OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

December 5, 2024

To:

Hon. Ellen K. Berz
Circuit Court Judge
Electronic Notice

Jeff Okazaki
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

Donald V. Latorraca
Electronic Notice

James F. Foote 196400
Stanley Correctional Institution
100 Corrections Dr.
Stanley, WI 54768

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

2023AP616-CR State of Wisconsin v. James F. Foote (L.C. # 2001CF58)

Before Graham, Nashold, and Taylor, 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).

James Foote, pro se, appeals a circuit court order denying his postconviction motions for modification of a restitution order. 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 (2021-22).[1] We summarily affirm.

BACKGROUND

Foote was convicted in 2001, after a jury trial, of attempted first-degree intentional homicide and first-degree reckless injury. The circuit court imposed a sentence totaling forty

[1] All references to the Wisconsin Statutes are to the 2021-22 version.

years of initial confinement and twenty years of extended supervision. In regard to restitution, the court ordered that any restitution that Foote was ordered to pay would be as a condition of extended supervision. In the judgment of conviction, the court ordered the State to submit an order for restitution within 45 days, with Foote having ten working days thereafter to request a restitution hearing. Several months later on January 7, 2002, the circuit court signed and entered a restitution order. There is no evidence in the circuit court record transmitted to this court that Foote objected to the State's proposed restitution order. The restitution order provides that Foote and his co-defendant are jointly and severally liable for payment of restitution and costs totaling $206,207.80.

In January 2004, this court summarily affirmed Foote's conviction in a no-merit appeal. *See* ***State v. Foote***, No. 2002AP2478-CRNM, unpublished op. and order (WI App Jan. 21, 2004). In August 2004, Foote filed a pro se postconviction motion pursuant to WIS. STAT. § 974.06. The circuit court denied the motion, and this court affirmed on appeal, determining that the claims Foote raised in his § 974.06 motion are procedurally barred. *See* ***State v. Foote***, No. 2004AP3283, unpublished op. and order (WI App Oct. 19, 2005).

In 2015, the state legislature enacted 2015 Wis. Act 355 ("Act 355"), which addressed the authority of the Department of Corrections (DOC) to collect restitution from prisoner wages and accounts. Following the passage of Act 355, DOC began deducting monies from Foote's prisoner wages and accounts for payment of restitution. In January 2017, Foote wrote a letter to the circuit court objecting to the restitution withdrawals from his wages and accounts. Foote alleged in the letter that he had never had a restitution hearing and, if he had, he would have questioned or objected to the amount of restitution ordered.

In April 2017, the circuit court appointed Attorney Mark Frank to represent Foote on the restitution issue. In 2019, Attorney Frank filed a motion on Foote's behalf that asked the court to vacate or modify the restitution order. The court set a briefing schedule, and the parties submitted briefs on the restitution issue.

Then, in 2021, before the circuit court decided the restitution motion filed by Attorney Frank, Foote filed an additional postconviction motion through his retained counsel, Jarrett Adams. In the 2021 motion, Foote challenged his sentence on grounds unrelated to restitution, including new factors, the sentencing court's consideration of allegedly inaccurate information, and the "unduly harsh" nature of his sentence. The court denied Foote's 2021 postconviction motion before it decided his 2019 restitution motion. Foote appealed, and this court affirmed the circuit court's decision, determining that Foote had failed to show the existence of a new factor and that Foote's other claims were procedurally barred. ***State v. Foote***, No. 2022AP812-CR, unpublished slip op. ¶1 (WI App Oct. 12, 2023).

In 2023, with the 2019 restitution motion filed by Attorney Frank still pending, Foote wrote a letter to the Office of the State Public Defender (SPD), asserting that Attorney Frank had abandoned him. Then, on March 9, 2023, Foote filed a pro se motion in the circuit court, alleging that he never had a restitution hearing, that the State failed to timely file a restitution order, and that Attorney Paul Nesson, who represented Foote in his no-merit appeal, failed to properly follow the no-merit procedure and should have challenged the restitution order. Foote further asserted that he is entitled to sentence modification based on a new factor, and he asked the court to reinstate his direct appeal rights.

