COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2011AP2862
2011AP2863

Cir. Ct. Nos. 1998CF894
1998CF1659

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LOREN L. LEISER,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Orders affirmed; appeal dismissed.*

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

¶1 PER CURIAM. Loren L. Leiser, *pro se*, appeals orders that commuted the excessive portions of three dispositions—a prison sentence and two terms of probation—and that otherwise denied his claims for postconviction relief.

We dismiss appeal No. 2011AP2863 for lack of jurisdiction, and we otherwise affirm.

BACKGROUND

¶2 A jury seated in 1998 to hear two consolidated cases against Leiser found him guilty, in case No. 1998CF894, of three counts of second-degree sexual assault of a child committed during the period between June 12, 1995, and August 27, 1995. The jury also found him guilty of five additional felonies: in case No. 1998CF894, the jury convicted him of one count of second-degree sexual assault of a child committed in January 1998 and one count of exposing a child to harmful materials; in case No. 1998CF1659, the jury convicted him of three counts of physically abusing a child.

¶3 The trial court imposed a twenty-year prison sentence for one of the sexual assaults that Leiser committed in the summer of 1995, and the trial court imposed twenty-year terms of probation for each of the other two sexual assaults he committed during that time frame. Additionally, the trial court imposed a twenty-year prison sentence for the 1998 sexual assault. As to the remaining four felonies, the trial court imposed one five-year term of probation and three three-year terms of probation. The trial court ordered Leiser to serve his two prison sentences consecutively and ordered him to serve each of his six terms of probation concurrently with the other probationary terms but consecutively to his prison sentences.

¶4 For most of 1995, Wisconsin law designated second-degree sexual assault of a child a Class C felony carrying a maximum prison sentence of ten

years. *See* WIS. STAT. §§ 948.02(2), 939.50(3)(c) (1993-94).[1] Effective for crimes committed on or after December 2, 1995, the legislature designated second-degree sexual assault of a child a Class BC felony carrying a maximum prison sentence of twenty years. *See* 1995 Wis. Act 69, §§ 4, 12, 20; WIS. STAT. § 991.11 (1995-96).

¶5 Leiser pursued many claims for postconviction relief without success before he filed the postconviction motion underlying this appeal. There, he alleged that the charging documents in case No. 1998CF894 improperly described the 1995 sexual assaults as Class BC felonies and that the sentence and probationary terms imposed for those 1995 sexual assaults exceeded the maximum terms permitted at the time of the offenses. He contended that this was a "new factor" and that the errors gave rise to a variety of constitutional violations requiring the circuit court to vacate either the penalties or the convictions for those offenses.[2]

¶6 The circuit court granted Leiser partial relief without a hearing. The circuit court entered an order in the records of both case No. 1998CF894 and case No. 1998CF1659 commuting his twenty-year prison sentence for sexual assault of a child in 1995 to a ten-year prison sentence, and the circuit court commuted his two twenty-year terms of probation for sexual assault of a child in 1995 to two eighteen-year terms. Leiser moved to reconsider, seeking both dismissal of the 1995 sexual assault charges and a resentencing hearing. The circuit court entered

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

[2] Throughout this opinion, we refer to the circuit court to identify the judge that presided over the postconviction proceedings in this matter. We refer to the trial court or to the sentencing court when we discuss the actions of the judge that presided over the trial and sentenced Leiser.

identical orders in the two records denying him any additional relief. In appeal No. 2011AP2862, Leiser appeals the orders entered in case No. 1998CF894, and, in appeal No. 2011AP2863, Leiser appeals the orders entered in case No. 1998CF1659.[3]

DISCUSSION

¶7 A person may not appeal from an order unless aggrieved. ***Ford Motor Credit Co. v. Mills***, 142 Wis. 2d 215, 217, 418 N.W.2d 14 (Ct. App. 1987). A person is aggrieved by an order if it "bears directly and injuriously upon his or her interests; the person must be adversely affected in some appreciable manner." ***Id.*** at 217-18. We are satisfied that Leiser's interests in case No. 1998CF1659 are not adversely affected by the orders underlying appeal No. 2011AP2863.

