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DISTRICT I

November 16, 2021

To:

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Circuit Court Judge
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County
Electronic Notice

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

2019AP1300 State of Wisconsin v. Kalvin Ed Vaughn (L.C. # 2014CF4584)

Before Brash, C.J., Donald, P.J., and White, J.

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).

Kalvin Ed Vaughn, *pro se*, appeals orders denying postconviction relief. Upon consideration of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] Vaughn's claims are procedurally barred, and therefore we summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In May 2015, a jury found Vaughn guilty of two counts of repeated sexual assault of the same child. His appellate counsel filed an appeal and a no-merit report on Vaughn's behalf pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738 (1967). Vaughn filed a response to the no-merit report, raising a multitude of claims. His appellate counsel filed a supplemental no-merit report to address the response, and Vaughn filed a thirty-three page reply. We concluded that the case did not present any arguably meritorious issues for an appeal and summarily affirmed the judgment of conviction. *See* ***State v. Vaughn*** (***Vaughn I***), No. 2017AP1751-CRNM, unpublished op. and order (WI App June 6, 2018). Vaughn then moved for reconsideration, which we denied. Our supreme court denied his petition for review on March 13, 2019, and dismissed his motion for reconsideration on April 4, 2019.

On May 30, 2019, Vaughn, *pro se*, filed a motion in the circuit court seeking postconviction relief pursuant to WIS. STAT. § 974.06. He alleged that his trial counsel was ineffective in numerous ways and that the circuit court erroneously exercised its sentencing discretion by relying on inaccurate and "mistaken" information. The circuit court entered an order on June 4, 2019, denying the motion as procedurally barred. Citing ***Brady v. Maryland***, 373 U.S. 83 (1963), Vaughn next filed, on June 21, 2019, a document titled "Motion for Request for Admissions/and Stipulation of Facts." The circuit court denied that motion on June 25, 2019. Three days later, Vaughn moved the circuit court to "rehear" his "motion ... purs[ua]nt to [] § 974.06." By order dated July 1, 2019, the circuit court construed that motion as seeking reconsideration of the June 4, 2019 order and denied the motion as construed. Vaughn appeals.

We begin by considering the claims that Vaughn filed under the cited authority of WIS. STAT. § 974.06. That statute permits a prisoner to pursue a collateral attack on a criminal conviction after the time for a direct appeal has passed. *See* ***State v. Henley***, 2010 WI 97, ¶50,

328 Wis. 2d 544, 787 N.W.2d 350. There is, however, a limitation, because "[w]e need finality in our litigation." *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Accordingly, a convicted person may not pursue postconviction claims that could have been raised in a previous postconviction motion or appeal unless the person provides a "'sufficient reason'" for serial litigation. *See* ***id.*** at 181-82 (citing § 974.06(4)).

"A no-merit appeal clearly qualifies as a previous motion under [WIS. STAT.] § 974.06(4)." ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124. Therefore:

> when a defendant's postconviction issues have been addressed by the no merit procedure under WIS. STAT. RULE 809.32, the defendant may not thereafter again raise those issues or other issues that could have been raised in the previous motion, absent the defendant demonstrating a sufficient reason for failing to raise those issues previously.

State v. Tillman, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574. Before applying a procedural bar to postconviction motions filed after a no-merit appeal, however, we "must consider whether the no-merit procedures (1) were followed; and (2) warrant sufficient confidence to apply the procedural bar[.]" ***Allen***, 328 Wis. 2d 1, ¶62.

We have conducted an assessment of the no-merit proceedings underlying ***Vaughn I***, and we have determined that appellate counsel and this court properly followed the procedures required by ***Anders*** and WIS. STAT. RULE 809.32. As our opinion in ***Vaughn I*** reflects, we independently examined the record and considered the submissions from Vaughn and his appellate counsel. *See* ***id.***, No. 2017AP1751-CRNM, at 2. We observed that appellate counsel "gave careful attention" to potential issues, *see* ***id.***, and we "commend[ed] appellate counsel's thoroughness" in responding to the many issues that Vaughn raised, *see* ***id.*** at 4. Ultimately, we concluded that Vaughn's allegations of error were unfounded and that the record confirmed

appellate counsel's determination that no arguably meritorious issues existed for appeal. *See* ***id.*** The proceedings in ***Vaughn I*** unquestionably warrant confidence in the outcome.

Accordingly, Vaughn may not pursue claims under WIS. STAT. § 974.06 unless he presents a sufficient reason for serial litigation. *See* ***Allen***, 328 Wis. 2d 1, ¶61. To do so, he must identify a reason for a second or subsequent postconviction motion, and he must set forth "'sufficient material facts—e.g., who, what, where, when, why, and how'" demonstrating the sufficiency of his identified reason. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶¶36-37, 360 Wis. 2d 522, 849 N.W.2d 668 (citation omitted). We assess the sufficiency of Vaughn's reason for additional postconviction litigation by examining the four corners of his postconviction motion, not his appellate briefs. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

Our review of Vaughn's WIS. STAT. § 974.06 motion confirms the State's contention that Vaughn offered no reason for serial litigation, much less a sufficient reason supported as required by allegations of material fact. On this basis alone, the circuit court properly denied Vaughn's claims as procedurally barred. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

For the sake of completeness, we observe that Vaughn's claims under WIS. STAT. § 974.06 are barred for the additional reason that Vaughn previously litigated them. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (stating that "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue"). The substantive allegations that Vaughn seeks to pursue now are variations on allegations that we considered in ***Vaughn I*** and determined were lacking in arguable merit.