On March 27, 2023, the circuit court entered an order denying the 2019 motion filed by Attorney Frank as well as the claims that Foote raised in his 2023 pro se motion. The court acknowledged that it had the "the discretionary authority to set the amount/percentage deduction from prison funds in the judgment of conviction for court-ordered financial obligations[,]" citing ***State ex rel. Ortiz v. Carr***, 2022 WI App 16, ¶¶29-37, 401 Wis. 2d 450, 973 N.W.2d 786. However, the court declined to use that discretionary authority, concluding that "enforcing the finality of litigation outweighed other considerations." Foote appeals the order denying his 2019 and 2023 motions.[2]

DISCUSSION

Foote argues a number of issues on appeal, some of which are overlapping.[3] In our discussion below, we group and address the issues raised by Foote in the order that this court considered them, and not necessarily in the order they appear in the parties' briefs.

[2] The electronic record compiled by the clerk of circuit court for this appeal is time-consuming to review because the items in the record appear in a seemingly random order. Pursuant to WIS. STAT. RULE 809.15, "[t]he clerk of circuit court shall assemble the record in the order set forth in sub. (1)(a), identify each record item by its circuit court document number, date of filing, and title, and prepare a list of the numbered documents." It is this court's strong preference that all items in the appellate record be listed in roughly chronological order, with transcripts at the end.

[3] Foote's brief does not comply with WIS. STAT. RULE 809.19(8)(bm), which addresses the pagination of appellate briefs. *See* RULE 809.19(8)(bm) (providing that, when paginating briefs, parties should use "Arabic numerals with sequential numbering starting at '1' on the cover"). This rule has recently been amended, *see* S. CT. ORDER 20-07, 2021 WI 37, 397 Wis. 2d xiii (eff. July 1, 2021), and the reason for the amendment is that briefs are now electronically filed in PDF format, and are electronically stamped with page numbers when they are accepted for efiling. As our supreme court explained when it amended the rule, the new pagination requirements ensure that the numbers on each page of a brief "will match … the page header applied by the eFiling system, avoiding the confusion of having two different page numbers" on every page of a brief. S. CT. ORDER 20-07 cmt. at xl.

The first issue we address, as a threshold matter, is the State's argument that the circuit court lost competency to address Foote's restitution-related claims once he appealed the circuit court's denial of his 2021 postconviction motion. The State cites WIS. STAT. § 808.075(2), which generally limits, with some exceptions, a circuit court's competency to act once a party files a notice of appeal. We decline to address the State's competency argument because, as explained in further detail below, we affirm the circuit court's decision on other grounds. "Issues that are not dispositive need not be addressed." ***Maryland Arms Ltd. Partnership v. Connell***, 2010 WI 64, ¶48, 326 Wis. 2d 300, 786 N.W.2d 15 (*citing* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938)).

We turn next to Foote's arguments challenging the circuit court's denial of the 2019 motion and the 2023 pro se motion regarding the restitution order. Foote argues that the circuit court failed to follow the requirements of WIS. STAT. § 973.20(13)(c) when it entered the restitution order, that it erred when it entered the restitution order without a hearing, and that he is entitled to a restitution hearing. We conclude that these claims are procedurally barred pursuant to ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), which provides that an issue which could have been raised on direct appeal or in a motion under WIS. STAT. § 974.02 cannot be the basis for a subsequent postconviction motion under WIS. STAT. § 974.06, unless there was a sufficient reason for failing to raise the issue earlier.

Foote has not asserted a sufficient reason for why the restitution issues he raises in the 2019 and 2023 motions were not raised previously. Foote had the opportunity to challenge the 2002 restitution order in his no-merit appeal, through one of the several no-merit responses he filed, and again in his 2004 pro se postconviction motion. Foote did not raise any restitution issue in either instance, and he fails to provide a sufficient reason for why he did not. Foote

