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DISTRICT I

January 3, 2019

To:

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

2018AP635-CR

State of Wisconsin v. Nucarlreo Lamar White, Sr.
(L.C. # 2014CF2277)

Before Brennan, Brash and Dugan, 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).

Nucarlreo Lamar White, Sr., *pro se*, appeals from orders denying his motions to vacate a \$250 DNA surcharge and to modify his sentence based on his asthma diagnosis. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for

summary disposition. *See* WIS. STAT. RULE 809.21(1) (2015-16).¹ We conclude that White's motions are procedurally barred and, on that basis, we summarily affirm the orders.

In April 2015, White pled guilty to second-degree recklessly endangering safety and being a felon in possession of a firearm. The trial court sentenced him to a total of five years of initial confinement and five years of extended supervision.² The trial court found White eligible for the Challenge Incarceration Program (CIP), but it explicitly declined to make him eligible for the Substance Abuse Program (SAP). It also imposed two mandatory DNA surcharges. *See* WIS. STAT. § 973.046(1r)(a) (requiring imposition of \$250 DNA surcharge for each felony conviction where sentence is imposed after January 1, 2014); *see also State v. Cox*, 2018 WI 67, ¶¶1, 6, 382 Wis. 2d 338, 913 N.W.2d 780 (stating that trial courts lack discretion to waive imposition of DNA analysis surcharges for crimes committed after January 1, 2014). White did not appeal his convictions.

In May 2016, White filed a *pro se* motion seeking “to amend or modify [the] judgment of conviction.” (Capitalization omitted.) His motion indicated that the Department of Corrections (DOC) had determined that White suffers from asthma and is therefore not able to participate in the CIP. The motion said that the DOC had further determined that White was in need of alcohol and other drug abuse treatment. Therefore, White asked the trial court to declare him eligible for

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

² The Honorable Dennis P. Moroney sentenced White.

the SAP. On May 10, 2016, the trial court denied the motion in a written order.³ White did not appeal.

In August 2016, White filed a *pro se* motion seeking, in the words of the trial court, “to amend his judgment of conviction to suspend payment of his financial obligations until he is released on extended supervision and to vacate one of the two DNA surcharges imposed.” On August 9, 2016, the trial court denied the motion in a written order. White did not appeal.

In January 2018, White filed a *pro se* petition to modify his sentence, asserting that he has “an extraordinary health condition” that justifies modification. White attached copies of a report and a letter from two health care providers discussing White’s asthma problems. On January 23, 2018, the trial court denied the motion in a written order.⁴ White did not appeal.

In March 2018, White filed a *pro se* motion seeking to vacate one of his DNA surcharges and refund \$250 that was already collected from him for that surcharge. On March 5, 2018, the trial court denied the motion in a written order, noting that the surcharge is mandatory for each felony. White appeals from that order.

Also in March 2018, White filed a *pro se* motion seeking to modify his sentence. His motion discusses his asthma condition and the fact that although he was declared eligible for the CIP, he is not allowed to participate due to his asthma. Attached to the motion were copies of the same two documents from health care providers that White submitted in January 2018, as

³ The Honorable Frederick C. Rosa denied the May 2016 and August 2016 motions.

⁴ The Honorable Joseph Wall denied the January 2018 and March 2018 motions.

well as additional documentation about White's attempts to participate in the CIP. On March 11, 2018, the trial court denied the motion in a written order. White appeals from that order.

On appeal, the State argues that White is procedurally barred from seeking to modify his sentence or vacate one DNA surcharge because those issues were adjudicated in prior postconviction proceedings. We agree. A matter once litigated may not be subsequently relitigated "no matter how artfully the defendant may rephrase the issue." *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). White challenged his DNA surcharge in 2016 and chose not to appeal. Similarly, in 2016 and early 2018 he unsuccessfully sought sentence modification on grounds that his asthma diagnosis made him ineligible to participate in the CIP. Both times, White chose not to appeal the orders denying his motions. His March 2018 motions alleging the same issues are procedurally barred. *See id.* On that basis, we affirm the orders denying White's March 2018 postconviction motions.

IT IS ORDERED that the orders of the trial court are 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