

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 10, 2010

A. John Voelker
Acting 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 Nos. 2008AP3237
2008AP3238
2008AP3239
2008AP3240
2008AP3241
2008AP3242
2008AP3243
2008AP3244**

**Cir. Ct. Nos. 2003CM575
2002CF489
2003CF88
2003CF473
2003CF623
2003CF624
2003CF770
2003CF771**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNSON CARTER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County:
THOMAS CANE, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Johnson Carter appeals an order denying his WIS. STAT. § 974.06¹ motion for postconviction relief. Carter raises several challenges to his conviction and sentence. We conclude the bulk of Carter’s arguments have either already been litigated or are procedurally barred. With respect to his challenge to the repeater allegations, we reject Carter’s argument. The order is therefore affirmed.

BACKGROUND

¶2 Carter was charged with numerous offenses including battery, false imprisonment, victim intimidation, carrying a concealed weapon, stalking, felony bail jumping, possession of drug paraphernalia, criminal damage to property, contempt of court, and failure to comply with sex offender reporting requirements. Pursuant to a December 2003 plea agreement, Carter pled no contest to thirteen offenses—several as a repeater—in exchange for the State agreeing to dismiss sixty-one other charges. The court ultimately imposed a twenty-two year sentence consisting of eleven years’ initial confinement and eleven years’ extended supervision.

¶3 Carter moved for postconviction relief in July 2004 and later filed several amended postconviction motions. The circuit court denied all of the motions. On direct appeal, Carter alleged: (1) prosecutorial misconduct; (2) breach of the plea agreement; (3) inaccurate information used at sentencing; (4) misdemeanors “turned into” felonies; (5) improper bail jumping charges; (6) other “false” charges; and (7) ineffective assistance of trial counsel. This court

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

rejected Carter’s claims and affirmed both his judgment of conviction and the denial of his motions for postconviction relief. *See State v. Carter*, Nos. 2005AP344-CR and 2005AP592-CR thru 2005AP598-CR, unpublished slip op. (Wis. Ct. App. Dec. 28, 2005).

¶4 In August 2006, Carter requested a postconviction hearing and the court denied the request, concluding his arguments were procedurally barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Carter appealed and, during briefing, filed a motion entitled “Motion Circuit Court Didn’t Have Subject Matter Jurisdiction,” in which it appeared Carter was requesting a remand for supplemental postconviction proceedings based on his belief that he had been convicted of nonexistent crimes. By order dated January 9, 2007, we denied the motion for remand, noting that “we take no position on whether Carter may return to the circuit court with further motions at this time.” To the extent Carter was asking this court to declare the circuit court lacked subject matter jurisdiction, we noted “The cases Carter cites in support of his motion reflect a misunderstanding of the meaning of ‘nonexistent crimes.’” Finally, in that same order, we dismissed the appeals at Carter’s request.

¶5 In July 2008, Carter filed another motion requesting postconviction relief and an evidentiary hearing. The circuit court denied the motion pursuant to *Escalona-Naranjo* and further noted that the issue Carter raised had already been addressed by the circuit court in its decision denying his first postconviction motion. Carter did not appeal.

¶6 Carter filed the underlying motion requesting postconviction relief and an evidentiary hearing in October 2008. The court denied his requests noting that *Escalona-Naranjo* barred Carter from pursuing all but one of his claims—his

challenge to the court's authority to impose a repeater enhancement. The court consequently addressed and rejected that argument on its merits. This appeal follows.

DISCUSSION

¶7 Carter argues he is entitled to a vacated sentence or an evidentiary hearing for several reasons: (1) the State never proved he was a repeater as required by WIS. STAT. § 973.12(1); (2) the court failed to comply with the requirements of WIS. STAT. § 971.08 at his plea hearing; (3) he was sentenced to nonexistent crimes that deprived the circuit court of its subject matter jurisdiction; (4) he was sentenced based on inaccurate information; and (5) he received ineffective assistance of counsel.²

¶8 To the extent Carter re-argues matters already disposed of, he cannot relitigate those issues. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (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.”). Therefore, we will not address Carter's claims that he was sentenced based on nonexistent crimes that deprived the circuit court of subject matter jurisdiction, that his sentence was based on inaccurate information, or that he received ineffective assistance of trial counsel.

