COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1190 **Cir. Ct. No. 2001CF6741**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK D. BROWN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Derrick D. Brown, *pro se*, appeals a circuit court order denying his WIS. STAT. § 974.06 (2007-08)[1] motion as both procedurally

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

barred and lacking merit. Brown asserts that WIS. STAT. § 973.15(2) (1979-80) prohibits his sentences in this case from running consecutive to an earlier sentence. We agree with the circuit court that the motion is procedurally barred, and we affirm the order.

¶2 In the underlying matter, Brown was charged with two counts of burglary. He pled guilty and on December 19, 2002, he was sentenced to two years' initial confinement and two years' extended supervision on each count. The sentences were set to run consecutively to each other and to any other sentence, including a sentence of seven years' initial confinement and ten years' extended supervision that Brown had received on December 17, 2002.[2]

¶3 Brown pursued postconviction relief in the present case. A no-merit appeal was filed on his behalf and the no-merit report addressed, in relevant part, the circuit court's sentencing discretion. Brown filed a response to the no-merit report, but evidently did not challenge the consecutive nature of his sentences.[3] This court summarily affirmed the judgment of conviction. *See* ***State v. Brown***, No. 2003AP2437-CRNM, unpublished slip op. (WI App Dec. 30, 2004).

[2] Brown tells us that he was sentenced on December 17, 2002, in Milwaukee County case No. 2001CF6659. Electronic docket entries indicate that Brown was convicted of three counts of armed robbery with the threat of force, as party to a crime, for each of which he received seven years' initial confinement and ten years' extended supervision, to be served concurrently.

[3] Neither the no-merit report nor Brown's response is in the record. Brown included a copy of the no-merit report in his appendix, although normally a party may not use an appendix to supplement the record. *See* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989).

¶4 On June 20, 2005, Brown moved for sentence modification.[4] He argued that under ***Bruneau v. State***, 77 Wis. 2d 166, 252 N.W.2d 347 (1977), his sentence in this case could not run consecutive to the sentence he received on December 17, 2002, because, at the time of sentencing in this case, he had not begun to serve the earlier sentence. The circuit court rejected the request for sentence modification, noting that the statute on which ***Bruneau***'s holding was based, WIS. STAT. § 973.15(2) (1975), had subsequently been amended, so ***Bruneau***'s statutory interpretation was no longer on point. The court observed that, as amended, § 973.15(2)(a) (2001-02)[5] permitted Brown's sentence in this case to run consecutive to his earlier sentence. Brown did not appeal.

¶5 On January 27, 2009, Brown filed a new motion for sentence modification, which the circuit court interpreted as claiming consecutive sentences were unduly harsh. The court rejected the motion because Brown had not set forth a new factor to justify sentence modification, nor was the motion timely under WIS. STAT. § 973.19 or WIS. STAT. RULE 809.30. Brown did not appeal.

¶6 On April 3, 2009, Brown filed a motion for postconviction relief under WIS. STAT. § 974.06, claiming his sentence was illegal based on ***State v. Zollicoffer***[6] and WIS. STAT. § 973.15(2) (1979-80). The circuit court denied the motion as procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168,

[4] It appears that this may have been a WIS. STAT. § 974.06 motion.

[5] WISCONSIN STAT. § 973.15(2)(a) (2001-02) provides that, with limited statutory exceptions not applicable here, "the court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously."

[6] *See* ***State v. Zollicoffer***, Nos. 1981AP2173 & 1981AP2174, unpublished slip ops. (July 28, 1992).

517 N.W.2d 157 (1994), and ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. The court also denied the motion as meritless. Brown appeals.

¶7 On appeal, Brown asserts that his sentence violates WIS. STAT. § 973.15(2), and he argues that he is not precluded from raising this argument because both appellate counsel and this court failed to notice and address the issue during the no-merit process. *See* ***State v. Fortier***, 2006 WI App 11, ¶27, 289 Wis. 2d 179, 709 N.W.2d 893. Even if ***Fortier*** applied, however, Brown's motion remains procedurally barred.

¶8 "It is well-settled that a defendant must raise all grounds for relief in his or her original, supplemental or amended motion for postconviction relief." ***Id.***, ¶16; *see also* WIS. STAT. § 974.06 and ***Escalona***, 185 Wis. 2d at 181. "If a defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a new postconviction motion, unless there is a 'sufficient reason' for the failure to allege or adequately raise the issue in the original motion." ***Fortier***, 289 Wis. 2d 179, ¶16.

¶9 A prior no-merit appeal "may serve as a procedural bar to a subsequent postconviction motion … which raises the same issues or other issues that could have been previously raised." ***Tillman***, 281 Wis. 2d 157, ¶27. Because Brown had a chance to raise his sentencing complaints in his no-merit response, the circuit court appropriately invoked the ***Tillman*** bar against him.

¶10 Brown is correct that ***Tillman*** may not always apply. When a "joint breakdown in the process" leads to the no-merit process not being followed, we do not necessarily apply the ***Tillman*** bar to a subsequent postconviction motion. *See* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶16, 314 Wis. 2d 112,

758 N.W.2d 806; ***Fortier***, 289 Wis. 2d 179, ¶27. Here, however, even if the ***Fortier*** exception applied and the ***Tillman*** bar could not be invoked based on Brown's failure to challenge his sentencing in the 2004 no-merit response, ***Escalona*** and WIS. STAT. § 974.06 would still bar Brown's current claims.

¶11 Brown's current claim of an illegal sentence is the same claim that was raised in his 2005 motion and rejected, on its merits, by the circuit court.[7] Brown cannot re-raise an issue that has already been adjudicated. WIS. STAT. § 974.06(4); ***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.").

¶12 Even if the current motion does not raise an issue identical to what was already adjudicated in the 2005 motion, Brown does not set forth any reason, much less a "sufficient reason," to explain why his current claims were not raised in either the 2005 motion or the first 2009 motion. *See* ***Fortier***, 289 Wis. 2d 179, ¶16. The ***Escalona***/WIS. STAT. § 974.06 bar thus applies against the current motion, even if ***Tillman***'s procedural bar does not.[8]

[7] For some reason, the State makes no mention of this 2005 motion in its brief.

[8] In addition, there is no merit to Brown's current complaint. Aside from the fact that ***Zollicoffer*** is unpublished and therefore of no precedential value, *see* WIS. STAT. RULE 809.23(3), that case as well as ***Bruneau v. State***, 77 Wis. 2d 166, 252 N.W.2d 347 (1977) (upon which the postconviction decision in ***Zollicoffer*** was based), both dealt with consecutive sentences in relation to versions of WIS. STAT. § 973.15 in effect prior to 1980. Subsequent amendments to the statute have changed the language in such a way that ***Bruneau***'s holding has effectively been abrogated.

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.