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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

10-22-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 15AP692

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JERMAINE D GREER SR,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 7, THE HONORABLE JUDGE WILLIAM HANRAHAN, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication. This court may decide this case by applying well-established legal principles to the facts presented.

SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF FACTS

As respondent, the State exercises its option not to present a full statement of the case. See Wis. Stat. § 809.19(3)(a)2.¹ Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

Greer was convicted of three misdemeanors on August 12, 2013. (38). On February 28, 2014, Greer was sentenced to 30 days on each misdemeanor, with each sentence consecutive to each other and consecutive to a federal prison sentence. (38). A Notice of Right to Seek Postconviction Relief was filed on February 28, 2014. (37).

Greer's first postconviction motion was heard on April 4, 2014, resulting in an amended judgment of conviction. (39, 40).

¹ Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

On July 21, 2014, Greer's second postconviction motion for sentence modification was denied. (41).

On September 23, 2014, Greer filed a third motion, labeling it as a "Motion for Postconviction Relief or, in the Alternative, Writ of Audia Querela." (42:2). At a status conference, on December 18, 2014, the trial court allowed Greer's attorney to withdraw at Greer's request, then with Greer proceeding pro se, the court denied Greer's motion to withdraw his plea and denied Greer's motion regarding a *Brady* violation (claims of prosecutorial discovery violations). (43).

On January 26, 2015, Greer, in correspondence to the circuit court, made at least his fourth² motion to the court, to withdraw his plea in relation to ineffective assistance of counsel. (46). It appears that the circuit court handled Greer's motion under Wis. Stat. § 974.06, since Greer's Rule 809.30 deadlines had expired. In a written order on February 2, 2015, the circuit court denied Greer's motion(s), labeling them as "mt. to withdraw plea, et al," and gave the following as grounds for denying the motion(s): no legal authority cited; insufficient factual

² Greer also filed a "Request for Final Disposition" under § 976.05 on December 26, 2014, which was summarily denied. (44, 45).

basis; requested relief not in the public interest; and, "untimely under *State v. Escalona-Naranjo*, 185 Wis. 2d 168 (1994). Previously considered claims at hearing conducted on 12/18/14." (48). It is from that denial that Greer must now be appealing.

ARGUMENT

I. THIS COURT SHOULD DECLINE TO ADDRESS THE MERITS OF GREER'S CLAIM BECAUSE GREER VIOLATED NUMEROUS MATERIAL AND SUBSTANTIAL RULES OF APPELLATE PROCEDURE

This court may decline to address the merits of Greer's claim because his appellate brief is inadequate to show any error. It does not comply with the rules of appellate procedure. See Wis. Stat. § 809.83(2).

The statement of issues in Greer's brief does not reflect how (or whether) the trial court decided the issues, in violation of Wis. Stats. § 809.19(1)(b). Greer's brief does not contain a statement with reasons as to whether oral argument is necessary and a statement as to whether the opinion should be published. See Wis. Stat. § 809.19(1)(c). The statement of the case does not include a description of the nature of the case, the procedural status of the case leading up to the appeal or the disposition in the trial court, in violation of Wis. Stats. § 809.19(1)(d). The statement of facts has no references to the record. See Wis. Stats. § 809.19(1)(d). The argument section of Greer's brief contains no record citations. See Wis. Stat. § 809.19(1)(e). It is not this

court's responsibility to sift through the record to locate the facts on which an appellant relies. See *State v. Thomas*, 2013 WI App 78, ¶ 1 n.3, 348 Wis. 2d 699, 834 N.W.2d 425 (citing *Tam v. Luk*, 154 Wis. 2d 282, 291 n.5, 453 Wis. 2d 158 (Ct. App. 1999)). Greer's argument contains numerous unsupported allegations and assertions. The argument does not contain one citation to the record and, in fact, seems to refer to alleged facts that are not part of the record. An appellate court is improperly burdened where briefs fail to consistently and accurately cite to the record. See *Meyer v. Fronimades*, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957). The court is placed in a position where it must comb through the record and create Greer's arguments for him. This court cannot serve as both advocate and judge. See *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Likewise, the State cannot reasonably be expected to sift through Greer's brief-in-chief in an effort to identify, develop and respond to each unsupported allegation and assertion.

Wisconsin Statutes, section 809.19(2)(a) requires the appellant's brief to contain the findings or opinions of the circuit court, and limited portions of the record essential to an understanding of the issues raised. See

Wis. Stats. § 809.19(2)(a). Greer's brief does not contain such an appendix. This leaves Greer's brief lacking the findings of the circuit court and any portion of the record. It is the appellant's responsibility to ensure completion of the appellate record. See *State v. McAttee*, 2001 WI App 262, ¶ 5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774. Even if Greer is imprisoned and does not have access to state law or to the record in this case (See Greer's Brief at 2³), the burden of ensuring a complete record does not shift to the State.

The Wisconsin Supreme Court requires pro se litigants to satisfy all of the procedural requirements that govern appeals. See *Waushara County v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16, 20, cert. denied, 506 U.S. 894, 113 S.Ct. 269, 121 L.Ed.2d 198 (1992). The rules of appellate procedure were not developed to make it impossible for a pro se appellant to represent himself; they were developed to compel an appellant to focus the court's attention on the issues of fact and law that the appellant contends were mistakenly decided by the trial court. Compliance with the rules is required because a high-volume intermediate

³ Although the pages of Greer's brief are not numbered, the State infers from Greer's table of contents that Greer's brief is meant to start with the page containing the "Introduction" as being page one (1) of the brief.

appellate court is an error-correcting court that cannot take time either to sift the record for facts that might support an appellant's contentions or develop legal argument on behalf of the appellant. See *Kepling v. Hardware Mut. Casualty Co.*, 24 Wis. 2d 319, 324, 129 N.W.2d 321, 323 (1964); *State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987).

