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DISTRICT I

March 11, 2025

To:

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Circuit Court Judge
Electronic Notice

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

2023AP1533 State of Wisconsin v. Eddie Lee Johnikin (L.C. # 2017CF2889)

Before White, C.J., Donald, P.J., and Geenen, 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).

Eddie Lee Johnikin, *pro se*, appeals an order denying his motion seeking postconviction relief under WIS. STAT. § 974.06 (2023-24).[1] Based upon a review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Johnikin's claims are procedurally barred. Accordingly, we affirm.

Johnikin pled guilty to robbery of a financial institution, armed robbery with the threat of force, and taking hostages who are released without bodily harm. *See* WIS. STAT. §§ 943.87,

[1] All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

943.32(2), 940.305(2) (2017-18). The trial court imposed three twenty-five-year terms of imprisonment, each bifurcated as eighteen years of initial confinement and seven years of extended supervision, and each concurrent with the others but consecutive to any earlier imposed sentence. Postconviction, Johnikin unsuccessfully moved to withdraw his guilty pleas, and then he pursued a no-merit appeal from the judgment of conviction and the postconviction order. *See* WIS. STAT. RULE 809.32. We affirmed. ***State v. Johnikin*** (***Johnikin I***), No. 2020AP37-CRNM, unpublished op. and order (WI App Oct. 25, 2022).

Johnikin next filed the postconviction motion underlying this appeal. He challenged the sufficiency of the plea colloquy and the validity of his guilty plea to robbery of a financial institution; he alleged that his trial counsel was ineffective for failing to review the plea questionnaire with him and for failing to provide him with a copy of the correct jury instructions at the time of the plea; and he claimed that the trial court was biased against him and sentenced him on the basis of inaccurate information. The circuit court concluded that the claims were barred.[2] Johnikin appeals.

A prisoner may raise constitutional and jurisdictional postconviction claims under WIS. STAT. § 974.06 after exhausting his or her statutory direct appeal rights. ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. The opportunity to pursue such claims is limited, however, because "[w]e need finality in our litigation." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A person therefore may not raise postconviction

[2] The Honorable David A. Hansher presided over the pretrial proceedings, the plea and sentencing hearing, and Johnikin's first postconviction motion. We refer to Judge Hansher as the trial court and, when clarity warrants, as the sentencing court. The Honorable Milton L. Childs, Sr., presided over the postconviction motion that underlies this appeal. We refer to Judge Childs as the circuit court.

claims under § 974.06, if the person could have raised the claims in a previous postconviction motion or on direct appeal unless the person states a "sufficient reason" for failing to assert or adequately raise the claims earlier. ***Escalona-Naranjo***, 185 Wis. 2d at 184; § 974.06(4). Moreover, a claim that has been litigated in a postconviction proceeding may not be litigated again in another postconviction proceeding "no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Johnikin previously challenged his conviction in a no-merit proceeding. "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. A prior no-merit appeal therefore permits the application of a procedural bar to later claims. ***State v. Tillman***, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574. When we consider the preclusive effect of no-merit proceedings, however, our review includes an assessment of whether appellate counsel and this court followed the no-merit procedures and whether those procedures warrant confidence in the outcome of the appeal. ***Id.***, ¶20.

As ***Tillman*** requires, we have conducted an assessment of the no-merit proceedings underlying ***Johnikin I***. Our assessment reveals that we reviewed the entire record, as required by ***Anders v. California***, 386 U.S. 738, 744 (1967), and we considered appellate counsel's no-merit report and Johnikin's response. We noted in our decision that the no-merit report addressed the propriety of the trial court's ruling on Johnikin's pretrial suppression motion, the validity of Johnikin's pleas, the trial court's denial of Johnikin's postconviction motion for plea withdrawal, and the trial court's exercise of sentencing discretion. ***Johnikin I***, No. 2020AP37-CRNM at 4. We stated our agreement with appellate counsel's analysis of the issues discussed

in the no-merit report and with appellate counsel's conclusion that those issues lacked arguable merit for an appeal. ***Id.***

