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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

February 24, 2020

To:

Hon. Jeffrey A. Wagner
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
821 W. State Street, Room 114
Milwaukee, WI 53233

Timothy M. Steel 397389
New Lisbon Correctional Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

Hannah Schieber Jurss
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2019AP713 State of Wisconsin v. Timothy M. Steel (L.C. # 2000CF2799)

Before Brash, P.J., Fitzpatrick and Donald, 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).

Timothy M. Steel, *pro se*, appeals from an order denying the postconviction motion he brought pursuant to WIS. STAT. § 974.06 (2017-18).[1] He also appeals from an order denying his motion for reconsideration. Based upon our review of the briefs and record, we conclude at

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We conclude that Steel's § 974.06 motion is procedurally barred. Therefore, we summarily affirm.

In 2000, Steel entered a plea agreement with the State pursuant to which he pled guilty to felony murder as a party to a crime with the underlying crime of armed robbery. *See* WIS. STAT. §§ 940.03, 939.05, and 943.32(1)(b) and (2) (1999-00). He was sentenced to thirty-seven years of initial confinement and twenty years of extended supervision. His appellate counsel filed a no-merit appeal, and we affirmed his conviction. *See* ***State v. Steel***, No. 2001AP2297-CRNM, unpublished op. and order (WI App Jan. 16, 2002).

Fifteen years later, in April 2017, Steel filed a *pro se* postconviction motion seeking to void the excess portion of his sentence, citing WIS. STAT. § 973.13 ("In 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."). The trial court denied the motion. Steel did not appeal. Instead, in November 2017, Steel filed another motion to void the excess portion of his sentence, adding references to additional case law. The trial court again denied the motion. Steel appealed. We affirmed, concluding that "the term of initial confinement imposed did not exceed the maximum allowed by law." *See* ***State v. Steel***, No. 2017AP2470-CR, unpublished op. and order at 5 (WI App Dec. 18, 2018).

In March 2019, Steel filed the *pro se* WIS. STAT. § 974.06 motion for postconviction relief that is the subject of this appeal. He argued that he should be allowed to withdraw his guilty plea because at the plea hearing, the trial court: (1) erroneously informed him that the maximum

sentence was sixty years, when it was actually eighty years;[2] and (2) failed to "inform Steel of the nature of the felony murder charge" and "ensure that he understood the elements of that crime." Steel further asserted that his postconviction/appellate counsel provided ineffective assistance by failing to identify these issues.

The trial court denied Steel's motion in a written order. The trial court said that Steel's motion was procedurally barred because he failed to raise the issues in response to the no-merit report. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994); ***State v. Tillman***, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574. The trial court also said that the issues "are completely without merit and do not warrant relief of any kind."

Steel filed a motion for reconsideration. The trial court denied the motion, adding an additional reason why Steel's motion was procedurally barred: "[T]here is no reason why he could not have raised the current issue in his former motions seeking to void an excessive sentence which were filed in 2017 (and which were appealed)." This appeal follows.

This appeal requires us to determine whether Steel's WIS. STAT. § 974.06 motion seeking plea withdrawal is procedurally barred. This presents "a question of law that we review *de novo*." ***State v. Allen***, 2010 WI 89, ¶15, 328 Wis. 2d 1, 786 N.W.2d 124. Under ***Escalona-Naranjo*** and its progeny, "claims that could have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of

[2] Steel's motion noted that the criminal complaint also indicated that the maximum penalty was sixty years rather than eighty years.

a sufficient reason for why the claims were not raised on direct appeal or in a previous § 974.06 motion." *See* ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756.

Steel asserts that his motion is not procedurally barred. He argues that his postconviction/appellate counsel and this court failed to identify two flaws in the plea colloquy and, therefore, the no-merit procedures were not followed. *See* ***Tillman***, 281 Wis. 2d 157, ¶20 (holding that courts deciding whether to apply ***Escalona-Naranjo***'s procedural bar "must pay close attention to whether the no merit procedures were in fact followed" and "must consider whether that procedure, even if followed, carries a sufficient degree of confidence warranting the application of the procedural bar under the particular facts and circumstances of the case"); *see also* ***Allen***, 328 Wis. 2d 1, ¶62.

Steel also asserts, without references to case law, that the trial court was wrong to suggest that he "could have raised the current issue[s] in his former motion seeking to void an excessive sentence." Steel argues that his 2017 motions were brought pursuant to WIS. STAT. § 973.13 and that that statute "is not the proper avenue to seek plea withdrawal."

In response, the State argues that Steel's allegation that he lacked an understanding of the nature of the offense is procedurally barred because he did not raise the issue in a response to the no-merit report. Second, the State argues that the same allegation, as well as Steel's allegation that he did not know the correct maximum sentence for the crime, are procedurally barred because he failed to raise them in his 2017 postconviction motions when he sought to void an excessive sentence. Because we conclude that the State's second argument is dispositive, we do not address whether Steel should have raised his concerns in a response to the no-merit report.

The State asserts that the two 2017 postconviction motions "constituted prior [WIS. STAT. §] 974.06 motions." In support, the State points to language in ***State v. Flowers***, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998), where the court referred to a motion to vacate the enhanced portion of a sentence under WIS. STAT. § 973.13 as the defendant's "fourth § 974.06, STATS., postconviction motion." *See* ***Flowers***, 221 Wis. 2d at 26. The State argues that Steel's current § 974.06 motion is barred by ***Escalona-Naranjo*** because he "offered no reason whatsoever to explain why he did not raise his plea withdrawal claims in his earlier [§] 974.06 postconviction motions."

Further, although the State agrees with Steel that plea withdrawal would not be the remedy for the excessive sentence claim that Steel raised in his 2017 postconviction motions, the State adds:

> [T]hat does not in turn mean Steel could not have advanced additional unrelated claims for separate relief in those same postconviction motions. Put differently, his collateral postconviction motions seeking commuted sentences under § 973.13 *were* § 974.06 motions. Those § 974.06 motions could have just as easily been motions seeking *both* plea withdrawal and reduced sentences under § 973.13. Indeed, § 974.06 itself specifically commands that a defendant raise "[a]ll grounds for relief "available to a person under this section ... in his or her original, supplemental or amended motion." [*See*] § 974.06(4). Steel has failed to offer any sufficient reason to explain why his plea withdrawal claims were not so raised.

(Section symbols inserted in place of the word section.)

Steel's reply brief does not address the State's assertion that the excessive sentence motions that he brought in 2017 *were* WIS. STAT. § 974.06 motions. Further, his reply brief does not address the State's argument that Steel could have raised his plea withdrawal claim at the same time he raised his excessive sentence claim. The State's arguments are therefore deemed admitted.

See ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (holding that we may take as a concession the failure to refute a proposition asserted in a response brief in a reply brief).

We conclude that Steel's WIS. STAT. § 974.06 motion is procedurally barred. He did not assert, much less demonstrate, "a sufficient reason for why the claims were not raised … in a previous § 974.06 motion." *See* ***Lo***, 264 Wis. 2d 1, ¶44.

Because we conclude that Steel's WIS. STAT. § 974.06 motion is procedurally barred, we do not address the State's alternative arguments, such as its assertion that the motion was deficient because it failed to affirmatively allege that Steel was unaware that the maximum sentence was eighty years rather than sixty years and further failed to identify which elements of the crime Steel alleges he did not understand. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (holding that "cases should be decided on the narrowest possible ground").

IT IS ORDERED that the orders are summarily affirmed. *See* 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