COURT OF APPEALS DECISION DATED AND FILED

April 25, 2017

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 Nos. 2016AP301
2016AP302

Cir. Ct. No. 1996CF964991
1996CF965731

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY SANDIFER,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: J.D. WATTS, Judge. *Affirmed.*

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 PER CURIAM. In these consolidated appeals, Anthony Sandifer, *pro se*, appeals from orders denying his WIS. STAT. § 974.06 motion for

postconviction relief.[1] Sandifer argues that the circuit court erroneously exercised its discretion when it denied his postconviction motion—which alleged ineffective assistance of trial and postconviction counsel—without a hearing.[2] He also argues that one of his convictions is void. We affirm.

BACKGROUND

¶2 In February 1997, seventeen-year-old Sandifer pled guilty to three felonies as a party to a crime: first-degree reckless homicide, attempted armed robbery by use of force, and armed robbery. A fourth charge, attempted armed robbery, was dismissed and read in for sentencing purposes.

¶3 The trial court sentenced Sandifer to forty years of initial confinement for the reckless homicide and imposed a consecutive sentence of ten years for the attempted armed robbery. It imposed and stayed a sentence of forty years for the armed robbery and ordered that Sandifer serve seven years of probation, consecutive to his prison sentence.

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[1] The two circuit court cases were consolidated before Sandifer's 1997 plea and sentencing. In 2016, he filed his WIS. STAT. § 974.06 motion referencing both circuit court cases, and the circuit court ultimately issued two identical orders, one for each case file. For ease of reference, we will refer to "motion" and "order" in this decision.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The Honorable J.D. Watts (referred to as the "circuit court" in this decision) denied Sandifer's postconviction motion. The Honorable Stanley A. Miller (referred to as the "trial court" in this decision) accepted Sandifer's guilty pleas and sentenced him.

¶4 Postconviction counsel was appointed for Sandifer and he filed a twenty-nine-page no-merit report[3] that addressed three issues:

> (1) Whether Sandifer's guilty pleas waived any challenge to the proceeding in which he was waived from juvenile to adult court; (2) whether Sandifer knowingly, voluntarily and intelligently entered his guilty pleas and whether the pleas had a factual basis; and (3) whether the trial court misused its discretion in sentencing Sandifer as an adult and refusing to order a juvenile disposition, and whether the court erred in considering the statements made by victims at the earlier sentencing of a co-actor.

State v. Sandifer, Case No. 1998AP1967-CRNM, unpublished slip op. and order at 2 (WI App March 19, 1999).

¶5 Sandifer filed a five-page response to the no-merit report that raised several issues. Sandifer asserted that the State had breached the plea agreement and that the trial court had erroneously exercised its sentencing discretion. He also complained about his trial counsel's performance, asserting that trial counsel performed ineffectively by: failing to prepare for trial, "abandon[ing] his client and his duties to properly investigate this case," failing to "exhibit a commitment to the achievement of his client[']s lawful objectives," and failing to properly consult with Sandifer about the benefits of going to trial "versus [accepting] a plea."

¶6 This court accepted postconviction/appellate counsel's assessment of the case and affirmed Sandifer's convictions. This court did not address the merits

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[3] The no-merit report and Sandifer's response to the no-merit report are not part of the circuit court record, but we take judicial notice of those legal filings in ***State v. Sandifer***, Case No. 1998AP1967-CRNM.

of Sandifer's complaints about his trial counsel. Sandifer filed a *pro se* petition for review with the Wisconsin Supreme Court, which was denied on July 1, 1999.

¶7 Sixteen and one-half years later, Sandifer filed a *pro se* WIS. STAT. § 974.06 motion in the circuit court. His motion alleged that his postconviction counsel had provided ineffective assistance by failing to allege that the trial court's plea colloquy was defective and that trial counsel had provided ineffective assistance because he did not: (1) "adequately explain the nature of the charges and the elements of the offenses"; and (2) "adequately determine if Mr. Sandifer comprehended the nature of the charges, … what he was pleading guilt[y] to[], if he could assist in his defense, and … [if he had] a reasonable understanding of the court proceedings." (Bolding and some capitalization omitted.) The postconviction motion also asserted that there was no subject matter jurisdiction for the attempted armed robbery count because "attempted armed robbery is not a recognized crime under [W]isconsin statutes."