asserts that, when he filed his no-merit responses and his 2004 pro se postconviction motion, he did not know about the restitution order. He asserts that he did not realize restitution had been ordered until the DOC began deducting money from his wages and accounts years later, after the enactment of Act 355. However, the record reflects that Foote was present in person at the sentencing hearing when the circuit court ordered the State to file a proposed restitution order within 45 days and for Foote to indicate within ten business days thereof whether he wanted a restitution hearing. The restitution order was entered on January 7, 2002, several months after sentencing, and was made part of the circuit court record. There is no indication in the record or assertions made that Foote requested a restitution hearing prior to the circuit court entering the restitution order. Further, Foote's counsel was included on the list of parties who received a copy of the restitution order. Even if we set aside, for the moment, these record facts and assume to be true Foote's assertion that he was "totally unaware of any restitution proceedings or entered order for restitution" until after the legislature passed Act 355, Foote's ignorance of the contents of the record is not a sufficient reason for failing to raise the restitution issue on direct appeal or in his 2004 postconviction motion. Because he has not asserted a sufficient reason for failing to raise his restitution claims earlier, those claims are procedurally barred under ***Escalona-Naranjo***, 185 Wis. 2d at 185.

We next address Foote's argument that he received ineffective assistance of counsel from Attorney Frank, who was appointed in 2017 by the circuit court to represent Foote with respect to the restitution issue. Foote's challenge to Attorney Frank's effectiveness rests on Foote's assumption that he had a constitutional right to the effective assistance of counsel in his collateral challenge to the restitution order. Foote had no such right. "[T]he right to appointed counsel extends to the first appeal of right, and no further." ***Pennsylvania v. Finley***, 481 U.S.

551, 555 (1987). There is no constitutional right to counsel when mounting a collateral attack upon a conviction. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 649, 579 N.W.2d 698 (1998). Because Foote had no right to counsel in his 2019 challenge to restitution, he cannot claim that he received constitutionally ineffective assistance of counsel in those proceedings. *See* ***Wainwright v. Torna***, 455 U.S. 586, 587-88 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance).

Foote also seeks to challenge the DOC's practices in collecting restitution by withdrawals from his prison wages and accounts. This court does not have general authority to direct the DOC to handle its affairs in any particular manner. An inmate generally must address any objections to the DOC's procedures through the Inmate Complaint Review System (ICRS). ***State v. Williams***, 2018 WI App 20, ¶¶1-5, 380 Wis. 2d 440, 909 N.W.2d 177. An inmate may seek relief in the circuit court through a writ of certiorari, a proceeding separate from his criminal case, only after all such available administrative remedies have been exhausted. *See* ***id.***, ¶5. Should Foote wish to challenge DOC's practices in collection of his restitution obligations, the proper avenue is through the administrative review process, and not through postconviction proceedings.

We next address Foote's request to reinstate his direct appeal rights. As discussed above, Foote previously brought a direct appeal of his conviction. To the extent Foote nonetheless wishes to pursue a claim related to reinstatement of his appeal rights under WIS. STAT. § 809.30, the process for pursuing such a claim is through a writ of habeas corpus filed in this court, rather than through an appeal of an order denying a postconviction motion in the circuit court. *See* ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992).

Finally, we address Foote's argument that the passage of Act 355 in 2015, which addressed the DOC's authority to withdraw funds from prisoners' wages and accounts, is a new factor entitling him to sentence modification. A defendant seeking sentence modification based on a new factor must make a threshold showing, "by clear and convincing evidence the existence of a new factor." ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is defined as a fact or a set of facts that is "highly relevant to the imposition of sentence, but not known to the [circuit court] 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." ***Id.***, ¶40 (citation omitted). Foote fails to develop any argument that Act 355 would have been highly relevant to the court's imposition of sentence in 2001 or its restitution order in 2002. This court need not consider arguments that are unsupported by adequate factual and legal citations or are otherwise undeveloped. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (lack of record citations), *abrogated on other grounds by* ***Wiley v. M.M.N. Laufer Family Ltd. P'ship***, 2011 WI App 158, 338 Wis. 2d 178, 807 N.W.2d 236; ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped legal arguments). We reject Foote's new factor sentence modification argument on grounds that it is undeveloped.

Any other arguments in the appellant's briefs that are not addressed here are either patently meritless or so inadequately developed that they do not warrant our attention. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (an appellate court need not discuss arguments that lack "sufficient merit to warrant individual attention").

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

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

Samuel A. Christensen
Clerk of Court of Appeals