COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP3078 **Cir. Ct. No. 1995CF951872**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAMIAH ABJIAH WHITESIDE,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Ramiah Abjiah Whiteside, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2009-10),[1] motion for postconviction

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

relief to withdraw his 1995 no-contest plea to second-degree reckless injury, operating a motor vehicle without the owner's consent, and four counts of second-degree reckless homicide. He also appeals from the order denying his motion to reconsider denial of the motion. He argues that he was entitled to a hearing on his claim that he suffered from a mental disorder at the time of the offenses and plea which made his plea involuntary and unknowing and that his trial and appellate attorneys were ineffective for not challenging his plea based on the then existing mental disorder and because of trial counsel's *ex parte* communication with the prosecutor. We affirm the circuit court's decision that Whiteside's § 974.06 motion, his fifth postconviction motion after a direct appeal, is barred under the principles of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¶2 WISCONSIN STAT. § 974.06, does not "create an unlimited right to file successive motions for relief." ***State ex rel. Dismuke v. Kolb***, 149 Wis. 2d 270, 273, 441 N.W.2d 253 (Ct. App. 1989). In ***Escalona-Naranjo***, 185 Wis. 2d at 177, our supreme court explained that § 974.06(4), compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion, thereby cutting off successive frivolous motions. If a defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a § 974.06 motion unless the circuit court ascertains that a sufficient reason exists for the failure to allege or adequately raise the issue earlier. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. The procedural bar exists because of the need for finality in litigation. ***Id.*** at 185. Whether claims in a § 974.06 motion are barred is a question of law we review *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶3 After Whiteside's convictions were affirmed on direct appeal,[2] Whiteside filed a *pro se* WIS. STAT. § 974.06 postconviction motion in 1999 claiming that his convictions were multiplicitous, that his trial and appellate attorneys were ineffective for causing him to abandon a multiplicity claim, that the "depraved mind" element of the crimes was not satisfied, and that his confession was not voluntary. The circuit court denied the motion as barred by ***Escalona-Naranjo***, and the ruling was affirmed on appeal.[3]

¶4 In March 2008, Whiteside filed a *pro se* motion for sentence modification on the ground that his entire sentence was unduly harsh and unconscionable. That motion also requested, as alternative relief, an evidentiary hearing on a claim for plea withdrawal due to the alleged ineffective assistance of trial counsel for failing to do any investigation. The motion was denied.

¶5 Whiteside filed another *pro se* motion for sentence modification in June 2010 alleging that a new factor existed because he likely suffered from a mental disorder at the time of the offenses which would mitigate his guilt. The motion was denied by an order entered June 8, 2010.[4]

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[2] *See* ***State v. Whiteside***, 205 Wis. 2d 685, 556 N.W.2d 443 (Ct. App. 1996).

[3] *See* ***State v. Ramiah A. Whiteside***, No. 99-3168-CR, unpublished op. and order (WI App Dec. 4, 2000). The appellate decision also affirmed the circuit court's determination that Whiteside's claims lacked merit. ***Id.*** at 3.

[4] In his appellant's brief Whiteside references the June 8, 2010 ruling on his motion for sentence modification and concludes his brief with a request for alternative relief of resentencing. Whiteside did not file a timely notice of appeal from the June 8, 2010 order and that ruling is not before this court in this appeal. Whiteside cannot litigate in this appeal whether the mental disorder was a new factor or mitigating circumstance that supports sentence modification. "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 (Ct. App. 1991).

¶6 Whiteside then filed a *pro se* motion to vacate the DNA surcharge; the motion was denied on July 19, 2010. Subsequently Whiteside filed the *pro se* motion to withdraw his plea which is the subject of this appeal.

¶7 The record demonstrates that Whiteside filed four previous postconviction motions after having had a direct appeal and that at least one of his previous motions raised claims of ineffective trial and appellate counsel. Neither Whiteside's motion nor his appellant's brief suggest any sufficient reason why he did not raise his claims for plea withdrawal in any of his previous motions. "Defendants must, at the very minimum, allege a sufficient reason in their motions to overcome the ***Escalona-Naranjo*** bar." ***State v. Allen***, 2010 WI 89, ¶46, 328 Wis. 2d 1, 786 N.W.2d 124.

¶8 At best Whiteside's motion for reconsideration suggested that the diagnosis was "recent," but even that is tempered by his characterization that the diagnosis was of a mental disorder that he had been suffering from since early childhood, post-traumatic stress disorder. Whiteside's June 2010 motion demonstrates his awareness of his past history of mental disorders.[5] In his reply brief and for the first time on appeal, Whiteside argues that he never raised the issue of any anxiety-related disorder and could not do so until the actual diagnosis was confirmed.[6] However, his June 2010 motion belies that contention. He

[5] The motion detailed that Whiteside had extensive counseling and therapy since grade school and had been placed in emotionally disturbed and learning disabled classes. It also referred to his commitment to a mental hospital at age twelve and other inpatient and outpatient treatment up to age fourteen. The motion set forth that in 2002 Whiteside was diagnosed with antisocial personality disorder and in 2003 he was also diagnosed with bipolar and mood disorders.

[6] Whiteside fails to pinpoint when the actual diagnosis of an anxiety disorder was confirmed.

referenced generalized anxiety disorder in that motion and characterized it as being similar to panic disorder. He listed several complications associated with generalized anxiety disorder in an attempt to mitigate his guilt by demonstrating that due to his mental disorders he was unable to control his behavior at the time of the offenses.

¶9 Whiteside could have raised his claim for plea withdrawal in his earlier postconviction motions. He has not shown a sufficient reason for failing to doing so. Whiteside is procedurally barred from raising those claims and was not entitled to an evidentiary hearing. *See* ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972) (no hearing is required when the record conclusively demonstrates that the defendant is not entitled to relief).

By the Court.—Orders affirmed.

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