COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1077 **Cir. Ct. No. 1999CF5988**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE D. PRUDE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Fine, Wedemeyer and Kessler, JJ.

¶1 PER CURIAM. Terrance D. Prude appeals *pro se* from an order denying his postconviction motion brought under WIS. STAT. § 974.06 (2005–06),[1] and from an order denying his motion to reconsider. The circuit court found that Prude's claims are procedurally barred. We affirm.

Background

¶2 Prude pled guilty to five counts of armed robbery as party to a crime. *See* WIS. STAT. §§ 943.32(2) and 939.05 (1999–2000). Prior to sentencing, he discharged his appointed lawyer. With the assistance of a new attorney, he moved in 2000 to withdraw his pleas on the ground that he had not understood the plea negotiation and its consequences. The circuit court denied the motion, and the matter proceeded to sentencing.

¶3 Prude next filed a motion for plea withdrawal in 2003. Acting *pro se*, he alleged that he did not understand the elements of the offense or the nature of the charge. The circuit court denied the motion, concluding that it was contradicted by the record and "completely frivolous."

¶4 Prude filed his third motion for plea withdrawal in 2004 with the assistance of an appellate attorney.[2] Prude alleged that his pleas were not

[1] All references to the Wisconsin Statutes are to the 2005–06 version unless otherwise noted.

[2] The State Public Defender appointed a lawyer to assist Prude in postconviction proceedings approximately eight months after the circuit court denied Prude's 2003 *pro se* motion for plea withdrawal.

knowingly and voluntarily entered because his trial lawyer lied to him regarding the sentence that he would receive. The circuit court denied the motion. Prude appealed, and this court affirmed.

¶5 Prude's fourth postconviction motion for plea withdrawal underlies this appeal. In 2007, again acting *pro se*, Prude repackaged his allegation that he did not understand the elements of the offense, contending solely that he did not understand the meaning of "party to a crime." The circuit court denied the motion as substantively meritless, as well as procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The circuit court subsequently denied Prude's motion to reconsider, and this appeal followed.

Discussion

¶6 "A matter once litigated may not be relitigated in a subsequent 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, 514 (Ct. App. 1991). In 2003, Prude moved to withdraw his pleas, broadly claiming that he did not understand the elements of the offense in any respect. The circuit court determined that the claim was groundless. Prude may not raise the issue again.

¶7 To the extent that Prude's 2007 motion presented a more narrowly focused claim than Prude presented in 2003, the circuit court correctly determined that the motion was barred by ***Escalona-Naranjo***. A defendant may not pursue a claim in a subsequent proceeding that could have been raised or that was inadequately raised in an earlier proceeding, unless the defendant provides a

sufficient reason for the omission or inadequacy. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 184, 517 N.W.2d at 163.

¶8 In this court, Prude contends that he had a reason for bringing his 2007 motion that is sufficient to overcome the bar of ***Escalona-Naranjo***, namely, ineffective assistance of his postconviction attorney during the direct appeal. Ineffective assistance of postconviction counsel may constitute a sufficient reason for an additional postconviction motion pursuant to WIS. STAT. § 974.06. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 683, 556 N.W.2d 136, 140 (Ct. App. 1996). Nonetheless, Prude's contention is unavailing. We assess the sufficiency of a postconviction motion by reviewing "only the allegations contained in [its] four corners … and not any additional allegations that are contained in [appellant's] brief." *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 588, 682 N.W.2d 433, 443. Prude's 2007 plea withdrawal motion contained no reference to ineffective assistance by his postconviction attorney or to any other reason sufficient to justify serial litigation. Accordingly, the circuit court properly concluded that Prude's claim was procedurally barred.

¶9 Prude's motion to reconsider the circuit court's decision did not correct the inadequacy in his motion for plea withdrawal, even assuming that a reconsideration motion is an appropriate vehicle for making such a correction. Although Prude alleged ineffective assistance of postconviction counsel in his reconsideration motion, his allegation is unsupported by the record.

¶10 The two-prong test for proving ineffective assistance of counsel requires the defendant to show that his or her attorney's performance was deficient and that the defendant was prejudiced as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant must satisfy both prongs of the test to be

afforded relief. *See* ***Allen***, 2004 WI 106, ¶26, 274 Wis. 2d at 587, 682 N.W.2d at 443. To prove deficiency, Prude must show that his attorney "'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *See* ***State v. Pote***, 2003 WI App 31, ¶15, 260 Wis. 2d 426, 440, 659 N.W.2d 82, 89 (citation omitted). To prove prejudice, Prude must show that his attorney's errors "had an actual, adverse effect." *See* ***id.***, 2003 WI App 31, ¶16, 260 Wis. 2d at 440, 659 N.W.2d at 89. If Prude's showing on one prong is insufficient, we need not address the other. ***Strickland***, 466 U.S. at 697.

¶11 Prude alleged that his postconviction attorney performed deficiently by not arguing that Prude lacked an understanding of the elements of the offense. In 2003, the circuit court determined that a motion for plea withdrawal on this ground was frivolous. Prude's postconviction attorney did not err in 2004 by foregoing renewal of a frivolous claim. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). Because Prude shows no attorney error, we do not reach the question of prejudice.

¶12 Finally, we address the State's request that Prude be warned against repeatedly filing postconviction motions based on the same facts and seeking the same relief. We agree that such a warning is appropriate. Repetitive litigation imposes a significant and unwarranted burden on the judicial system. We will not countenance squandering scarce judicial resources in considering and reconsidering one individual's claim. Therefore, we caution Prude that we are prepared to impose appropriate sanctions should he persist in filing repetitive motions. *See* ***State v. Casteel***, 2001 WI App 188, ¶¶23–27, 247 Wis. 2d 451, 463–465, 634 N.W.2d 338, 345–346. Additionally, we remind Prude that allegations unsupported by a sufficient reason for not previously raising the claims, artful

rephrasing of resolved issues, and conclusory assertions will not earn him postconviction relief.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.