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DISTRICT I

August 16, 2022

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

2021AP707 State of Wisconsin v. Jesus David Gutierrez-Mendoza
(L.C. # 2010CF5414)

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).

Jesus David Gutierrez-Mendoza, *pro se*, appeals an order denying his motion for postconviction relief filed under WIS. STAT. § 974.06 (2019-20).[1] He claims that his convictions for both second-degree sexual assault of a child and for repeated sexual assault of the same child violate the constitutional prohibition against double jeopardy. The circuit court determined that his claim was procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517

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

N.W.2d 157 (1994). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We reject Gutierrez-Mendoza's challenges to the circuit court's order as well as his request for reversal in the interest of justice. Accordingly, we summarily affirm.

A jury in 2012 found Gutierrez-Mendoza guilty of thirteen crimes involving sexual misconduct with a minor, C.J.P. As relevant here, the jury convicted him of second-degree sexual assault of a child for a sexual act involving C.J.P. on or about February 11, 2009, as alleged in count one of the second amended information; and the jury convicted him of repeated acts of sexual assault of the same child for various sexual acts involving C.J.P. during the period from April 7, 2009, to October 8, 2009, as alleged in count four.[2]

Represented by postconviction counsel, Gutierrez-Mendoza pursued a postconviction motion in 2016. He alleged that his trial counsel was ineffective, and he also sought postconviction discovery. The circuit court denied the motion, and we affirmed. *See* ***State v. Gutierrez-Mendoza***, No. 2016AP975-CR, unpublished slip op. (WI App Nov. 7, 2017). Proceeding *pro se,* Gutierrez-Mendoza next filed a petition for sentence adjustment. After the circuit court denied the petition, Gutierrez-Mendoza filed a motion alleging that the emergence of COVID-19 and a 2012 order requiring his deportation to Mexico constituted new factors warranting sentence modification. The circuit court denied the motion, and we affirmed. *See* ***State v. Gutierrez-Mendoza*** (***Gutierrez-Mendoza II***), No. 2020AP1217-CR, unpublished op. and order (WI App Jan. 11, 2022).

[2] The jury also convicted Gutierrez-Mendoza of child enticement and ten counts of sexual intercourse with a child age sixteen or older.

While the appeal in ***Gutierrez-Mendoza II*** was pending, Gutierrez-Mendoza filed the postconviction motion at issue here. He alleged that his conviction and sentence for second-degree sexual assault of a child "violate the double jeopardy protections of the Fifth Amendment of the U.S. Constitution and [are] contrary to public policy and legislative intent." In support, he contended that the charge of repeated sexual assault of a child set forth in count four "cover[ed] the offense date" for the charge of second-degree sexual assault of a child set forth in count one; and that the two crimes did not each require proof of a fact that the other did not. He asked the circuit court to vacate his conviction for second-degree sexual assault of a child and credit the time served to his sentence in count four. The circuit court denied the motion, and he appeals.

After the time for a direct appeal has passed, WIS. STAT. § 974.06 permits collateral challenges to a defendant's criminal convictions based on alleged jurisdictional and constitutional errors. *See* ***State v. Henley***, 2010 WI 97, ¶¶50, 52, 328 Wis. 2d 544, 787 N.W.2d 350. There is, however, a limitation. A defendant who has pursued a postconviction motion or a direct appeal may not seek collateral review of an issue that was or could have been raised in the earlier proceeding unless the defendant can show a sufficient reason for failing to raise or adequately address the issue earlier. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. "Whether a WIS. STAT. § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier is a question of law subject to *de novo* review." ***State v. Romero-Georgana***, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668.

In the postconviction motion, Gutierrez-Mendoza offered a one-paragraph list of five allegations that he contended were sufficient reasons for not raising his constitutional claim previously. On appeal, he renews two of those allegations. We turn to those contentions.[3]

Gutierrez-Mendoza first asserts that he has a sufficient reason for not raising his current claim earlier because he was "unaware" of it. Ignorance of the law, however, is not a sufficient reason for failing to raise a claim when the law in question was well-established at the time of the original litigation. *See* ***State v Allen***, 2010 WI 89, ¶44, 328 Wis. 2d 1, 786 N.W.2d 124. In this case, Gutierrez-Mendoza alleged in his most recent postconviction motion that the State charged him with a single criminal offense in two counts, thereby violating the constitutional prohibition against double jeopardy. The law governing such claims of multiplicitous charging was firmly established when he filed his original postconviction motion in 2016. Nearly twenty years before that, our supreme court observed: "It is well-established that this court analyzes claims of multiplicity using a two-prong test: 1) whether the charged offenses are identical in law and fact; and 2) if the offenses are not identical in law and fact, whether the legislature

[3] We do not consider the reasons for failing to raise a claim that Gutierrez-Mendoza listed in his postconviction motion but did not renew on appeal. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) ("[I]n order for a party to have an issue considered by this court, it must be raised and argued within its brief.").

intended the multiple offenses to be brought as a single count."[4] *See* ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). Accordingly, Gutierrez-Mendoza's alleged lack of awareness of his legal claim in 2016 is not a sufficient reason for his serial litigation.