¶8 Our review of Leiser's postconviction motion reveals that Leiser captioned it with both case No. 1998CF894 and case No. 1998CF1659, but he expressly advised the circuit court that he moved to vacate "three sentences under case No. [19]98CF894," and he added a footnote that the two cases were originally joined over his objection. Leiser went on to explain why, in his view, constitutional principles and various cases require granting him relief as to "the three charges of discussion." He contended that his analysis provided "relevant reasons in support for all three charges being vacated," and he asked the circuit court to "simply dismiss counts 3, 4, and 5 of case No. [19]98CF894." He then

[3] Leiser filed his notices of appeal a few days before the circuit court entered the orders denying his motion to reconsider. His notices stated that he had not yet received a response to his request for reconsideration. We treat the notices of appeal as filed after the entry of the orders denying reconsideration. *See* WIS. STAT. § 808.04(8).

asserted that, after the three counts were dismissed, he should have a resentencing hearing to "rearrange" his periods of probation.

¶9 After the circuit court commuted the excess portions of Leiser's sentence and probationary terms in case No. 1998CF894, Leiser sought reconsideration. He insisted that the three counts in case No. 1998CF894 should have been vacated and contended that, by commuting his sentences in case No. 1998CF894, the circuit court had imposed excessive sentences.

¶10 Nothing in Leiser's submissions demonstrates that Leiser asked the circuit court for relief in case No. 1998CF1695, or shows that the circuit court issued an adverse resolution of any such claims.[4] We are satisfied that the postconviction orders underlying this appeal did not adversely affect Leiser's interests in case No. 1998CF1659, and that we therefore lack jurisdiction over his appeal from those orders in appeal No. 2011AP2863. We dismiss that appeal, and turn to his claims in appeal No. 2011AP2862.

¶11 Leiser believes that he is entitled to a resentencing hearing rather than summary commutation of the excessive portions of his sentence and probationary terms for the sexual assaults that he committed in 1995. We reject his contentions.

[4] We note Leiser's assertion that, by commuting the excessive portions of the sentence and probationary terms in case No. 1998CF894, the circuit court also required Leiser to serve his probationary terms consecutively. This assertion finds no support in the record. As the circuit court explained when denying Leiser's motion to reconsider: "the probation terms are consecutive to the prison sentences ... as ordered by the original sentencing judge. They are not consecutive to each other as [Leiser] appears to argue in his motion."

¶12 Leiser incorrectly asserts that the circuit court "was procedurally obligated to hold a resentencing hearing." In fact, no hearing is necessary to commute excessive sentences and probationary terms. *See* WIS. STAT. § 973.13 (stating that if the circuit court imposes a sentence in excess of that allowed by law, the excess "shall stand commuted without further proceedings"); *see also* WIS. STAT. § 973.09(2m) (stating that if circuit court imposes a probationary term in excess of that authorized by statute, excess "is commuted without further proceedings"). Indeed, the statutory authority to commute excessive sentences and probationary terms without further proceedings extends to this court, which can and does commute such excessive penalties without remanding for an additional resentencing hearing. *See, e.g.*, ***State v. Theriault***, 187 Wis. 2d 125, 133, 522 N.W.2d 254 (Ct. App. 1994), and ***State v. Goldstein***, 182 Wis. 2d 251, 262, 513 N.W.2d 631 (Ct. App. 1994) (commuting excessive prison sentences); ***State v. Stewart***, 2006 WI App 67, ¶¶9, 22, 291 Wis. 2d 480, 713 N.W.2d 165 (commuting excessive probationary term).

¶13 To be sure, a circuit court that commutes an excessive sentence "may, in its discretion, resentence the defendant if the premise and goals of the prior sentence have been frustrated." ***State v. Holloway***, 202 Wis. 2d 694, 700, 551 N.W.2d 841 (Ct. App. 1996). Here, however, the circuit court concluded that commutation without further proceedings sufficiently served the goals of the original sentencing court, and the record supports that conclusion.

¶14 The trial court expressed profound concern when sentencing Leiser that his failure to accept responsibility for his crimes was "an indicator that rehabilitation is very unlikely," and the trial court explained that it intended Leiser to spend "substantial time" in prison. Given the trial court's premise that Leiser was unlikely to be rehabilitated, the sentencing goal of imposing long-term

supervision and control, and the original sentence and terms of probation selected to effect the sentencing objective, we cannot conclude that the circuit court erroneously exercised its discretion by commuting the original terms to the maximum allowed by law without conducting a hearing. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether the circuit court exercised discretion, not whether the circuit court could have exercised discretion differently).