We next observed that, in response to the no-merit report, Johnikin presented "a new twist on his originally filed postconviction motion," specifically, "that trial counsel was ineffective for not providing him with the correct jury instruction on the charge of robbery of a financial institution." ***Id.*** We considered Johnikin's allegations at length, assessing them in light of the trial court's findings following the postconviction hearing, including findings that trial counsel testified credibly and had "explained everything to [Johnikin]" prior to his guilty pleas. ***Id.*** at 5-6. We expressly determined that Johnikin's ineffective assistance of counsel claim lacked arguable merit. ***Id.*** at 6. We also made clear that, to the extent we had not discussed an issue that Johnikin presented in his response to the no-merit report, we had concluded that the issue lacked sufficient merit or importance to warrant individual attention. ***Id.*** at 7. We therefore summarily affirmed the judgment of conviction and the postconviction order.

We are satisfied that the no-merit process underlying ***Johnikin I*** unfolded as contemplated by ***Anders*** and WIS. STAT. RULE 809.32, and therefore we have confidence in the proceedings. Accordingly, Johnikin may not pursue his current claims unless he shows that we should not apply a procedural bar. Johnikin fails to make such a showing.

In ***Johnikin I***, Johnikin previously litigated his claims of a defective plea colloquy and ineffective assistance of trial counsel. As ***Tillman*** explains, "the no[-]merit process 'necessarily implicates the merits of an appeal'" and "'can only be understood as a merits-based decision with respect to each of the claims raised in the petition.'" ***Id.***, 281 Wis. 2d 157, ¶18 (citation omitted). The rule prohibiting a convicted person from relitigating claims therefore bars

Johnikin's current claims of a defective plea colloquy and ineffective assistance of counsel. ***Witkowski***, 163 Wis. 2d at 990.

Also barred is Johnikin's claim that postconviction counsel was ineffective for failing to allege trial counsel's ineffectiveness in connection with Johnikin's guilty pleas. When a defendant alleges ineffective assistance of postconviction counsel on the basis of a failure to assert trial counsel's ineffectiveness, the defendant must first establish that trial counsel was in fact ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. We concluded in ***Johnikin I***, however, that a challenge to Johnikin's pleas and a claim of ineffective assistance of trial counsel would lack arguable merit. Johnikin cannot relitigate those claims merely by "retheorizing" them as a claim that postconviction counsel was ineffective. ***Witkowski***, 163 Wis. 2d at 990.

Further, Johnikin previously litigated his claim of judicial bias. In his response to the no-merit report, as in his current litigation, Johnikin pointed to remarks that the trial court made on the record, and he alleged that the "judge was prejudice[d]" and "bias[ed]." Although we did not address these allegations with specificity in ***Johnikin I***, we noted that Johnikin had raised issues that we rejected without comment because they were too insubstantial to warrant discussion. ***Id.***, No. 2020AP37-CRNM at 7. Our opinion in ***Johnikin I*** thus constitutes a merits-based decision resolving Johnikin's claim of judicial bias. ***Tillman***, 281 Wis. 2d 157, ¶18. Johnikin may not litigate the issue anew. ***Witkowski***, 163 Wis. 2d at 990.

Johnikin additionally sought to raise a claim in his WIS. STAT. § 974.06 motion that he did not raise in ***Johnikin I***, namely, that the sentencing court relied on inaccurate information when concluding that Johnikin was ineligible to participate in the challenge incarceration

program (CIP) and the Wisconsin substance abuse program (WSAP).[3] *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (holding that a defendant has a right to be sentenced on accurate information). Johnikin may not raise the claim now absent a sufficient reason for his earlier failure to do so. ***Escalona-Naranjo***, 185 Wis. 2d at 184. We determine the sufficiency of his reason by examining the allegations within the four corners of his postconviction motion, keeping in mind that conclusory allegations are insufficient to warrant relief.[4] *See* ***State v. Allen***, 2004 WI 106, ¶¶12, 23, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

