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 III

April 29, 2025

To:

Hon. Maureen D. Boyle
Circuit Court Judge
Electronic Notice

Sharon Millermon
Clerk of Circuit Court
Barron County Justice Center
Electronic Notice

Michael C. Sanders
Electronic Notice

George E. Phelps III 648612
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2023AP1215 State of Wisconsin v. George E. Phelps III (L. C. No. 2016CF26)

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).

George E. Phelps III, pro se, appeals from an order of the circuit court denying his WIS. STAT. § 974.06 (2023-24)[1] motion for postconviction relief. 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.

We explained much of the factual and procedural history of this case in one of our prior decisions. *See* ***State v. Phelps***, No. 2021AP698, unpublished op. and order (WI App June 22, 2022). To recap, in 2016, Phelps was convicted of child enticement and second-degree sexual

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

assault of a child under the age of sixteen after pleading guilty in exchange for the dismissal of multiple other charges. Phelps' appointed appellate counsel filed a no-merit notice of appeal and a no-merit report. After Phelps repeatedly failed to file a response to the report—despite being granted several extensions to do so—Phelps' counsel moved to dismiss the appeal so Phelps could proceed pro se. We dismissed the appeal and extended the deadline for Phelps to file a pro se direct appeal, which he did. However, we ultimately dismissed the appeal in 2018 because Phelps failed to comply with our order that he identify any issues that were preserved for appeal.

In 2020, Phelps filed his first pro se postconviction motion collaterally attacking his conviction pursuant to WIS. STAT. § 974.06. He sought to withdraw his pleas based upon claims of ineffective assistance of trial counsel, arguing that his attorney: (1) failed to find a cell phone that would show the victim had claimed to be eighteen years old on an online dating site; (2) spent an inadequate amount of time with Phelps; and (3) did not inform Phelps that his bond could be revoked pending sentencing. The circuit court denied Phelps' motion without a hearing on the grounds that his allegations were insufficient to establish prejudice, there was overwhelming evidence of Phelps' guilt, Phelps received substantial benefits by entering the pleas, and Phelps had confessed to the agent who authored his presentence investigation report (PSI). Phelps filed an untimely appeal, which we dismissed for lack of jurisdiction.

In 2021, Phelps filed his second pro se postconviction motion collaterally attacking his conviction pursuant to WIS. STAT. § 974.06. This motion repeated, nearly verbatim, the same three claims raised in Phelps' first motion. In addition, Phelps asserted that his trial counsel led him to believe that he could challenge his conviction by "bringing forward unseen evidence during the PSI." The circuit court denied the motion, concluding that Phelps' first three issues

were procedurally barred because they had already been litigated. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (holding that a matter already decided cannot be relitigated in subsequent postconviction proceedings "no matter how artfully the defendant may rephrase the issue"). The court further concluded that the new issue Phelps raised was procedurally barred because Phelps did not provide a sufficient reason for failing to previously raise the issue. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) (noting that no issues that could have been raised in a previously filed postconviction motion or on direct appeal can be the basis for a subsequent § 974.06 motion unless the defendant provides a sufficient reason for failing to raise the issue in the earlier proceeding). On appeal, we affirmed. *See* ***Phelps***, No. 2021AP698 at 1.

In 2023, Phelps filed his third pro se WIS. STAT. § 974.06 postconviction motion. He again argued that his trial counsel was ineffective for not obtaining the cell phone Phelps believes would show the victim mispresented his age and for not sufficiently investigating. Phelps recast these two arguments as claims involving "newly discovered evidence," in the form of a time slip showing the hours his attorney worked, a letter from an officer at the jail, and his counsel's statement to the Office of Lawyer Regulation. Phelps also argued for the first time that his attorney failed to demand discovery from the State. The circuit court denied Phelps' motion without a hearing based on the procedural bars of ***Witkowski*** and ***Escalona-Naranjo***. Phelps then filed this appeal.

Like the circuit court, we conclude that all of the issues Phelps raises are procedurally barred. This is Phelps' fifth appeal to this court and the third time Phelps has raised arguments regarding the cell phone and trial counsel's allegedly deficient investigation. Phelps may not raise these arguments again, recast as claims based on new information, particularly when he has

not alleged that the information was unavailable to him earlier and the information provides no meaningful support for his arguments. *See* ***Witkowski***, 163 Wis. 2d at 990. As for his argument that his attorney failed to seek discovery from the State, Phelps has failed to provide a sufficient reason for failing to raise this argument during his prior postconviction and appellate litigation. Therefore, he is barred from raising it. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185.

Even if the discovery claim were not procedurally barred by ***Escalona-Naranjo***, Phelps' argument would fail on the merits. To establish ineffective assistance of counsel, a person must show that his counsel performed deficiently and that the deficient performance prejudiced his or her defense. ***Strickland v. Washington***, 466, U.S. 668, 687 (1984). Phelps has not asserted facts that, if true, would meet the prejudice prong of the ***Strickland*** test. As the circuit court aptly explained in a prior iteration of this litigation, "[b]ased on the record, including the defendant's own confession, corroborated by evidence on the child's phone and the defendant's phone, there is no reasonable probability that the outcome would have been any different." Because there is no reasonable probability of a different outcome, Phelps is not entitled to relief.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to 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