¶15 Leiser next asserts that he is entitled to a resentencing hearing because he has identified a "new factor," namely, the alleged "absence of any testimonial evidence" to support the 1995 charges. We disagree.

¶16 A new factor is "'a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (ellipsis added; citation omitted). Leiser's claim of insufficient evidence does not allege a "new factor." The sentencing court presided over the trial and was thus fully aware of the quantity and quality of the evidence offered to support the charges. Accordingly, the evidence presented at trial does not constitute a "new factor" warranting further sentencing proceedings.

¶17 Leiser also asserts that the "original sentencing court ... bulked [sic] at [its] obligations," and that its assorted errors infected the proceedings. His argument careens through a variety of disjointed contentions that include an allegation that his case was resolved by a hung jury and an observation that his notice of appeal contains no underscoring. He concludes this portion of his brief

with the assertions that "the resentencing court condoned this fiasco of a sentencing pronouncement" but should have "give[n its] own reasons for the sentences." His assertions earn him no relief. A party may not "simply toss a bunch of concepts into the air with the hope that either the ... court or the opposing party will arrange them into viable and fact-supported legal theories." ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). To the extent that Leiser contends in this component of his brief that he is entitled to resentencing rather than to summary commutation of the excessive portions of his sentence and probationary terms, we have already explained that he is not.

¶18 Leiser next claims that the circuit court erred by concluding that he faced a statutory maximum term of eighteen years of probation for the Class C felonies that he committed in 1995. We disagree.

¶19 Calculation of the statutory maximum term of probation is governed by WIS. STAT. § 973.09 (1995-96), which states, in pertinent part:

> **(2)** The original term of probation shall be:
>
> ...
>
> **(b)**
>
> **1.** Except as provided in subd. 2., for felonies, not less than one year nor more than either the statutory maximum term of imprisonment for the crime or 3 years, whichever is greater.
>
> **2.** If the probationer is convicted of 2 or more crimes, including at least one felony, at the same time, the maximum original term of probation may be increased by one year for each felony conviction.

Leiser does not dispute that, pursuant to § 973.09(2)(b)1. (1995-96), the circuit court correctly began its calculation by determining that he faced ten years of probation for each second-degree sexual assault of a child that he committed in

1995 because, at the time he committed those crimes, they were Class C felonies carrying a maximum prison sentence of ten years. Leiser contends, however, that he faced a total probationary period of only eleven years for each Class C felony, because, he says, the language of § 973.09(2)(b)2. "means that one year can be added over the maximum sentence authorized by law."

¶20 In fact, we have determined that the language of WIS. STAT. § 973.09(2)(b)2. clearly provides that "if a defendant is convicted of two or more crimes 'at the same time,' the trial court may increase 'the maximum original term of probation ... by one year for each felony conviction.'" *See* ***State v. Langham***, 2006 WI App 149, ¶¶2-3, 295 Wis. 2d 384, 720 N.W.2d 544; *see also* ***Stewart***, 291 Wis. 2d 480, ¶9 (recognizing that defendant's maximum term of probation is increased by two years where defendant is convicted of two felonies at the same time).[5] Because Leiser was convicted of eight felonies at the same time, the circuit court correctly determined that his maximum term of probation for each Class C felony conviction was eighteen years.

¶21 Leiser next raises a series of constitutional claims. He maintains that he was convicted and sentenced for the 1995 sexual assaults in violation of the *ex post facto* clauses of the United States and Wisconsin constitutions. *See* U.S. CONST. art. 1, § 9, cl. 3 and § 10, cl. 1; WIS. CONST. art. I, § 12. He also alleges that he was convicted in violation of his due process right to notice of his crimes and that the circuit court sentenced him in violation of his due process right to be

[5] The language of WIS. STAT. § 973.09(2)(b)2. (1995-96) is the same as the language of § 973.09(2)(b)2. that is interpreted and applied in ***State v. Langham***, 2006 WI App 149, 295 Wis. 2d 384, 720 N.W.2d 544, and ***State v. Stewart***, 2006 WI App 67, 291 Wis. 2d 480, 713 N.W.2d 165.

sentenced on accurate information. The circuit court rejected these contentions, concluding that all of Leiser's constitutional claims are procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) and WIS. STAT. § 974.06. We agree.