Gutierrez-Mendoza next maintains that he has a sufficient reason for failing to raise his claim in his original postconviction motion because his alleged "duplicative conviction was overlooked by not only Mr. Gutierrez, but all parties and was highly relevant to his sentence." In support, he cites ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828. ***Harbor*** has no relevance here. In ***Harbor***, our supreme court held that a party may pursue a claim for sentence modification on the ground that a new factor exists, and the court defined "new factor" as "a fact or set of facts highly relevant to the imposition of sentence, but ... unknowingly overlooked by all of the parties." *See* ***id.***, ¶40 (citation omitted). Gutierrez-Mendoza, however, is not seeking a

[4] In light of the well-settled test for analyzing allegations of multiplicitous charging, we agree with the State that Gutierrez-Mendoza's claim "appears to be without merit." The State charged Gutierrez-Mendoza with second-degree sexual assault of a child based on his act of sexual intercourse with a child on or about February 11, 2009; the State charged him with repeated acts of sexual assault of the same child based on his sexual conduct with that child from April 7, 2009, to October 8, 2009. The two charges were therefore different in fact. *See* ***State v. Anderson***, 219 Wis. 2d 739, 749, 580 N.W.2d 329 (1998) (holding that "offenses are not multiplicitous if the facts are ... separated in time"); *see also* ***State v. Schultz***, 2020 WI 24, ¶¶2, 5-6, 11, 40 & nn.4, 5, 390 Wis. 2d 570, 939 N.W.2d 519 (concluding that a prosecution for repeated acts of sexual assault of the same child during a period that ended in September 2012, did not support jeopardy attaching for any conduct during the month of October 2012, thus permitting a subsequent prosecution for sexual assault of the child "on or about October 19, 2012").

sentence modification for which he must present a new factor.[5] He is seeking to vacate a conviction and escape any accompanying sentence on the ground that the conviction violates the constitutional prohibition against double jeopardy. To pursue that claim now he must have a sufficient reason for failing to do so in earlier litigation. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. An allegation that a claim is "highly relevant to [the defendant's] sentence" is clearly not a reason, let alone a sufficient reason, for failing to raise that claim previously.

Relatedly, Gutierrez-Mendoza argues that, regardless of whether ***Harbor*** is directly controlling, this court concluded in ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893, that a convicted person has a sufficient reason for failing to raise a claim in an original postconviction motion when the claim was "overlooked by all parties." Gutierrez-Mendoza both misunderstands and misapplies ***Fortier***. It does not hold that serial litigation is permissible if all parties previously overlooked a claim. Rather, in ***Fortier***, this court held that, where postconviction counsel and a reviewing court overlooked a sentencing issue of potential merit in the context of a no-merit appeal, the procedural bar of ***Escalona-Naranjo*** did not apply because the defendant did not receive the full examination of the appellate record to which he or she was entitled under the no-merit procedures set forth in WIS. STAT. RULE 809.32. *See* ***Fortier***,

[5] To the extent, if any, that Gutierrez-Mendoza suggests in this court that his multiplicity claim is a new factor warranting sentence modification, we agree with the State that such a claim is too inadequately briefed for our consideration. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Moreover, the postconviction motion, no matter how generously we might construe it, did not raise a claim for sentence modification based on an alleged new factor. The motion presented a request under WIS. STAT. § 974.06 to vacate a conviction based on an alleged double jeopardy violation. If Gutierrez-Mendoza intended to present a claim for sentence modification, he failed to do so. *See* ***State v. Woods***, 144 Wis. 2d 710, 716, 424 N.W.2d 730 (Ct. App. 1988) (explaining that claims must be presented to the circuit court with sufficient clarity that the circuit court understands the grounds for relief actually asserted). Accordingly, Gutierrez-Mendoza cannot pursue sentence modification in this court. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 (stating that we do not consider issues raised for the first time on appeal).