² Carter also posits “Were Johnson Carter’s Guilty Pleas Knowingly Intelligently and Voluntar[ily] Entered[?]” The discussion that follows that heading, however, is intertwined with Carter’s claims regarding nonexistent crimes, ineffective assistance of counsel and the circuit court’s alleged violation of WIS. STAT. § 971.08. Therefore, we will not address this claim separately.

¶9 Turning to Carter’s new claim that the court failed to comply with WIS. STAT. § 971.08 at the plea hearing, we conclude this claim is procedurally barred by WIS. STAT. § 974.06(4) and *Escalona-Naranjo*. In *Escalona-Naranjo*, our supreme court held that “a motion under sec. 974.06 could not be used to review issues which were or could have been litigated on direct appeal.” *Id.* at 172. The statute, however, does not preclude a defendant from raising “an issue of constitutional dimension which for sufficient reason was not asserted or was inadequately raised in his [or her] original, supplemental or amended postconviction motions.” *Id.* at 184. Carter has not provided a “sufficient reason” for failing to raise this argument in his earlier motions. Carter makes the circular argument that the court’s failure to comply with the statutory requirements at the plea hearing constitutes a “sufficient reason.” A restatement of the newly-alleged error, however, does not, by itself, constitute a sufficient reason.

¶10 Finally, Carter claims the circuit court lacked authority to impose the repeater enhancement in his cases because he never admitted he was a repeater and the State never proved he was a repeater. Although Carter does not provide a sufficient reason for his failure to challenge the repeater allegations in earlier postconviction motions, this court has recognized a narrow exception to *Escalona-Naranjo*’s procedural bar where, as here, a defendant alleges the State has not proven, and the defendant has not admitted, a prior conviction necessary to support a repeater allegation. See *State v. Flowers*, 221 Wis. 2d 20, 30, 586 N.W.2d 175 (Ct. App. 1998). We will therefore address this claim on its merits.

¶11 A prior conviction that increases the maximum possible sentence under WIS. STAT. § 939.62 must be proven by the State or admitted by the defendant. WIS. STAT. § 973.12(1). A no contest plea by a defendant who is fully

aware of the repeater charge and its consequences, however, may constitute an admission of the prior conviction. *State v. Liebnitz*, 231 Wis. 2d 272, 287-88, 603 N.W.2d 208 (1999). The application of the penalty enhancer statute to the facts of a case is a question of law that this court reviews independently. See *State v. Bonds*, 2006 WI 83, ¶12, 292 Wis. 2d 344, 717 N.W.2d 133.

¶12 Here, the court applied the repeater enhancer to a number of offenses arising from four of Carter's cases. In each case, the Information alleged Carter was a repeater, identified the nature of Carter's previous convictions (e.g., misdemeanors), indicated the previous convictions had occurred within the past five years, set forth the maximum sentence for the respective crimes, and explained the extent to which his repeater status could enhance the maximum term.

¶13 In each case, the complaints included copies of an Oneida County judgment of conviction showing Carter's conviction for three misdemeanors in March 2000. The complaints in two of his cases also included an Oneida County judgment of conviction showing his conviction for a fourth misdemeanor. At the plea hearing, Carter stated he agreed with the State's explanation of the plea agreement, which included Carter's repeater status. During the plea colloquy, Carter likewise stated his understanding that he was being charged as a repeater on some of the allegations.

¶14 Although the court did not specifically ask Carter whether he admitted the prior convictions, it was not required to do so under *Liebnitz*. There, our supreme court concluded a plea of no contest by a defendant who is fully aware of the repeater charge and its consequences may constitute an admission of the prior conviction. *Id.* at 287-88. Here, the totality of the record demonstrates a

valid admission by Carter of the repeater allegation. In any event, Carter's repeater status was proven by copies of a judgment of conviction attached to the complaints, showing at least three misdemeanors within the requisite time period. Because the attachment of the judgment of conviction constituted proof of Carter's repeater status, the court properly imposed a repeater enhancement. *See Flowers*, 221 Wis. 2d at 32 (recognizing that a judgment of conviction is the best evidence to show existence of prior convictions).

By the Court.—Order affirmed.

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