Specifically, Vaughn argues in his appellate brief that his trial counsel was ineffective for: failing to object "to significant improper amendments to the information," to a "speculation/confrontation clause violation," and to hearsay testimony; failing to cross-examine a key witness, namely, his girlfriend Laquida Penelton; and failing to authenticate certain text messages that the State offered as trial exhibits. As discussed in ***Vaughn I***, however, appellate counsel's no-merit reports thoroughly addressed the amendments to the charges, and we determined that "Vaughn's emphatic complaint" about the amendments was groundless. *See* ***id.***, No. 2017AP1751-CRNM, at 3. The no-merit proceedings also included consideration of Penelton's failure to appear for trial despite the State's efforts to subpoena her; Vaughn's allegations about her absence; the State's argument in regard to absent witnesses; Vaughn's hearsay claims; and Vaughn's complaints about the victim's text messages. *See* ***id.*** at 2. Our review of the record satisfied us that these issues lacked arguable merit. *See* ***id.***, at 2, 4. Vaughn cannot relitigate these issues by couching them as allegations that trial counsel was ineffective for failing to pursue the matters. *See* ***Witkowski***, 163 Wis. 2d at 990; *see also* ***State v. Wheat***, 2002 WI App 153, ¶30, 256 Wis. 2d 270, 647 N.W.2d 441 (explaining that trial counsel is not ineffective for failing to raise meritless claims).

Vaughn also argues now that the circuit court erroneously exercised its sentencing discretion. We determined in ***Vaughn I***, however, that the sentences in this case represented a proper exercise of discretion. *See* ***id.***, No. 2017AP1751-CRNM, at 2. Moreover, while Vaughn

asserts that the circuit court relied on allegedly inaccurate information, we are unable to discern any allegations of inaccuracies other than litigation errors that we have rejected.[2]

In sum, the claims that Vaughn raised pursuant to WIS. STAT. § 974.06 are procedurally barred for several independent reasons. The circuit court therefore properly rejected those claims.

Last, we address the circuit court's order denying Vaughn's June 21, 2019 "Motion for Request for Admissions/and Stipulation of Facts." The text of the motion reflects that Vaughn sought the contents of the prosecutor's file, certain cell phone records, and medical records from Children's Hospital of Wisconsin. The circuit court construed this motion as a request for postconviction discovery. Upon review of the motion, we agree with that construction. We also agree with the circuit court's conclusion that the motion for postconviction discovery was barred because Vaughn failed to present a reason that the discovery claims were not raised in his May 30, 2019 postconviction motion filed under the authority of WIS. STAT. § 974.06.[3] "Motions for postconviction discovery are not independent from other postconviction

[2] In this court, Vaughn seeks sentencing relief based on alleged new factors. Vaughn does not direct our attention to any place in his postconviction motions where he sought relief on this basis. We do not consider sentencing challenges presented for the first time on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (we do not consider issues raised for the first time on appeal); *see also* ***State v. Walker***, 2006 WI 82, ¶30, 292 Wis. 2d 326, 716 N.W.2d 498 (explaining that the rules of appellate procedure governing sentence modification embody a policy that a defendant should allow the sentencing court to correct any errors it may have made).

[3] We observe that the June 21, 2019 motion appears to seek documents, including hospital records and text messages, that Vaughn also sought in the no-merit proceedings, where he claimed that the documents had not been provided. *See* ***State v. Vaughn*** (***Vaughn I***), No. 2017AP1751-CRNM, unpublished op. and order at 3 (WI App June 6, 2018). In response to those claims, appellate counsel explained that he had provided Vaughn with some of the requested materials and that some of the materials do not exist. Our decision in ***Vaughn I*** reflects our conclusion that further pursuit of these discovery claims would lack arguable merit. Vaughn may not relitigate them now. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

motions[.]" ***State v Kletzien***, 2011 WI App 22, ¶11, 331 Wis. 2d 640, 794 N.W.2d 920. Accordingly, claims for postconviction discovery that could have been raised on direct appeal or in a previous § 974.06 postconviction motion may not be raised in a later postconviction motion absent a sufficient reason for failing to raise the claims in earlier proceedings. *See* ***Kletzien***, 331 Wis. 2d 640, ¶13. Because Vaughn did not demonstrate in his June 21, 2019 motion that he had a sufficient reason for failing to pursue his discovery claims in his earlier litigation, the claims are barred.

IT IS ORDERED that the postconviction orders are 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