Johnikin first asserted that he had a sufficient reason for serial litigation because his appellate counsel "failed to follow no-merit procedures and made a false representation to the court when counsel certified that she had discussed all potential issues with the defendant-appellant." Johnikin did not include any allegations of material fact in support of this bald and conclusory assertion. It was therefore inadequate to constitute a sufficient reason for serial litigation. ***Id.***

Second, Johnikin suggested that he could pursue serial litigation because appellate counsel and this court overlooked an arguably meritorious sentencing claim. We have recognized that a joint failure by both this court and appellate counsel to identify an arguably

[3] CIP and WSAP are prison programs. After an inmate completes either program, the inmate's remaining initial confinement time is normally converted to time that the inmate must serve on extended supervision. WIS. STAT. §§ 302.045(1), 302.045(3m)(b), 302.05(1)(am), 302.05(3)(c)2; *but see* ***State v. Gramza***, 2020 WI App 81, ¶3, 395 Wis. 2d 215, 952 N.W.2d 836.

[4] The appendix that Johnikin filed with his appellant's brief included a document titled "Motion Pursuant to WIS. STAT. § 974.06." That document is different from the postconviction motion that he filed in the circuit court. Accordingly, we have not considered the motion included in the appendix. *See* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989) (providing that a party may not use the appendix to supplement the appellate record).

meritorious sentencing issue in a no-merit proceeding may constitute a sufficient reason for a later postconviction motion. ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶16, 314 Wis. 2d 112, 758 N.W.2d 806. As the circuit court explained in its postconviction decision, however, Johnikin's sentencing claim does not satisfy the necessary conditions for serial litigation because the claim lacked any merit.

When imposing sentence for certain felonies, a court must exercise its sentencing discretion to determine whether the defendant is eligible to participate in CIP and WSAP. WIS. STAT. § 973.01(3g), (3m).[5] In this case, the sentencing court stated: "I'm not gonna make [Johnikin] eligible because of his age and his mental health problems. They won't take him anyway. And I don't think this is the type of case where we want him to be released early." Johnikin contends that these remarks are inaccurate because "there are not any rules that say that defendants cannot take the [WSAP] program if they have mental health problems or if they are older."[6] The circuit court rejected these arguments, explaining that "Johnikin conflates the statutory eligibility requirements with the court's sentencing discretion.... The [sentencing] court, acting within the exercise of discretion, could reasonably conclude that he was not an appropriate candidate for early release due to his mental health problems and strong rehabilitate needs." The circuit court was correct. *See* ***State v. Owens***, 2006 WI App 75, ¶¶10-11, 291 Wis. 2d 229, 713 N.W.2d 187.

[5] The WSAP was formerly known as the earned release program. The legislature renamed the program in 2011. *See* 2011 Wis. Act 38, § 19. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

[6] Johnikin was forty-four years old at the time of his sentencing and was therefore statutorily excluded from participating in CIP, which may not admit an inmate who has attained the age of forty years old as of the date the inmate would enter the program. *See* WIS. STAT. § 302.045(2)(b).

Moreover, the sentencing remarks included the accurate observation that Johnikin would not be accepted into either CIP or WSAP regardless of any eligibility finding. One of Johnikin's three concurrent sentences is for taking hostages in violation of WIS. STAT. § 940.305(2), and a person serving a sentence for a crime specified in WIS. STAT. ch. 940 is statutorily excluded from both programs. *See* WIS. STAT. §§ 302.045(2)(c), 302.05(3)(a)1. Accordingly, neither appellate counsel nor this court overlooked a meritorious claim for sentencing relief based on inaccurate information regarding Johnikin's qualifications for admission to CIP and WSAP. *See* ***Allen***, 328 Wis. 2d 1, ¶83.

In sum, Johnikin's claims are procedurally barred, and the circuit court therefore properly rejected them. For all the foregoing reasons, we affirm.

IT IS ORDERED that the circuit court's order is summarily affirmed. *See* 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