¶22 A prisoner raising constitutional or jurisdictional claims after the time for an appeal has passed generally must do so pursuant to WIS. STAT. § 974.06. ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. The goal of § 974.06 is finality. ***Henley***, 328 Wis. 2d 544, ¶53. Therefore, "[a]ll grounds for relief available to a person under [§ 974.06] must be raised in his or her original, supplemental or amended motion." *See* § 974.06(4). Successive postconviction motions raising additional claims that could have been heard in a prior postconviction proceeding are barred unless the defendant presents a sufficient reason that the claim was not asserted or was inadequately raised earlier. ***Escalona-Naranjo***, 185 Wis. 2d at 184.

¶23 Leiser first pursued postconviction and appellate relief to challenge his judgments of conviction with the assistance of counsel. *See* ***State v. Leiser***, No. 2000AP0033-CR, unpublished slip op. (WI App Jan. 30, 2001) (***Leiser I***). Thereafter, he raised approximately two dozen additional claims in *pro se* litigation, also without success. *See* ***State v. Leiser***, No. 2002AP1714, unpublished slip op. (WI App Dec. 26, 2002) (***Leiser II***); ***State v. Leiser***, No. 2004AP996, unpublished slip op. (WI App May 16, 2006) (***Leiser III***). Accordingly, he must present a sufficient reason for failing to raise constitutional

or jurisdictional issues in his prior postconviction litigation before such claims may be heard.[6]

¶24 Leiser responds that he is not required to present a sufficient reason for his serial litigation or to otherwise comply with the rules governing proceedings under WIS. STAT. § 974.06, because he did not cite that statute as his authority for pursuing his current claims. He asserts that the circuit court is not "authorized" to treat his claims as filed under § 974.06 when he purports to bring them using different procedural vehicles. Leiser is wrong. A court is not bound by the label that a litigant selects to describe his or her claims. ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). When appropriate, a court may relabel a *pro se* litigant's submission and "proceed from there." *See* ***id.***

¶25 Leiser also argues that the procedural bar is inapplicable because he "never had a direct appeal." This contention is nonsense. ***Leiser I*** arrived before us as an "appeal from judgments and [an] order of the circuit court." *See* ***Leiser I***, No. 2000AP0033-CR, unpublished slip op. at 1. Moreover, the postconviction motions underlying ***Leiser II*** and ***Leiser III*** each independently bar additional postconviction litigation absent a "sufficient reason" for failing to raise all

[6] The circuit court concluded here that the procedural bar imposed by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), did not prevent commutation of Leiser's excessive sentence and probationary terms under WIS. STAT. §§ 973.13 and 973.09(2m). In support of that conclusion, the circuit court cited ***State v. Flowers***, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998). There, we considered a claim by an alleged repeat offender seeking relief from an enhanced sentence on the ground that the State had not proved the habitual criminality necessary to support the repeater enhancement. *See* ***id.*** at 26. Our opinion carved out "a narrow exception to ***Escalona-Naranjo*** [that] is only applicable when a defendant alleges that the State has neither proven nor gained the admission of the defendant about a prior felony conviction necessary to sustain [a] repeater allegation." ***Flowers***, 221 Wis. 2d at 30. Leiser's case does not involve a repeater allegation. The State, however, did not cross-appeal, so we do not consider whether the circuit court properly applied the ***Flowers*** exception when granting Leiser relief from his sentence and probationary terms in this case.

available claims in those earlier proceedings. *See* WIS. STAT. § 974.06 (4). Leiser fails to offer such a reason. Accordingly, his current constitutional claims are barred.

¶26 Leiser next asserts that when the circuit court commuted his sentence and probationary terms, the circuit court reinstated his appellate rights. He acknowledges that he has no authority to support this contention, so we address it no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶27 We conclude our review of Leiser's claims with the observation that Leiser's submissions to this court are rambling and repetitious, filled with unsupported statements and rhetorical questions unaccompanied by meaningful analysis. To the extent that we have not addressed a claim that Leiser believes he has raised, we have determined that it is too vague, too undeveloped, or too insubstantial to earn mention. Such claims are deemed denied. *See* ***Libertarian Party v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (appellate court need not discuss arguments unless they have "sufficient merit to warrant individual attention").

By the Court.—Orders affirmed; appeal dismissed.

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