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March 2, 2021

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

2020AP733

State of Wisconsin v. Andreas L. Moore, Jr. (L.C. # 2014CF2531)

Before Dugan, Graham and White, 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).

Andreas L. Moore, *pro se*, appeals an order denying his motion for postconviction relief.

Upon our review of the briefs and record, we conclude at conference that this matter is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We summarily affirm.

In 2014, a jury found Moore guilty of two counts of first-degree recklessly endangering safety. The convictions stemmed from a shooting that occurred on September 12, 2013, where Moore allegedly retrieved a .22 caliber pistol from his apartment and shot both D.G. and J.M. outside of a convenience store. The circuit court imposed consecutive sentences of six years' initial confinement and five years' extended supervision for both convictions.

Following the conviction, Moore, by appointed postconviction counsel, filed a motion for postconviction relief pursuant to WIS. STAT. RULE 809.30. The motion alleged that Moore was entitled to a new trial on the basis of newly discovered evidence, ineffective assistance of trial counsel, and in the interest of justice. The circuit court denied the motion without a hearing.

Moore, *pro se*, later filed a motion for sentence modification. The motion alleged several “new factors” warranting sentence modification. Specifically, the motion alleged that: Moore’s co-defendant received a lesser sentence; the sentencing court failed to properly consider the required sentencing factors; the sentencing court erroneously exercised its discretion by failing to explain its reason for imposing consecutive sentences; and Moore successfully completed postsentencing rehabilitation. The motion also alleged multiple due process violations; specifically, a violation of Moore’s right to present evidence of a “secret deal” between the State and his co-defendant, a violation of his right to face his accuser during trial and sentencing, and a violation of his right to the effective assistance of counsel.

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

The circuit court denied the motion without a hearing, stating that Moore's arguments regarding the sentencing court's alleged erroneous exercise of discretion were time-barred, that Moore's postsentencing rehabilitation efforts did not constitute new factors, and that Moore's due process claims were barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

Moore, *pro se*, then filed the postconviction motion, pursuant to WIS. STAT. § 974.06, that underlies this appeal. The motion argued that Moore was entitled to a new trial on the bases of ineffective assistance of postconviction counsel and in the interest of justice. Specifically, the motion alleged that Moore's appointed postconviction counsel was ineffective for failing to argue the following in his WIS. STAT. RULE 809.30 motion: (1) that Moore's confrontation rights were violated; (2) that Moore's due process rights were violated by a "secret deal" made between the State and "the actual shooter" (Moore's co-defendant); (3) that Moore's trial counsel was ineffective for failing to produce an exonerating eye witness; (4) that Moore's trial counsel was ineffective for preventing Moore from testifying; (5) the plain error doctrine; and (6) Moore's actual innocence. The motion also argued that Moore was entitled to a new trial in the interest of justice.

The circuit court denied the motion without a hearing, stating that Moore's motion was procedurally barred. The court also stated that "[w]hile the allegations of ineffective assistance of postconviction counsel may provide the defendant with a sufficient reason for failing to raise these claims during his direct appeal," the "defendant's failure to raise these claims in his prior *pro se* motion" was not "excuse[d]" under *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). This appeal follows.

On appeal, Moore argues that the circuit court erred in denying his latest postconviction motion as procedurally barred because his previous *pro se* motion was a request for sentence modification, not a WIS. STAT. § 974.06 motion for relief. Generally, Moore would be correct; a motion alleging a new factor or challenging the circuit court’s exercise of sentencing discretion does not fall under § 974.06. *See State v. Grindemann*, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507. However, a due process claim *does* fall under § 974.06, *see Grindemann*, 255 Wis. 2d 632, ¶19 n.4, and Moore raised multiple due process claims in his motion for sentence modification. We reject Moore’s attempt to circumvent the *Escalona-Naranjo* bar by arguing that the motion underlying this appeal is his first attempt at filing a § 974.06 motion.

It is well-settled that courts “look beyond the legal label affixed by the prisoner to a pleading and treat a matter as if the right procedural tool was used.” *State ex rel. McMillian v. Dickey*, 132 Wis. 2d 266, 279, 392 N.W.2d 453 (Ct. App. 1986), *overruled on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900. Here, multiple claims in Moore’s first *pro se* motion—if substantiated—would have established constitutional rights violations potentially warranting a new trial, not 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, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *See Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975) (defining a “new factor”). We agree with the State’s analysis that Moore’s first *pro se* motion was indeed a WIS. STAT. § 974.06 motion, and thus, “[d]espite thinly veiled efforts to disguise several alleged constitutional rights violations as new sentencing factors ... Moore cannot ... overcome applicable procedural bars just by labeling his claims as something they are not.”

Moore's second *pro se* postconviction motion—labeled as a WIS. STAT. § 974.06 motion—alleges ineffective assistance of postconviction counsel as his reason for failing to raise his constitutional claims in his WIS. STAT. RULE 809.30 motion; however, Moore does not explain why he failed to raise those claims in his first *pro se* motion, which raised other § 974.06 claims. *See State v. Allen*, 2010 WI 89, ¶46, 328 Wis. 2d 1, 786 N.W.2d 124 (“Defendants must, at the very minimum, allege a sufficient reason in their motions to overcome the *Escalona-Naranjo* bar.”). Moreover, Moore's second postconviction motion raised two issues already raised in his first *pro se* motion: that he was denied his rights to confront his accusers and to present evidence in his defense. “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

For the foregoing reasons, we affirm the circuit court.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals