN STAT. § 974.06 is the mechanism for a convicted offender to bring constitutional claims after the time for a direct appeal has passed. *See* ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. Although Phonisay asserted that his postconviction motion was not filed under § 974.06, courts look beyond the label that a prisoner applies to pleadings to determine if he or she is entitled to relief. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). Phonisay's postconviction motion raised the kind of constitutional claim that is cognizable under § 974.06. Accordingly we turn to whether Phonisay may obtain relief under that statute.

¶7 Pursuit of claims under WIS. STAT. § 974.06 is limited by a well-settled rule: an issue that could have been raised on direct appeal or in a previous motion is barred absent a sufficient reason for not raising the issue in the earlier proceedings. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). In this case, Phonisay previously pursued a no-merit appeal in ***Phonisay I***. "A no-merit appeal clearly qualifies as a previous motion under § 974.06(4)." ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124. Before we apply the rule of ***Escalona-Naranjo*** to postconviction motions filed after a no-merit appeal, however, we "must consider whether the no-merit procedures (1) were followed; and (2) warrant sufficient confidence to apply the procedural bar." ***Allen***, 328 Wis. 2d 1, ¶62.

¶8 We have reviewed ***Phonisay I***. Our opinion reflects that we considered appellate counsel's no-merit report and independently reviewed the record as required by WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). We discussed the issues addressed by counsel, and we considered

whether any other issues might warrant relief. In short, we followed the procedure for no-merit appeals, warranting confidence in our conclusion that further proceedings would lack arguable merit. *See* ***Allen***, 328 Wis. 2d 1, ¶¶58, 81-82. Additionally, Phonisay did not respond to the no-merit report that his appellate counsel served upon him, *see* ***Phonisay I***, unpublished op. and order at 1, and the records of this court reflect that he did not ask us to reconsider our opinion after we released it.[3] A convicted person's failure to respond both to the no-merit report and to the opinion resolving the no-merit appeal "firms up the case for forfeiture of any issue that could have been raised." ***Allen***, 328 Wis. 2d 1, ¶72.

¶9 In his appellate briefs, Phonisay suggests that this court did not properly follow the no-merit procedures when resolving ***Phonisay I*** because we overlooked the claim he raises now. *See* ***State v. Fortier***, 2006 WI App 11, ¶27, 289 Wis. 2d 179, 709 N.W.2d 893. ***Fortier*** is inapposite. In that case, we concluded that the no-merit procedures were not followed because appellate counsel and this court failed to recognize an issue readily apparent from the record, namely, that the defendant had received an illegally enhanced sentence. *See* ***id.***, ¶¶9-10, 27. By contrast, this court did not "overlook" information about Phonisay's eating habits and financial resources that was known to Phonisay but that he did not reveal during the sentencing proceedings.

¶10 Were we to conclude, however, that the no-merit process was flawed—and we do not reach such a conclusion—we would nonetheless hold that

[3] "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).

Phonisay's current claim is barred absent a sufficient reason for serial litigation. Phonisay pursued a *pro se* postconviction motion raising a constitutional claim after his no-merit appeal was resolved. Specifically, his May 2014 motion included the assertion that he had the right "to be sentenced based upon accurate information." He went on to suggest he was denied that right because a police officer made statements at sentencing that were not supported by "independent credible evidence." To be sure, Phonisay asserted in the May 2014 motion that he sought relief based on new factors, but, because he actually raised a constitutional challenge to the accuracy of the sentencing information, WIS. STAT. § 974.06 was the mechanism that allowed pursuit of the claim. Accordingly, the 2014 proceeding independently constitutes a bar to Phonisay's current claim absent a sufficient reason for failing to raise the claim previously. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

¶11 We determine whether Phonisay offers a sufficient reason for serial litigation by examining the four corners of his postconviction motion. *See* ***Allen***, 328 Wis. 2d 1, ¶46. Our examination reveals that neither the postconviction motion nor the motion to reconsider states any reason, much less a sufficient reason, that Phonisay failed to raise his current claim in earlier proceedings.

¶12 In the reply brief that Phonisay filed in this court, he asserts that his limited English language skills impeded his ability to pursue his claims during the no-merit appeal. Specifically, he alleges he could read at only a seventh grade level when he entered the prison system following his convictions in 2010. Phonisay was required to present a sufficient reason for serial litigation in his circuit court motion, not in his appellate briefs. *See* ***id.*** Moreover, we do not consider arguments presented for the first time in a reply brief because opposing

counsel has no opportunity to address them.[4] *See* ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶28, 318 Wis. 2d 488, 770 N.W.2d 727.

¶13 "Defendants must, at the very minimum, allege a sufficient reason in their motions to overcome the ***Escalona-Naranjo*** bar." ***Allen***, 328 Wis. 2d 1, ¶46. When a defendant fails to identify and support a sufficient reason for serial litigation in the postconviction motion itself, "the circuit court should summarily deny the motion." *See* ***id.***, ¶91. The circuit court properly did so here. *See* ***id.***

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

[4] For the sake of completeness, we note with some interest that the 2010 presentence investigation report—filed well before Phonisay pursued a no-merit appeal—states his "score on the Slosson Oral Reading Test places him at a reading level above that of a high school graduate."