COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2675 **Cir. Ct. No. 2001CF1820**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAZ L. MOSEBY,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Chaz L. Moseby, *pro se*, appeals from orders of the circuit court that denied his motion to withdraw his plea and his motion for reconsideration. We agree with the circuit court that the motion to withdraw the

plea was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 163–164 (1994), so we affirm.

¶2 After his waiver from juvenile court, Moseby was charged in 2001 with two counts of armed robbery as party to a crime. In exchange for his guilty pleas, the State agreed to recommend concurrent five-year sentences, consecutive to a twenty-five-year sentence Moseby had received on an armed robbery conviction in Washington County. The Washington County sentence was structured as twelve years' initial confinement and thirteen years' extended supervision.

¶3 At the March 2002 sentencing hearing, the State made the agreed-upon recommendation. The circuit court declined to follow it, sentencing Moseby to seventeen years' initial confinement and eight years' extended supervision on count one, and twelve years' initial confinement with eight years' extended supervision on count two. These sentences would be concurrent to each other and the Washington County sentence.[1]

¶4 In September 2003, Moseby's postconviction attorney moved for resentencing on the grounds that Moseby had cooperated with federal prosecutors. The circuit court granted a resentencing hearing. At that hearing, the State recommended that the original sentence stand. The circuit court resentenced Moseby to fifteen years' initial confinement and ten years' extended supervision on the first count and ten years' initial confinement and ten years' extended supervision on the second count, still concurrent to each other and to the

[1] The State would later note that the concurrent sentences, as imposed, had the effect of a consecutive five-year sentence.

Washington County sentence. It appears that the aggregate effect of the new sentence was a two-year reduction in Moseby's total initial confinement time.

¶5 A no-merit appeal was commenced, with new counsel replacing the postconviction attorney. Moseby filed a response to the no-merit report, and counsel filed a supplemental report. We adopted counsel's no-merit and supplemental reports by reference and affirmed Moseby's conviction. *See* ***State v. Moseby***, No. 2004AP1733-CRNM, unpublished slip op. and order (WI App May 19, 2005).

¶6 On August 8, 2008, Moseby filed a *pro se* motion seeking eligibility for the challenge incarceration or earned release programs. On June 24, 2009, he filed a *pro se* motion to vacate a DNA surcharge. On September 29, 2009, he filed a *pro se* motion seeking to have his Class B felonies reclassified as Class C felonies. The circuit court denied each of these motions.

¶7 On August 16, 2010, Moseby filed a WIS. STAT. § 974.06 motion seeking to withdraw his guilty pleas. He alleged that there had been deficiencies in the plea colloquy, that the State had breached the plea bargain with its stance at the resentencing hearing, and that postconviction counsel had been ineffective for not preserving these issues by motion prior to appeal. The circuit court denied Moseby's motion as procedurally barred. Moseby moved for reconsideration, which the circuit court also denied. Moseby appeals.

¶8 A defendant is required to raise all grounds for relief in his or her original, supplemental or amended motion for postconviction relief. *See* WIS. STAT. § 974.06(4); *see also* ***Escalona***, 185 Wis. 2d at 181, 517 N.W.2d at 162. The phrase "original, supplemental or amended motion" also encompasses a direct appeal. *See* ***State v. Lo***, 2003 WI 107, ¶32, 264 Wis. 2d 1, 17, 665 N.W.2d 756,

764. This bar also applies when the direct appeal is a no-merit appeal. ***State v. Allen***, 2010 WI 89, ¶4, 328 Wis. 2d 1, 5, 786 N.W.2d 124, 125–126.

¶9 Claims that could have been raised on direct appeal or by prior motion are barred from being raised in a subsequent postconviction motion absent a sufficient reason for not raising the claims earlier. *See* ***Lo***, 2003 WI 107, ¶44, 264 Wis. 2d at 22, 665 N.W.2d at 766. The requirements of WIS. STAT. § 974.06 apply even to claims of constitutional magnitude. ***Lo***, 2003 WI 107, ¶¶31–32, 264 Wis. 2d at 16–17, 665 N.W.2d at 763–764. Whether Moseby's current claims are procedurally barred is a question of law that we review *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175, 176 (Ct. App. 1997).

¶10 Moseby offers no explanation for why his current allegations of plea deficiencies, breach of the plea bargain, or ineffective assistance of postconviction counsel were not raised in his no-merit response, his 2008 motion, or his 2009 motions. *See* ***Escalona***, 185 Wis. 2d at 181, 517 N.W.2d at 162. While Moseby complains the circuit court failed to "solicit a reason why these issues were not previously advanced" by him, the burden is on Moseby to demonstrate a sufficient reason, not on the circuit court to make an inquiry.[2] *See* ***Allen***, 2010 WI 89, ¶41, 328 Wis. 2d at 19–20, 786 N.W.2d at 133. The current motion is, therefore, procedurally barred.

[2] Ineffective assistance of postconviction counsel is sometimes offered by defendants as a "sufficient reason" for not raising issues earlier, *see* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996), but the argument is unavailing here. First, Moseby does not specifically assert counsel's ineffectiveness as a reason for avoiding a procedural bar; he relies on counsel's performance only as a reason for plea withdrawal. Second, given that Moseby filed three *pro se* motions between his no-merit response and the current motion, postconviction counsel's performance is not sufficient to explain Moseby's failure to raise his current issues in his prior *pro se* submissions.

¶11 In any event, Moseby's claims are meritless.[3] He alleged that during the plea colloquy, the circuit court failed to address the party-to-a-crime elements, to explain that it was not bound by the plea bargain, and to ascertain a factual basis for his pleas. The plea hearing transcript clearly refutes those claims. Moseby complained that the State breached the plea bargain at the resentencing hearing when it asked to have the original sentences stand. However, Moseby does not claim the State violated the plea bargain during the original sentencing hearing, and Moseby points to no evidence that indicates the parties' agreement was meant to extend past the original hearing. *See* ***State v. Windom***, 169 Wis. 2d 341, 350, 485 N.W.2d 832, 835 (Ct. App. 1992). Given that there is no merit to those claims, postconviction counsel was not ineffective for failing to pursue or preserve them. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235, 247 (1987).

By the Court.—Orders affirmed.

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

[3] To the extent that Moseby's claims were previously addressed in the no-merit appeal, they would be barred under ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").