COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1902 **Cir. Ct. No. 2004CF670**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. MELBY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Michael Melby appeals an order that denied his postconviction motion for relief from a felony conviction. For the reasons discussed below, we affirm.

BACKGROUND

¶2 In 2006, Melby entered a no contest plea to one count of first-degree reckless homicide of a disabled person, as a party to the crime, in exchange for the read-in dismissal of multiple other charges. In response to a motion for sentence modification under WIS. STAT. RULE 809.30(2)(h) (2011-12),[1] the circuit court vacated the original judgment of conviction, and entered a new judgment that sentenced Melby to five fewer years of initial confinement.

¶3 In June 2012, Melby filed a second motion for postconviction relief, this time seeking plea withdrawal or, in the alternative, another resentencing, and further alleging ineffective assistance of counsel. The circuit court denied the motion without a hearing, and Melby appeals both the plea withdrawal and resentencing issues. We will set forth additional facts relevant to these issues as necessary in our discussion below.

STANDARD OF REVIEW

¶4 To obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. We review the sufficiency of a postconviction motion as a question of law subject to de novo review; we limit our review to the allegations contained in the four corners of the postconviction motion. ***Id.*** at ¶¶9, 27. We review de novo whether any claims are

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

procedurally barred. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

DISCUSSION

Procedural Bars

¶5 As a threshold matter, the State asserts that Melby should be procedurally barred from raising his current plea withdrawal claims because he failed to raise any of them in his first postconviction motion. Under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), any claim that could have been raised on a prior direct appeal or postconviction motion from a criminal judgment of conviction cannot be the basis for a subsequent WIS. STAT. § 974.06 motion unless the court finds there was sufficient reason for failing to raise the claim in the earlier proceeding. The State has not, however, addressed how the ***Escalona-Naranjo*** doctrine applies when the prior proceeding related to a judgment that was vacated and the current motion arises from a subsequently entered judgment. We therefore decline to apply the procedural bar to Melby's plea withdrawal claims in this case. As a consequence, we will examine his claims directly, rather than through the additional layer of ineffective assistance of counsel that Melby alleged in order to demonstrate a sufficient reason why he did not seek plea withdrawal earlier.

¶6 The State argues that Melby should be procedurally barred from raising a claim for resentencing based upon the disparity between his sentence and those of his co-actors because Melby already presented that very claim in his original motion for sentence modification. We agree. An appellant may not relitigate matters previously decided in the underlying case, no matter how artfully rephrased. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App.

1991). In other words, because the circuit court has already granted Melby some relief on a claim that his sentence was unduly harsh or disproportionate to the sentences given his co-actors, he is now precluded from presenting additional reasons why his sentence was unduly harsh or disproportionate. Because that is the only resentencing argument Melby has fully developed on this appeal, our discussion of the merits will be limited to the plea withdrawal claims.

Plea Withdrawal Claims

¶7 A defendant who asserts that the procedures outlined in WIS. STAT. § 971.08 or other mandated duties were not followed at the plea colloquy (*i.e.*, a ***Bangert*** violation), and further alleges that he did not understand the omitted information is entitled to a hearing on his plea withdrawal motion. ***State v. Hampton***, 2004 WI 107, ¶¶65-67, 274 Wis. 2d 379, 683 N.W.2d 14; ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). No hearing is required, though, when the defendant presents only conclusory allegations, or the record conclusively demonstrates that he is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

¶8 Here, Melby advances three reasons why he should be allowed to withdraw his plea. However, the record conclusively demonstrates that his allegations are insufficient to establish a ***Bangert*** violation on any of the claims.

¶9 First, Melby complains that the circuit court failed to advise him about the "while masked" element of the offense. However, as the State correctly points out, the statutory provision in WIS. STAT. § 939.641 to enhance a sentence for concealing identity was repealed effective February 1, 2003, by 2001 Wis. Act 109 § 577. Therefore, there was no "while masked" element of the offense in effect about which to advise Melby prior to the entry of his plea. Any reference in

the charging documents to the effect that Melby was masked during the offense was superfluous information that did not affect either his potential or actual sentence.

¶10 Second, Melby claims that the circuit court misadvised him about the legal effect of his read-in offenses when it stated that the "defendant may expect a read-in charge to enhance a sentence that would be imposed without such read-ins." We disagree. The court's statement was an accurate statement of law, correctly advising the defendant that when a dismissed charge is read-in, the circuit court may consider it for sentencing purposes and therefore increase the sentence imposed on the offense of conviction from what it would have been absent the read-in charge. We note that the plea questionnaire form that Melby signed further explained that "although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased."

¶11 Third, Melby claims that the circuit court erred in failing to advise him that by agreeing to have the dismissed charges read-in, he was admitting that he had committed them. The circuit court had no obligation to so inform Melby, because that is not a correct statement of law. A defendant's agreement to have an offense read-in does *not* constitute an admission of guilt for sentencing purposes; it merely allows the court to consider the allegations. ***State v. Straszkowski***, 2008 WI 65, ¶92, 310 Wis. 2d 259, 750 N.W.2d 835.

¶12 In sum, because the record shows that the circuit court correctly advised Melby both about the actual elements of the charged offense and about the effect of the read-in offenses on the maximum sentence he faced, the allegations in Melby's complaint were insufficient to warrant a plea withdrawal hearing.

By the Court.—Order affirmed.

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