289 Wis. 2d 179, ¶27. Gutierrez-Mendoza, however, did not pursue a no-merit appeal. He pursued an appeal on the merits, and he did so with the assistance of counsel. In an appeal on the merits, counsel has the right and the duty to select the issues to pursue and "is entitled to exercise reasonable professional judgment in winnowing out even arguable issues in favor of others perceived to be stronger." ***State ex rel. Ford v. Holm***, 2004 WI App 22, ¶4, 269 Wis. 2d 810, 676 N.W.2d 500 (citations omitted). Counsel's exercise of his or her duties in this regard does not constitute a sufficient reason for a second or subsequent postconviction motion. Such a conclusion would entirely swallow the rule set forth in WIS. STAT. § 974.06 and ***Escalona-Naranjo***.[6]

In addition to arguing that he has cleared the bar to serial litigation imposed by ***Escalona-Naranjo***, Gutierrez-Mendoza also argues that the bar is inapplicable to his claim. His primary basis for this allegation appears to be his contention that his "sentence is void." In support, he cites ***State v. Flowers***, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998). Gutierrez-Mendoza again relies on inapplicable authority. In ***Flowers***, this court held that a claim for relief under WIS. STAT. § 973.13 is not subject to the procedural bar imposed by WIS. STAT. § 974.06, because § 973.13 includes an "express statutory mandate ... to alleviate all maximum penalties imposed in excess of that prescribed by law."[7] *See* ***Flowers***, 221 Wis. 2d at 29. However,

[6] A defendant might seek to show that his or her counsel was ineffective in selecting the issues to pursue in postconviction proceedings. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Here, however, while Gutierrez-Mendoza alleged in his postconviction motion that his postconviction counsel was ineffective, he did not pursue that allegation in this court.

[7] WISCONSIN STAT. § 973.13 provides: "In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings."

§ 973.13 is inapplicable when the sentence imposed does not exceed the maximum statutory penalty prescribed for the crime of conviction. *See* ***State v. Finley***, 2016 WI 63, ¶74, 370 Wis. 2d 402, 882 N.W.2d 761. Gutierrez-Mendoza's sentences here do not exceed the maximum statutory penalty permitted for his convictions. He faced maximum forty-year terms of imprisonment for both second-degree sexual assault of a child and repeated acts of sexual assault of the same child. *See* WIS. STAT. §§ 948.02(2), 948.025(1)(e), 939.50(3)(c) (2009-10). The circuit court imposed eleven-year and nine-year terms, respectively. Accordingly, neither § 973.13, nor ***Flowers*** has any bearing here.

Gutierrez-Mendoza next argues that the procedural bar does not apply because, he says, "no procedural bar can block" a double jeopardy claim. In support, he cites a case decided by the Fourth Circuit Court of Appeals. We need not examine that case because decisions from the Fourth Circuit are not controlling in Wisconsin state courts. *See* ***State v. Mechtel***, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993). The law in Wisconsin is that issues of multiplicity and double jeopardy are procedurally barred in a second or subsequent postconviction motion absent a sufficient reason for failing to raise them earlier. *See* ***State v. Tillman***, 2005 WI App 71, ¶26, 281 Wis. 2d 157, 696 N.W.2d 574. Accordingly, the bar applies to the instant litigation.

Before we leave this issue, we note that Gutierrez-Mendoza argues in this court that the circuit court violated his constitutional rights by applying a procedural bar to his claim. The precise basis for his contention is unclear, but he appears to believe that the circuit court misunderstood his arguments and analyzed them incorrectly. Whether claims are procedurally barred, however, is a question of law for our independent review, and we will affirm the circuit court's resolution of the question if the circuit court reached the correct result, even if we rely on different reasoning. *See* ***State v. Thames***, 2005 WI App 101, ¶10, 281 Wis. 2d 772, 700 N.W.2d

285. As our foregoing discussion reflects, we independently conclude that Gutierrez-Mendoza's claim is procedurally barred. The circuit court therefore properly declined to consider that claim.

Finally, we reject Gutierrez-Mendoza's claim for discretionary reversal in the interest of justice. Under WIS. STAT. § 752.35, this court may grant relief to accomplish justice when the real controversy has not been fully tried or when it is probable that justice has for any reason miscarried. "[R]eversals under WIS. STAT. § 752.35 are rare and reserved for exceptional circumstances." ***State v. Kucharski***, 2015 WI 64, ¶41, 363 Wis. 2d 658, 866 N.W.2d 697. This is not such a case. Gutierrez-Mendoza asserts that "justice [ha]s surely miscarried," but he expressly concedes that his "sexual encounter was unlawful." In this case, where Gutierrez-Mendoza concedes his criminal conduct and has not demonstrated any flaw in his convictions, he fails to persuade us that justice has probably miscarried. For all the foregoing reasons, we affirm.

IT IS ORDERED that the circuit court 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