COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP918 **Cir. Ct. No. 2001CF7006**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS L. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Thomas Anderson appeals an order denying his motion for postconviction relief from a judgment of conviction that was previously affirmed on a no-merit appeal. Anderson raises nine issues, seven of

which we conclude are procedurally barred and two of which we reject on their merits. Accordingly, we affirm the order of the circuit court.

BACKGROUND

¶2 In Milwaukee County Case No. 2001CF3864, the State charged Anderson with second-degree recklessly endangering safety, while armed, based upon allegations that he had fired multiple shots into a pickup truck, grazing one of the occupants. In Milwaukee County Case No. 2001CF7006, the State charged Anderson with eleven counts stemming from his participation in a home invasion.

¶3 Anderson eventually entered guilty pleas to the reckless endangerment count in the first case, and to two armed robbery charges, one sexual assault charge, and a reckless endangerment charge in the second case. In exchange for the pleas, the State dismissed the remaining seven charges and a number of penalty enhancers, and agreed not to make a specific sentencing recommendation.

¶4 Anderson subsequently filed an appeal under the no-merit procedures set forth in WIS. STAT. RULE 809.32 (2011-12).[1] After appellate counsel filed a no-merit report that addressed the validity of the pleas and sentences, Anderson filed a response with the assistance from another inmate claiming that there was not probable cause to support the bindover; the State improperly added charges to the information without a preliminary hearing; some of the charges were multiplicitous; the State breached the plea agreement with

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

respect to its sentencing recommendation; trial counsel provided ineffective assistance by not challenging the bindover and information, not challenging an eyewitness identification, pressuring Anderson to accept the plea offer, and failing to object to the breach of the plea agreement; and Anderson's pleas were unknowingly entered because he was unaware of the potential challenges to the case against him. Upon independently reviewing the record, as well as the no-merit report and Anderson's response, this court affirmed the conviction.

¶5 Anderson then filed a postconviction motion under WIS. STAT. § 974.06, seeking to withdraw his pleas and raising multiple claims of ineffective assistance of counsel. The circuit court denied the motion without a hearing and Anderson appeals. We will set forth additional facts relevant to each of the issues raised on appeal as necessary in our discussion below.

STANDARD OF REVIEW

¶6 In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. In the context of a claim of ineffective assistance of counsel, that means the facts alleged would, if true, establish both that counsel provided deficient performance and that the defendant was prejudiced by that performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. No hearing is required, though, when the defendant presents only conclusory allegations or when the record conclusively demonstrates that the defendant is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Non-conclusory allegations should present the "who, what, where, when, why, and how" with

sufficient particularity for the court to meaningfully assess the claim. ***Allen***, 274 Wis. 2d 568, ¶23.

¶7 We review a circuit court's decision to deny a postconviction motion without an evidentiary hearing under the de novo standard, independently determining whether the facts alleged would establish the denial of a constitutional right. *See* ***State v. Bentley***, 201 Wis. 2d 303, 308, 548 N.W.2d 50 (1996). As part of that review, we will independently determine whether the record demonstrates that claims are procedurally barred. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

DISCUSSION

¶8 Anderson raises the following claims on this appeal: (1) trial counsel provided ineffective assistance by not challenging a witness identification; (2) Anderson's pleas were not knowingly entered because he suffers from a learning disability and did not understand that he could chose to enter a plea in one case but not another; (3) the preliminary hearing was not properly adjourned; (4) the preliminary hearing was not properly waived; (5) trial counsel provided ineffective assistance at the adjournment hearing; (6) there was insufficient evidence to support the convictions; (7) the circuit court relied upon inaccurate information at sentencing; (8) trial counsel provided ineffective assistance with regard to a restitution order; and (9) trial counsel provided ineffective assistance by pressuring Anderson to accept the plea bargain and providing him misinformation about the nature of the plea bargain and the need to register as a sex offender.

¶9 Anderson's first claim regarding the eyewitness identification is clearly based upon the same argument that he raised in his response to the no-

merit report on his prior appeal, and was explicitly rejected by this court. Issues that have already been considered on direct appeal cannot be raised in a subsequent motion for relief under WIS. STAT. § 974.06. *See* ***State v. Rohl***, 104 Wis. 2d 77, 96, 310 N.W.2d 631 (Ct. App. 1981).

¶10 In Anderson's second and ninth claims, he has expanded upon issues raised on his prior appeal, going into considerably more detail about how he believes trial counsel pressured him into entering the pleas, what it was that he misunderstood, and how his learning disability affected his understanding of the process. Nonetheless, Anderson's claims are still, at their core, plea withdrawal issues that were before this court as part of the no-merit proceeding. An appellant may not relitigate matters previously decided, no matter how artfully rephrased. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Because our order deciding Anderson's prior appeal determined that his pleas were valid, Anderson is now merely "attempt[ing] to rephrase or re-theorize his previously-litigated" claims that the pleas were unknowingly and involuntarily entered. *See* ***id.*** at 992.

