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DISTRICT IV

July 16, 2020

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

2019AP616-CR

State of Wisconsin v. Michael Solomon (L.C. # 1993CF2106)

Before Fitzpatrick, P.J., Graham, and Nashold, 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).

Michael Solomon appeals circuit court orders denying his motion for sentence modification and his motion for reconsideration. After reviewing the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We summarily affirm.

Solomon was convicted in 1994 of four counts of sexual assault and one count of attempted sexual assault, for which he was sentenced to a total of 80 years of imprisonment and 30 years of probation. In 1995, Solomon filed a postconviction motion for plea withdrawal, alleging ineffective assistance of trial counsel. Solomon later withdrew his motion. Over the following 20 years, Solomon filed numerous motions seeking plea withdrawal, sentence modification, and other relief. The circuit court's denial of these motions led to multiple appeals. In each of Solomon's appeals, this court either affirmed the decision of the circuit court or dismissed the appeal.² This court also denied two petitions for writ of habeas corpus filed by Solomon.³

In July of 2018, Solomon filed a postconviction motion seeking sentencing clarification and modification. The motion alleged that his sentence was the result of an abuse of discretion, that the sentencing judge exhibited bias, and that his trial counsel failed to notify the court that Solomon was under the influence of drugs at the time of the assaults, which Solomon argued constituted a new factor entitling him to sentence modification. The circuit court denied the motion on the basis that all of his claims were procedurally barred under *State v. Escalona-*

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

² *See* Appeal Nos. 1999AP964, 2001AP2382, 2002AP800, 2005AP2076, 2007AP436-CR, and 2014AP247.

³ *See* Appeal Nos. 1998AP2435-W and 2001AP3491-W.

Naranjo, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Solomon filed a motion for reconsideration, which also was denied. He now appeals.

Solomon argues that the circuit court erred when it concluded that his motion was procedurally barred. *Escalona-Naranjo* provides that an issue which could have been raised on direct appeal or in a motion under WIS. STAT. § 974.02 cannot be the basis for a subsequent postconviction motion under § 974.06, unless there was a sufficient reason for failing to raise the issue earlier. *Escalona-Naranjo*, 185 Wis. 2d at 185. Solomon contends that his motion is one seeking sentence modification and clarification and, therefore, should not be subject to the procedural bar on motions under § 974.06(4). However, a closer look at the substance of his claims leads us to conclude that they are, indeed, procedurally barred.

Solomon's claim of judicial bias at sentencing amounts to a constitutional claim implicating his due process rights. *See, e.g., State v. Gudgeon*, 2006 WI App 143, ¶24, 295 Wis. 2d 189, 720 N.W.2d 114. Solomon's allegation that his trial counsel knew, but failed to inform the court, that Solomon was under the influence of drugs at the time of the assaults is likewise a constitutional argument, rooted in the right to the effective assistance of counsel. *See* U.S. CONST. amend. VI; WIS. CONST. art. I, § 7.

WISCONSIN STAT. § 974.06(4) does not preclude a defendant from raising “an issue of constitutional dimension which *for sufficient reason* was not asserted or was inadequately raised in his original, supplemental or amended postconviction motions.” *Escalona-Naranjo*, 185 Wis. 2d. at 184 (emphasis added). Here, however, the State asserts that Solomon has not provided any reason, much less a sufficient one, for failing to raise his current claims on direct appeal or in one of his previous postconviction motions. Solomon did not file a reply brief and, therefore, the

State's assertion on this point 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). Given the absence of a sufficient reason for Solomon's failure to raise in his previous motions the constitutional issues he now argues, we affirm the circuit court's ruling that the issues are procedurally barred.

The only issue discussed in Solomon's brief that is not constitutional in nature is his argument that he is entitled to clarification of his sentence because of a change in parole policy for offenders sentenced before Truth-In-Sentencing (TIS). However, the record reflects that Solomon pursued a claim related to this change in policy in 2010. The circuit court rejected the argument at that time, and Solomon did not appeal. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding 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).

Having concluded that the circuit court properly denied Solomon's motion without a hearing, on the basis that all of his claims were procedurally barred, we likewise affirm the circuit court's denial of Solomon's motion for reconsideration.

IT IS ORDERED that the orders are summarily affirmed under WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals