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DISTRICT III

October 22, 2024

To:

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Circuit Court Judge
Electronic Notice

Thomas S. Barker
Clerk of Circuit Court
Lincoln County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2017AP1441

State of Wisconsin v. Chase M.A. Boruch (L. C. No. 2010CF269)

Before Stark, P.J., Hruz and Gill, 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).

Chase Boruch, pro se, appeals from an order denying his WIS. STAT. § 974.06 (2021-22)¹ motion for postconviction relief without holding an evidentiary hearing. 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 affirm based upon a determination made during

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

prior proceedings that the § 974.06 motion failed to state any claim upon which relief could be granted. We also decline to exercise our discretionary reversal power.

Following a jury trial, Boruch was found guilty of first-degree intentional homicide in the death of his mother and was sentenced to life in prison without the possibility of extended supervision. This court affirmed the conviction on direct appeal.

Boruch then filed a motion for postconviction relief under WIS. STAT. § 974.06, raising multiple issues not raised in his direct appeal and alleging ineffective assistance of appellate counsel as the reason he had not previously raised those issues. The circuit court denied the motion without holding an evidentiary hearing upon finding that the record conclusively demonstrated that Boruch was not entitled to relief on any of the claims.

Boruch next filed this appeal from the denial of his WIS. STAT. § 974.06 motion. While this appeal was pending, Boruch sought to waive the cost of producing transcripts. This court affirmed the circuit court's denial of a transcription fee waiver in *State v. Boruch*, No. 2018AP152, unpublished slip op. ¶¶23, 33 (WI App May 19, 2020). We first noted that none of the issues Boruch sought to raise in his § 974.06 motion were clearly stronger than the issues his appellate attorney had raised in his direct appeal.² *Boruch*, No. 2018AP152, ¶26. We then concluded that Boruch had failed to allege sufficient facts to demonstrate that his appellate counsel was ineffective for failing to raise the issues and that, consequently, Boruch could not establish a sufficient reason why he had not raised the issues in his direct appeal, as required to

² Although Boruch attempts to challenge that determination, the proper place to do so would have been by an appeal to the Wisconsin Supreme Court. We do not review our prior decision in this appeal.

avoid the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 173, 517 N.W.2d 157 (1994). Because Boruch could not obtain relief on procedurally barred claims, he was not entitled to a transcription fee waiver under WIS. STAT. § 814.29(1) and *State ex rel. Luedtke v. Bertrand*, 220 Wis. 2d 574, 578, 583 N.W.2d 858 (Ct. App. 1998), *aff'd by an equally divided court*, 226 Wis. 2d 271, 594 N.W.2d 370 (1999), *superseded by statute on other grounds*.

Now, in this appeal, Boruch challenges WIS. STAT. § 974.06(6)'s requirement that a sufficient reason be shown for failing to consolidate issues in a first postconviction motion or appeal. He claims that the statute is unconstitutional as applied to the facts of this case because it required him to prove a claim of ineffective assistance of counsel by clear and convincing evidence rather than a preponderance of the evidence. However, the Wisconsin Supreme Court has already upheld the constitutionality of the higher burden for collateral attacks. *State v. Walberg*, 109 Wis. 2d 96, 103-04, 325 N.W.2d 687 (1982).

Boruch next renews his arguments that he is entitled to a hearing on each of the claims in his postconviction motion. The State responds—and Boruch concedes in a letter stating that he will not file a reply brief—that this court's determination in the transcript appeal that the WIS. STAT. § 974.06 motion failed to state a claim upon which relief could be granted is dispositive of those arguments. We agree. Our decision in the prior appeal that Boruch's § 974.06 motion failed to state a claim upon which relief could be granted is now the law of the case. *See State v. Moeck*, 2005 WI 57, ¶18, 280 Wis. 2d 277, 695 N.W.2d 783. In short, the circuit court was not required to hold a hearing on a postconviction motion that attempted to raise procedurally barred issues.

Finally, Boruch asks this court to employ our discretionary reversal power. WISCONSIN STAT. § 752.35 allows this court to reverse a circuit court judgment “if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.” In order to establish that the real controversy has not been fully tried, a party must show “that the jury was precluded from considering ‘important testimony that bore on an important issue’ or that certain evidence which was improperly received ‘clouded a crucial issue’ in the case.” *State v. Darcy N.K.*, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted). To establish a miscarriage of justice, there must be “a substantial degree of probability that a new trial would produce a different result.” *Id.* (citation omitted). In either case, however, we will exercise our discretionary reversal power only sparingly. *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

As we noted on Boruch’s direct appeal, Boruch’s conviction was supported by “overwhelming evidence of guilt.” *State v. Boruch*, No. 2013AP925-CR, unpublished slip op. ¶22 (WI App Jan. 22, 2014). We need not repeat our analysis of the evidence at trial here. Suffice it to say that Boruch has not persuaded us that any of the issues he is now attempting to raise prevented the real controversy from being tried or create a substantial probability of a different result upon retrial. We therefore decline to use our discretionary reversal power.

Upon the foregoing,

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

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

Samuel A. Christensen
Clerk of Court of Appeals