COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP152 **Cir. Ct. No. 1998CF271**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW M. OBRIECHT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Andrew Obriecht appeals a circuit court order that denied reconsideration on a motion for postconviction relief and sentence modification. We affirm for the reasons discussed below.

¶2 In a prior order, we explained that, because the notice of appeal was filed more than ninety days after the original order denying Obriecht's motion, our jurisdiction on this appeal would be limited to any new issues raised in the reconsideration motion. We therefore specifically directed the parties to include in their briefs a discussion of this court's jurisdiction over the issues Obriecht sought to raise on this appeal. While Obriecht has complied with our directive, the State has inexplicably failed to do so. Instead, the State has asked us to find some of the issues raised on the current appeal to be barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and/or ***State v. Witkowski***, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991), and further requests that we issue a ban on Obriecht's future filings in this court, pursuant to ***State v. Casteel***, 2001 WI App 188, 247 Wis. 2d 451, 634 N.W.2d 338.

¶3 ***Escalona-Naranjo*** holds that any claim that could have been raised in a prior direct appeal or postconviction motion cannot form the basis for a subsequent WIS. STAT. § 974.06 (2007-08)[1] motion unless the court finds there was sufficient reason for failing to raise the claim earlier. ***Escalona-Naranjo***, 185 Wis. 2d at 185. ***Witkowski*** stands for the proposition that a § 974.06 motion cannot be used to relitigate any matter which has already been actually litigated, no matter how artfully rephrased. ***Witkowski***, 163 Wis. 2d at 990. Here, the State asserts that "Obriecht has either previously litigated his claims [of ineffective assistance of counsel] or could have previously litigated them in any of the numerous postconviction motions he has filed." However, the State has not identified any specific prior motion or appeal in which the current claims were

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

actually litigated or explained the procedural posture of any prior motion or appeal in which the State contends Obriecht could have raised his current claims. Nor, for that matter, has the State provided this court with copies of any of the prior decisions it is relying upon so that we could evaluate their purported preclusive effect for ourselves.

¶4 We note that the current claims of ineffective assistance of counsel arise from the postconviction proceedings and appeal that followed the revocation of Obriecht's probation. Our decision denying Obriecht's direct appeal from his sentencing following that revocation was issued on December 13, 2007. It is not immediately apparent[2] when or how Obriecht could have raised claims of ineffective assistance of counsel that arose during those proceedings. For instance, he could not have done so in any of the numerous postconviction motions, writs and appeals Obriecht filed relating to his original conviction. Since the State has failed to provide us with any materials or analysis to establish that Obriecht did or could have raised his current claims in more recent proceedings, we decline to apply a procedural bar to them. Nor will we issue a ***Casteel***-type order banning future filings without a more detailed analysis of Obriecht's past litigation.

¶5 If Obriecht's ineffective assistance of counsel claims are not procedurally barred, the State requests permission to file a supplemental brief addressing the merits of those claims. It notes that we permitted such

[2] Given the sheer number of motions and petitions that Obriecht has filed, we do not discount the possibility that he did, in fact, previously raise some variation of the current claims or had the opportunity to do so. Our point is that the State has not adequately made the case to us.

supplemental briefing in ***State v. Tillman***, 2005 WI App 71, ¶13 n.4, 281 Wis. 2d 157, 696 N.W.2d 574. It is true that this court has allowed supplemental briefing in ***Tillman*** and some other cases. However, there is no right to supplemental briefing under the appellate rules. Ordering such briefing is wholly within the discretion of this court, and will be done only when the panel hearing the case decides it would be of use. We are not inclined to permit supplemental briefing here, where the State merely asserted a procedural bar without undertaking any meaningful analysis to support that assertion. We will instead address the merits of Obriecht's claims based upon his brief and the record before us.

¶6 Obriecht contends that the criminal complaint in this matter was defective in two ways: it improperly applied the attempt statute to a second-degree sexual assault charge and it failed to specify all the required elements of that charge. Based on the premise that the complaint was defective, Obriecht further argues that the circuit court lacked subject matter jurisdiction over that charge; that Obriecht did not receive adequate notice to prepare for trial in violation of his Sixth and Fourteenth Amendment rights; and that the court had no authority to sentence him, either initially or after revocation. Obriecht then asserts that post-revocation counsel (both the attorney who represented him at the sentencing after revocation and on the appeal from that sentence) provided ineffective assistance by failing to adequately advance these claims. We conclude that this line of arguments fails at the first level because the complaint was not deficient in either of the two respects Obriecht claims.

¶7 Obriecht claims that attempted second-degree sexual assault is not a chargeable crime in Wisconsin because the attempt statute, WIS. STAT. § 939.32, does not enumerate WIS. STAT. § 948.02 in the list of offenses to which it applies. We disagree. The attempt statute applies to "[w]hoever attempts to commit a

felony *or* a crime specified in [a list of statutes that all include misdemeanor levels of offense] may be fined or imprisoned" as provided in the statute. WIS. STAT. § 939.32(1) (emphasis added). Since second-degree sexual assault is a felony, it is plainly an offense to which the attempt statute may be properly applied.

¶8 Obriecht claims that the complaint failed to state all of the elements of attempted second-degree sexual assault because it did not explain that attempt requires both the intent to commit the crime charged and acts taken in furtherance of that intent. However, the Wisconsin Supreme Court has explicitly held that a complaint need not spell out what needs to be shown in order to establish intent. Instead, a complaint need only allege the elements of the underlying crime, and then mention the attempt element. ***Wilson v. State***, 59 Wis. 2d 269, 275-76, 208 N.W.2d 134 (1973).

¶9 Because the complaint was not deficient, the court did not lack subject matter jurisdiction to proceed to trial or sentence Obriecht; Obriecht's Sixth and Fourteenth Amendment rights were not violated; and counsel did not provide ineffective assistance by failing to develop any of those claims.

¶10 Next, Obriecht contends that post-revocation counsel provided ineffective assistance by failing to adequately develop an argument that his post-revocation sentence was unduly harsh. Specifically, Obriecht contends that counsel should have provided more information on the sentences given to other teenaged offenders being charged with similar crimes. As we explained in our prior opinion, however, Obriecht's post-revocation sentence took into account a series of crimes that he had committed while on probation, as well as the seriousness of the initial offense. We are not persuaded that any different

argument by counsel would have changed this court's view that Obriecht's sentence was not unduly harsh.

¶11 Finally, Obriecht argues that the circuit court erroneously exercised its discretion in denying his motion for sentence modification before obtaining a response from the State. Obriecht views this as showing partiality toward the State. We view it as an appropriate evaluation of the sufficiency of the allegations in Obriecht's motion. When a litigant has made no allegations that would warrant the relief requested, there is no requirement that a court wait for a response before denying the motion. Here, Obriecht claimed that he was entitled to sentence modification because he had not yet been allowed to participate in sex offender treatment; he had been born again in Jesus Christ; he was mentally ill at the time he committed the offense; and he had been denied parole. We agree with the circuit court that none of these allegations constituted a new factor that would warrant sentence modification.

¶12 For all of the above reasons, we conclude that the circuit court properly denied Obriecht's motion for reconsideration of his claims for postconviction relief based on ineffective assistance of counsel and sentence modification.

By the Court.—Order affirmed.

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