¶8 The circuit court denied the motion in a written order, without a hearing. It concluded that "[t]o the extent that [Sandifer] failed to raise his claims for plea withdrawal in his response to the no merit report, he is precluded from raising them now," pursuant to ***State v. Escalona-Naranjo***, 185 Wis. 2d 169, 517 N.W.2d 157 (1994), and ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. The circuit court also rejected Sandifer's claim that attempted armed robbery was not a recognized crime in Wisconsin. This appeal follows.

LEGAL STANDARDS

¶9 As noted above, the circuit court denied Sandifer's WIS. STAT. § 974.06 motion without a hearing. Whether a § 974.06 motion is sufficient on its face to entitle a defendant to an evidentiary hearing on his or her ineffective-

assistance-of-postconviction-counsel claim is a question of law that appellate courts review *de novo*. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. ***Balliette*** explained:

> If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the circuit court must hold an evidentiary hearing. However, if the motion does not raise such facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the grant or denial of the motion is a matter of discretion entrusted to the circuit court.

Id. (citations omitted). On appeal, we consider *de novo* whether a postconviction "motion on its face alleges sufficient material facts that, if true, would entitle the defendant" to an evidentiary hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶10 Where, as here, a defendant alleges that his *postconviction* counsel provided constitutionally deficient representation by failing to allege that the defendant's *trial* counsel performed deficiently, the defendant must first establish that the trial counsel's representation was constitutionally deficient. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. The defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not consider both prongs "if the defendant makes an insufficient showing on one." ***Id.*** at 697. On appeal, the circuit court's findings of fact with respect to ineffective assistance of counsel will not be disturbed unless shown to be clearly erroneous, but whether there was ineffective assistance of counsel is a question of law that this court reviews *de novo*. *See* ***Balliette***, 336 Wis. 2d 358, ¶19.

¶11 A WIS. STAT. § 974.06 motion filed after a direct appeal may be procedurally barred absent a showing of a sufficient reason why the claims were not raised in a previous motion or on direct appeal. *See* ***State v. Lo***, 2003 WI 107, ¶44 n.11, 264 Wis. 2d 1, 665 N.W.2d 756; ***Escalona-Naranjo***, 185 Wis. 2d at 185. The ineffective assistance of postconviction counsel may constitute a sufficient reason for failing to raise a claim on direct appeal. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 683, 556 N.W.2d 136 (Ct. App. 1996). ***Tillman*** held that the ***Escalona-Naranjo*** procedural bar applies to defendants whose direct appeal was via the no-merit procedure, as long as the no-merit procedures were in fact followed and the record demonstrates a sufficient degree of confidence in the result. *See* ***Tillman***, 281 Wis. 2d 157, ¶¶19-20.

¶12 Finally, a defendant may not relitigate issues that were previously decided. *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.").

DISCUSSION

¶13 We begin with Sandifer's complaints about the plea colloquy, such as the fact that the trial court did not state the elements of the crimes on the record. The no-merit report discussed the sufficiency of the plea hearing at length, including the fact that the crimes' elements were not stated on the record. This court agreed with postconviction/appellate counsel's analysis and affirmed Sandifer's convictions. *See* ***Sandifer***, Case No. 1998AP1967-CRNM, unpublished slip op. and order at 2. Sandifer cannot relitigate the sufficiency of the plea colloquy. *See* ***Witkowski***, 163 Wis. 2d at 990.

¶14 Sandifer's second argument is that postconviction counsel should have alleged that trial counsel provided ineffective assistance by failing to: (1) "adequately explain the nature of the charges and the elements of the offenses"; and (2) "adequately determine if Mr. Sandifer comprehended the nature of the charges, … what he was pleading guilt[y] to[], if he could assist in his defense, and … [if he had] a reasonable understanding of the court proceedings." (Bolding and some capitalization omitted.) At the outset, we observe that these are different allegations about trial counsel's performance than Sandifer raised in his response to the no-merit report. Because Sandifer is raising new issues about trial counsel's performance, his claim may be procedurally barred absent a showing of "a sufficient reason for failing to raise those issues" in his response to the no-merit report. *See* ***Tillman***, 281 Wis. 2d 157, ¶19.

¶15 Sandifer's postconviction motion asserts that he was not aware of the errors until a paralegal pointed them out to him in prison. He also points to his "educational and comprehension problems."

