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

2018AP828

State of Wisconsin v. Javontai Vernell French
(L.C # 2013CF3364)

Before Lundsten, P.J., Sherman and Kloppenburg, 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).

Javontai French, pro se, appeals an order denying his postconviction motion filed pursuant to WIS. STAT. § 974.06 (2015-16).¹ Based upon our review of the briefs and record, we

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

conclude at conference that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21.

French was charged with three misdemeanors and two felonies. All of the charges included repeater provisions for habitual criminality. *See* WIS. STAT. § 939.62. French pled guilty to one count of misdemeanor criminal damage to property, as a repeater, and one count of strangulation/suffocation, also as a repeater. The remaining charges were dismissed but read in. On the count of criminal damage to property, the court imposed a six-month sentence, concurrent to French's sentence on the strangulation/suffocation count, for which he was sentenced to seven years of initial confinement and three years of extended supervision. The court utilized the repeater enhancer in fashioning French's sentence, as the sentence imposed exceeded the maximum penalty for strangulation/suffocation. *See* WIS. STAT. §§ 940.235(1) (classifying strangulation/suffocation as a Class H felony), 939.50(3)(h) (maximum imprisonment term for Class H felony is six years). French pursued postconviction relief, including the filing of two postconviction motions under WIS. STAT. RULE 809.30, both of which were granted, and a no-merit appeal, 2015AP676-CRNM. This appeal arises from a pro se motion for plea withdrawal filed by French under WIS. STAT. § 974.06. The circuit court denied the motion without an evidentiary hearing, and French now appeals.

On appeal, French argues that he is entitled to plea withdrawal because the circuit court failed to inform him during the plea colloquy of the effect of the read-in charges, and that his trial counsel was ineffective for failing to advise him on that issue. French also argues that his postconviction counsel was deficient for failing to raise a claim of ineffective assistance of trial counsel as to the read-in issue. All of these arguments are procedurally barred because French previously argued, in his response to the no-merit report filed in appeal number 2015AP676-

CRNM, that he was not advised that the read-ins could be used at sentencing. The opinion and order issued in the no-merit appeal states that this court conducted a full and independent review of the record and found only one issue of arguable merit, which was not related to the read-in issue.² French is procedurally barred from relitigating the issue of the read-ins, whether couched in terms of ineffective assistance of counsel or in terms of an alleged deficiency in the plea colloquy. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (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.”).

French also challenges the repeater enhancer that the circuit court imposed, arguing that he did not admit on the record to being a repeat offender, and that the State failed to prove that he was a repeat offender. WISCONSIN STAT. § 973.12(1) provides that a defendant may be sentenced as a repeater under WIS. STAT. § 939.62 if the defendant admits to the prior convictions alleged in the complaint, or if the State proves those convictions.

Here, the complaint alleged that, on or about October 21, 2008, French was convicted of second-degree recklessly endangering safety, a felony in violation of WIS. STAT. § 941.30(2). The crimes for which French was sentenced in the instant case were committed on or about July 20, 2013 and, thus, fell within the five-year period required to classify French as a repeater under WIS. STAT. § 939.62(2).

² The single issue of arguable merit identified by this court in appeal number 2015AP676-CRNM was the circuit court’s failure to establish the requisite facts to impose the domestic-abuse modifier and surcharge. This court rejected the no-merit report on the basis of that single issue. French then filed a postconviction motion challenging the domestic-abuse modifier and surcharge, and the court granted his motion.

During the plea colloquy, the circuit court drew French's attention to the fact that he was charged as a repeater. The transcript of the colloquy reads as follows:

THE COURT: Mr. French, you are charged with criminal damage to property as a repeater and strangulation and/or suffocation as a repeater from July 20th of last year at 9764 West Lisbon Avenue.

In the criminal damage to property, it says you intentionally damaged the property of a victim initials RNW without that person's consent. You're charged as a repeater which means the penalty of nine months otherwise is increased by not more than two years. What's your plea to that charge?

THE DEFENDANT: Guilty.

THE COURT: You are also charged in count four with strangulation and suffocation. It's alleged on or about July 20th, 2013, 4112 North 21st Street, Milwaukee, Milwaukee County, you did intentionally impede the normal breathing of RNW, that's the victim, by applying pressure to the neck or throat of that person contrary to Wisconsin Statutes.

That's a class H felony punishable by up to six years in prison. You add the repeater and that's an additional four years. You are facing ten years on that offense. What's your plea to that offense?

THE DEFENDANT: Guilty.

The State argues that, under the circumstances, French's guilty pleas were sufficient to support the repeater enhancer, citing *State v. Rachwal*, 159 Wis. 2d 494, 465 N.W.2d 490 (1991). In *Rachwal*, 159 Wis. 2d at 509, the supreme court concluded that the defendant had made an affirmative, direct, and specific admission of prior convictions, where the circuit court expressly drew the defendant's attention to the repeater nature of the charge and to the fact that the possible penalties could be enhanced under the repeater statute as a result of the defendant's plea.

French did not file a reply brief in this case and, therefore, the State's assertion that French's guilty pleas were sufficient to support the repeater enhancer is deemed admitted. *See*

Schlieper v. DNR, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (a proposition asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted).

In light of all of the above, we are satisfied that the circuit court properly denied French's postconviction motion without a hearing.

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals