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DISTRICT II

July 30, 2025

To:

Hon. Rebecca L. Persick
Circuit Court Judge
Electronic Notice

Chris Koenig
Clerk of Circuit Court
Sheboygan County Courthouse
Electronic Notice

Lisa E.F. Kumfer
Electronic Notice

Frank Hvizdak #584797
Fox Lake Correctional Institution
W10237 Lake Emily Road
Fox Lake, WI 53933

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

2024AP1530 State of Wisconsin v. Frank Hvizdak (L.C. #2010CF498)

Before Gundrum, P.J., Grogan, and Lazar, 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).

Frank Hvizdak, pro se, appeals from an order denying his WIS. STAT. § 974.06 (2023-24)[1] postconviction motion. Hvizdak's brief is difficult to decipher, but he appears to be arguing that he was sentenced based on inaccurate information and that newly discovered evidence warrants a new trial. 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.

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

In 2011, Hvizdak pled guilty to one count of second-degree intentional homicide, unnecessary defensive force, contrary to WIS. STAT. § 940.05(1),[2] and the circuit court imposed a sentence of 25 years' initial confinement followed by 10 years' extended supervision. He did not file a direct appeal, but starting in 2013, filed five postconviction motions and writ petitions that: (1) raised allegations of ineffective assistance of counsel, witnesses against him committing perjury, and the State committing a ***Brady*** violation;[3] (2) sought plea withdrawal; and (3) challenged sentence enforcement. All of his motions/petitions were denied.

In 2024, Hvizdak filed a WIS. STAT. § 974.06 motion—his sixth postconviction motion. The motion, which is difficult to decipher, generally alleges: (1) that evidence of a statement Hvizdak made without counsel present was introduced; (2) ineffective assistance of counsel; (3) unconstitutional suppression of evidence; (4) use of perjured testimony; (5) abridgement of a constitutional right not recognized at the time of conviction; (6) that the sentencing court should have been informed about the victim's and the victim's witnesses' criminal records; (7) that the victim's family and friends, some of whom had witnessed the crime, lied at the sentencing hearing; and (8) that the victim's friends who witnessed the crime made inconsistent statements. Hvizdak acknowledges in his motion that these issues were all previously raised in at least one prior motion; however, he asserts that what he had *not* previously raised was that this information was not known to him "until 2020 through 2022." In other words, Hvizdak seemingly concedes that the only "new evidence" raised in the motion currently under review is

[2] We note that the plea hearing transcript indicates that the plea included the assertion of "an imperfect self-defense." *See* WIS. STAT. § 940.01(2)(b).

[3] ***Brady v. Maryland***, 373 U.S. 83 (1963).

when he learned about the victim's and victim's witnesses' criminal records, his attorney's alleged failures to investigate, and that an alleged ***Brady*** violation occurred—not that that information itself is "new evidence" for purposes of the motion under review.[4] The circuit court summarily denied Hvizdak's motion, and he appeals.

As noted, this is Hvizdak's sixth postconviction motion. He conceded in his motion to the circuit court that all of these claims/issues were raised previously, but contends he should be allowed to relitigate the same issues because he had previously failed to inform the court as to *when* he discovered the "new" information. We reject his assertions.

In ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), our supreme court held that "[w]e need finality in our litigation." Any claim that could have been raised in a prior postconviction motion or on direct appeal cannot form the basis for a subsequent motion under WIS. STAT. § 974.06 unless the defendant demonstrates a sufficient reason for failing to raise the claim earlier. ***Escalona-Naranjo***, 185 Wis. 2d at 184. The defendant may not relitigate a matter previously litigated "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).

Whether a defendant's claim is procedurally barred and whether a sufficient reason exists for the failure to previously assert the claim present questions of law we review de novo. ***State v. Kletzien***, 2011 WI App 22, ¶¶9, 16, 331 Wis. 2d 640, 794 N.W.2d 920.

[4] Even if we were to construe Hvizdak as asserting that information about the victim's and victim's witnesses' criminal records, his attorney's alleged failure to investigate, and that an alleged ***Brady*** violation occurred is "new evidence" for the purposes of our appeal, our analysis would ultimately lead to the same result—that Hvizdak's most recent postconviction motion is barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

Based on these principles, Hvizdak's claim is procedurally barred by WIS. STAT. § 974.06(4) and ***Escalona-Naranjo***. He admits he previously raised these claims in his prior five postconviction motions/petitions, and he has provided no reason why he failed to inform the circuit court as to *when* he learned the "new" information in his prior motion. That ends the matter. His claim that he should be allowed to relitigate some of the claims the courts previously rejected because he previously omitted the time period in which he learned, what he describes as "new" information, does not help him. Finding a different way to argue claims that have previously been deemed meritless does not open the ***Escalona-Naranjo*** door. *See* ***Witkowski***, 163 Wis. 2d at 990.

Further, to the extent he claims his "new information"—whether in regard to the substantive information he provided in the prior motion or when he learned of this substantive information—provides newly discovered evidence warranting a new trial, we are not persuaded. Hvizdak pled guilty to the crime, and his prior postconviction motions seeking plea withdrawal and alleging ineffective assistance were all meritless. Even if he could somehow overcome those facts, he fails to meet at least two of the criteria of the newly discovered evidence standard as his information is not "new" and he fails to adequately explain how he was not negligent in seeking the evidence—particularly as it relates to when he learned the substantive information. *See* ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (To succeed on a newly discovered evidence claim based on "newly-discovered evidence, a defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." (citation omitted)); *see also* ***State v. Bembenek***, 140 Wis. 2d 248, 256, 409 N.W.2d 432 (Ct. App. 1987) ("'Newly discovered evidence' does not include a new appreciation of the

importance of evidence previously known but not used."); ***State v. Fosnow***, 2001 WI App 2, ¶16, 240 Wis. 2d 699, 624 N.W.2d 883 (2000) (evidence that "existed and was available to the defendants or their counsel prior to conviction and sentencing" does not constitute newly discovered evidence).

To the extent Hvizdak contends the information he found about the victim's and the witnesses' criminal records constitutes a new factor that warrants sentence modification, we reject it. The information Hvizdak offers is not a new factor. Likewise, *when* he learned that information is also not a new factor, particularly given that he had learned that information *before* he filed his February 2023 Petition for Coram Nobis. A new factor is "'a fact or set of facts highly relevant to the imposition of sentence'" that is not known to the sentencing court, "'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.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). This information is not highly relevant to the sentence imposed. The sentence is related to Hvizdak's crime—it is not meant to pass judgment on the victim's or other witnesses' unrelated conduct. *Cf.* ***State v. Gallion***, 2004 WI 42, ¶¶58-72, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Harbor***, 333 Wis. 2d 53,¶49, 797 N.W.2d 828.[5]

[5] The State requests that we impose sanctions on Hvizdak because he "knows or should know" that his repeated motions challenging his conviction are meritless. *See* ***State v. Casteel***, 2001 WI App 188, ¶19, 247 Wis. 2d 451, 634 N.W.2d 338. We agree that Hvizdak's successive meritless challenges to his conviction are an "abus[e of] the appellate process," *see* ***id.***, ¶25, and contrary to the finality principle. Although we decline to impose sanctions against Hvizdak at this time, we warn Hvizdak that any future filings will result in sanctions against him.

Therefore,

IT IS ORDERED that the order of the circuit court 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