¶11 Anderson's third, fourth, and fifth claims all relate to the lack of a preliminary hearing, and trial counsel's role in first postponing and then waiving it. Aside from any overlap these claims may also have with arguments presented in Anderson's response to the no-merit report, the entry of a guilty plea operates to waive all defenses and non-jurisdictional defects, including constitutional errors, that occurred prior to the plea. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. To the extent that Anderson attempts to bootstrap some of his arguments on these issues into additional reasons why his plea was invalid, the same reasoning discussed above applies. Therefore, all of the claims relating to the preliminary hearing are also procedurally barred.

¶12 Anderson's sixth claim is that there was insufficient evidence in the record to prove him guilty beyond a reasonable doubt. However, by entering a plea Anderson waived his right to trial and thereby relieved the State of its burden to prove the charges beyond a reasonable doubt. Instead, the only factual basis required was that necessary for the circuit court to satisfy itself that the conduct Anderson was acknowledging actually constituted the crimes charged. *See* ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Moreover, this court's determination that the pleas were valid also included the premise that there was a sufficient factual basis set forth in the complaint to support the court's acceptance of those pleas. Therefore, Anderson's attempt to challenge the sufficiency of the evidence is barred as well.

¶13 Anderson's seventh and eighth claims—that he was sentenced based upon inaccurate information and that he lacked the ability to pay the restitution award—were not explicitly addressed in the no-merit proceeding and were not waived by entry of his pleas. The State contends that these claims are nonetheless barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¶14 ***Escalona-Naranjo*** holds that an issue that *could* have been raised on a prior direct appeal cannot be the basis for a subsequent postconviction motion under WIS. STAT. § 974.06 unless the defendant demonstrates a sufficient reason for failing to raise the issue earlier. ***Id.*** at 185. The procedural bar of ***Escalona-Naranjo*** may be applied to a defendant whose direct appeal was addressed under the no-merit procedures set forth in WIS. STAT. RULE 809.32, so long as the no-merit procedures were in fact followed and the record demonstrates a sufficient degree of confidence in the result. ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574.

¶15 We are satisfied that the proper no-merit procedures were followed on Anderson's prior appeal. Anderson was afforded the opportunity to submit a response to appellate counsel's no-merit report, and did so. This court then engaged in an independent review of the record before affirming the convictions. Nothing in our current review of the record undermines our confidence in our evaluation of the issues that were before us at that time. Therefore, the opinion deciding the no-merit appeal is conclusive on all issues that could have been raised therein absent a showing of a sufficient reason for the omission.

¶16 Anderson asserts that his learning disabilities and reliance upon a "fellow inmate" provide a sufficient reason why he could not have raised his claims of inaccurate sentencing information and excessive restitution in his response to appellate counsel's no-merit report. We are skeptical of that assertion, given that both claims are based upon basic factual information that was in Anderson's possession, rather than complex legal theories. Nonetheless, we will assume for the sake of argument that Anderson's cognitive difficulties excuse his failure to previously raise these two issues. Anderson still has not persuaded this court, however, that he was entitled to a hearing on either claim.

¶17 The sentencing information that Anderson claims was inaccurate was a statement in the PSI that a witness heard Anderson laughing while saying to a co-defendant on the rape charge, "after you get what you want, shoot that bitch." Anderson denies having made that comment and argues that, "it was arbitrary for the court to put major stock in an empty statement that Collins never made to anyone until it came time for Anderson to be sentenced, thus [implying] that it was made in an attempt to get Anderson a long sentence." However, neither the fact that Anderson disputes having made the comment, nor the fact that the comment

was first relayed to the court in the PSI means that the sentencing information was inaccurate.

¶18 First of all, Anderson has not alleged that the witness has recanted or disputed having heard Anderson's comment. Therefore, there is no reason to believe that the PSI contained anything but an accurate report of the witness's statement. Moreover, it is one of the functions of the PSI to flush out additional details of the crimes of conviction from anyone with information to relate. Thus, circuit courts are frequently faced at sentencing with assertions being related to the court for the first time by victims or other witnesses that are disputed by a defendant. We have no reason to conclude that the circuit court here overemphasized or misused this particular allegation. In sum, the circuit court's decision to give credit to a disputed witness's account set forth in the PSI is a matter of credibility and the weighing of competing inferences, not a question of inaccurate sentencing information.

¶19 Finally, Anderson contends that trial counsel provided ineffective assistance by failing to object to the amount of restitution and to request a hearing on Anderson's ability to pay. *See* WIS. STAT. § 973.20(13)(a) and (c). The problem here is that Anderson did not allege any facts in his motion that would, if true, show that the restitution award was not reasonably related to expenses actually incurred by the victim or that Anderson did not have the ability to pay it. The court imposed an award of $943.31, to be paid over seven years of extended supervision. That works out to about $135 a year, or less than $12 a month. Even if Anderson's learning ability might limit his employment opportunities, it is not unreasonable to expect him to be able to make such modest payments. Since Anderson has not made sufficient allegations to show that the restitution award

would not have been entered if trial counsel had challenged it, we conclude that Anderson was not entitled to a hearing on his motion.

By the Court.—Order affirmed.

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