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DISTRICT I

March 29, 2022

To:

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Circuit Court Judge
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County
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You are hereby notified that the Court has entered the following opinion and order:

2019AP976

State of Wisconsin v. Martie D. Berry (L.C. # 2006CF2708)

Before Brash, C.J., Donald, P.J., and Dugan, 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).

Martie D. Berry, *pro se*, appeals the order denying his petition for a writ of habeas corpus. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).¹ We summarily affirm.

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

Berry has challenged his 2007 sexual assault convictions numerous times. On direct appeal, this court agreed with appointed counsel's assessment in her no-merit report that there were no issues of arguable merit that Berry could raise in postconviction proceedings and affirmed. *See State v. Berry (Berry I)*, No. 2008AP1182-CRNM, unpublished op. and order (WI App Mar. 6, 2009). Berry did not respond to that report. The Wisconsin Supreme Court denied Berry's petition for review.

In 2010, Berry, *pro se*, filed a motion for postconviction discovery. The circuit court denied the motion, and Berry did not appeal.

In 2012, Berry, *pro se*, filed a motion seeking an evidentiary hearing or a new trial based on multiple claims, including the following: trial counsel was ineffective for not adequately investigating; the charges against him were multiplicitous; and the state crime lab was biased against him. The circuit court denied the motion, concluding it was barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and *State v. Tillman*, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. In its decision, the circuit court explained that Berry had an opportunity to respond to appellate counsel's no-merit report and to raise all of the issues that were now raised in his motion, but he did not do so. Berry filed an appeal and later voluntarily dismissed it.

In 2014, Berry, *pro se*, filed a WIS. STAT. § 974.06 motion arguing that his trial counsel was ineffective and that he should get a new trial in the interest of justice. He additionally argued that postconviction counsel was ineffective for not raising these claims. The circuit court denied the motion, and Berry appealed. We agreed with the circuit court that Berry's motion

was procedurally barred and affirmed. *See State v. Berry (Berry II)*, No. 2014AP286, unpublished slip op. (WI App Dec. 23, 2014).

In 2019, Berry filed a petition for a writ of habeas corpus in the circuit court. He raised claims of ineffective assistance of trial counsel and of postconviction/appellate counsel for not challenging trial counsel's ineffectiveness. The circuit court construed Berry's filing as a third motion for postconviction relief—his second filed pursuant to WIS. STAT. § 974.06—and denied it. The circuit court determined that the claims were barred because Berry could have raised them previously. This appeal follows.

Whether a claim is procedurally barred is a question of law that this court determines *de novo*. *See Tillman*, 281 Wis. 2d 157, ¶14. Habeas corpus is an extraordinary remedy that may not substitute for an appeal. *State v. Pozo*, 2002 WI App 279, ¶8, 258 Wis. 2d 796, 654 N.W.2d 12. In postconviction proceedings, a writ of habeas corpus is not available when (1) the petitioner raises claims that he failed to assert in a prior appeal and he does not offer a proper reason for doing so or (2) the petitioner attempts to relitigate claims that were the subject of a previous appeal or postconviction motion. *Id.*, ¶9.

In reviewing this matter, our analysis does not turn on whether Berry's claims were brought as part of a habeas petition or a WIS. STAT. § 974.06 postconviction motion. Under either rubric, Berry may not relitigate prior claims and is barred from raising new ones absent a "valid" or a "sufficient" reason excusing the failure to raise it(them?) earlier. *See Pozo*, 258 Wis. 2d 796, ¶9 (in context of habeas petition); *Escalona-Naranjo*, 185 Wis. 2d at 181-82 (in context of § 974.06 postconviction motion).

The closest Berry comes to providing such a reason is his claim, raised for the first time on appeal, that appellate counsel never provided him with a copy of her no-merit report, and, therefore, he cannot be faulted for not responding. We do not address issues raised for the first time on appeal. *See State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Even if we were to do so here, Berry does not explain why he could not have raised his claims about appellate counsel's failure to provide him with a copy of her no-merit report earlier.

Beyond this, Berry asserts that postconviction/appellate counsel did not pursue or include in the no-merit report the issues that he pointed out to her. This claim could have been raised earlier, and therefore, is procedurally barred.

Therefore,

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