¶16 Even if we assume for purposes of this appeal that Sandifer has demonstrated a sufficient reason for failing to raise his new claims about trial counsel's performance in his response to the no-merit report, we nonetheless affirm because the WIS. STAT. § 974.06 motion fails to adequately raise "sufficient material facts that, if true, would entitle" Sandifer to an evidentiary hearing. *See*

Allen, 274 Wis. 2d 568, ¶9. His motion also fails because it presents conclusory allegations.[4] *See* ***Balliette***, 336 Wis. 2d 358, ¶18.

¶17 For instance, Sandifer baldly asserts that his trial counsel failed "to adequately explain the nature of the charges." However, Sandifer does not explain what he failed to understand about the charges and how having different information would have affected his decision to plead guilty.

¶18 Sandifer also contends that he "was not able to comprehend the charges, and assist in his own defense." He attached to his postconviction motion reports indicating that as a minor he received Supplemental Security Income benefits based on learning disabilities. In addition, Sandifer provided copies of what appears to be educational testing reports. He has not adequately explained those documents or how his learning disabilities rendered him unable to understand the proceedings. Moreover, contrary to Sandifer's assertion that trial counsel, the State, and the trial court were unaware of Sandifer's educational challenges, those issues were acknowledged at sentencing, when trial counsel stated: "He was evaluated by his school and his I.Q. was 69, high sixties, low seventies. There was an evaluation that said that that does not mean he can't understand what's going on. What it does do, I think, is it makes him somewhat limited in foreseeability." Not only does this statement demonstrate that the parties were made aware of Sandifer's learning disabilities, they also suggest that trial counsel did, in fact, assess Sandifer throughout his representation. Sandifer's

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[4] Moreover, in some instances, Sandifer's allegations are simply wrong. For example, the affidavit he submitted in support of his postconviction motion asserts that his postconviction/appellate counsel "filed a No-Merit Report and Sandifer did not respond." Not only did Sandifer file a five-page typed response, he also sent numerous letters to this court and the Wisconsin Supreme Court before and after the no-merit report was filed.

unsupported allegations to the contrary are insufficient to warrant an evidentiary hearing.

¶19 The final issue Sandifer raised in his postconviction motion was whether he was properly convicted of attempted armed robbery. His motion asserted that the trial court lacked subject matter jurisdiction on that count "because the crime of attempted armed robbery is not a recognized crime under [W]isconsin statutes." As the circuit court concluded, this assertion is erroneous. The State explains on appeal:

> A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both." WIS. STAT. § 939.12. Thus, conduct that is prohibited by the Wisconsin statutes is a crime "known to law." If Sandifer committed acts prohibited by the Wisconsin statutes at the time he committed them, the circuit court had subject matter jurisdiction over his case.
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> The criminal complaint against Sandifer—and by extension, the information—charged Sandifer with a crime known to law, i.e., attempted armed robbery. Under one statutory designation or another, that crime existed before, during, and after Sandifer's attempted armed robbery. *See* WIS. STAT. §§ 943.32(1)(a), 943.32(2), 939.32 (1993-94); WIS. STAT. §§ 943.32(1)(a), 943.32(2), 939.32 (1995-96); WIS. STAT. §§ 943.32(1)(a), 943.32(2), 939.32 (1997-98).
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> Moreover, WIS. STAT. § 939.32(1) expressly provides that the attempt statute applies to "[w]hoever attempts to commit a felony[.]" Sandifer's armed robbery charge is a felony and falls squarely within the terms of WIS. STAT. § 939.32(1). The State charged Sandifer with a crime known to law and satisfied the elements of that crime.

(Some capitalization altered; record citations omitted.)

¶20 The State's argument is persuasive. We also note that Wisconsin's appellate courts have acknowledged the crime of attempted armed robbery on numerous occasions. *See, e.g.*, ***State v. Reynolds***, 2010 WI App 56, ¶1, 324

Wis. 2d 385, 781 N.W.2d 739; ***State v. Denton***, 2009 WI App 78, ¶29, 319 Wis. 2d 718, 768 N.W.2d 250. Finally, Sandifer did not respond to the State's argument in his reply brief. Unrefuted arguments are deemed admitted. *See* ***State v. Alexander***, 2005 WI App 231, ¶15, 287 Wis. 2d 645, 706 N.W.2d 191. Sandifer's argument fails not only because he has failed to refute the State's argument, but also on its merits.

¶21 For the foregoing reasons, we conclude that the circuit court did not erroneously exercise its discretion when it denied Sandifer's WIS. STAT. § 974.06 postconviction motion without a hearing. Sandifer 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. This opinion may not be cited under RULE 809.23(3)(b).