The State recognizes the difficulties faced by pro se litigants. Both this court and the State routinely expend great amounts of time and energy to ensure that pro se litigants receive a fair hearing on their claims of error in efforts to guarantee the legitimacy of the judicial system. However, given the errors and inadequacies of Greer in complying with the rules of appellate procedure, the State finds it difficult, if not impossible, to identify, develop and respond to each of Greer's allegations and assertions.

Greer fails to sufficiently develop any legal argument based on concrete references and proper citations to pertinent portions of the record and the application of governing legal authority. Greer's arguments can thus be rejected. See *State v. Pettit*, 171 Wis. 2d 627, 646-47,

492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to review inadequately developed issues).

II. THE CIRCUIT COURT PROPERLY DENIED GREER'S MOTION BECAUSE GREER DID NOT EXPLAIN WHY HIS CLAIMS ARE NOT BARRED BY *ESCALONA-NARANJO*

A. Applicable Legal Principles and Standards of Review

Wisconsin Statutes, Section 974.06(4) provides in relevant part:

Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

Wis. Stat. § 974.06(4).

"[A]ll claims of error that a criminal defendant can bring should be consolidated into one motion or appeal[.]" *State v. Lo*, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756 (reaffirming holding of *Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994)). "[C]laims that could have

been raised on direct appeal or in a previous 974.06 motion are barred from being raised in a subsequent § 974.06 post-conviction motion absent a showing of sufficient reason" why the claims were not previously raised. *Id.*

Whether *Escalona-Naranjo* bars a claim is a question of law which this court reviews de novo. See *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997)(citations omitted).

**B. Greer's Latest Postconviction Motion Was
Procedurally Barred Under *Escalona-Naranjo*.**

Greer contends that he should be allowed to withdraw his guilty pleas because: his right to appeal was erroneously denied by the circuit court; his counsel was ineffective for failing to file a notice of appeal; and, there was prosecutorial misconduct (Greer's Brief at 2-3). The State again submits that none of the above contentions have been adequately briefed and may therefore be disregarded by this court. See *Pettit*, 171 Wis. 2d at 646 (appellate court can ignore inadequately briefed issues). However, the circuit court acted properly in rejecting the defendant's claims, labeling Greer's latest motion as "mt. to withdraw plea, et al". (48). A defendant's successive post-conviction efforts to litigate the same issue are

barred. See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). "A matter once litigated may not be re-litigated in a subsequent post-conviction proceeding, no matter how artfully the defendant may rephrase the issue." *Id.*

Greer's first postconviction motion was filed on March 4, 2014, and was set for a motion hearing on April 4, 2014. (39). The circuit court considered it a motion for sentence modification, the motion was granted and an amended judgement of conviction was prepared. (39, 40).

Greer's second postconviction motion was filed June 27, 2014 (and appears to not be included in the appellate record). Again, it is the appellant's responsibility to ensure completion of the appellate record. See *McAttee*, 2001 WI App 262 at ¶ 5 n.1. That motion was denied on July 21, 2014. (41). Greer did not appeal.

Greer's third postconviction motion, a motion to withdraw plea, was addressed by the circuit court on December 18, 2014, and was denied. (43). Greer did not appeal.

Greer's fourth postconviction motion, to withdraw his plea in relation to ineffective assistance of counsel (46),

was denied by the circuit court in written order on February 2, 2015.(48).

It appears that Greer now appeals from the circuit court's rejection of his fourth postconviction motion.

All three of Greer's stated issues in his brief could have been raised in a prior appeal, and Greer gives no reason why they were not, so they are barred under *Escalona-Naranjo*.

Multiple and successive attacks on the same conviction undermine the goal of finality of litigation, clog the judicial system, and waste judicial resources to the detriment of other litigators. See *State v. Lo*, 2003 WI 107, ¶¶44-46, 264 Wis. 2d 1, 665 N.W.2d 756. Thus, the supreme court held in *Escalona-Naranjo* that issues which could have been but were not raised in an earlier appeal may not be raised in a subsequent Wis. Stat. § 974.06 motion unless the appellant shows "sufficient reason" for failing to raise the issues previously. See *Escalona-Naranjo*, 185 Wis. 2d at 181-82; Wis. Stat. § 974.06(4) (stating "[a]ll grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion").

"[D]ue process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error" *State ex rel. Macemon v. Christie*, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). Convicted defendants are not entitled to pursue an endless succession of postconviction remedies:

We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

Escalona-Naranjo, 185 Wis. 2d at 185.

Here, Greer raised the issues of ineffective assistance of counsel and prosecutorial misconduct in his third postconviction motion, for plea withdrawal. (42). Greer again raised the issues in his fourth postconviction motion. (46). Greer has not provided this court with any reason why he did not raise these issues in his first, or even second, postconviction motion or in an earlier appeal. Instead, he continued to pursue an endless succession of postconviction remedies with the circuit court.

If a defendant could have raised a claim in a previous postconviction motion and/or direct appeal, that defendant is barred from raising the claim in a subsequent postconviction motion under Wis. State. § 974.06 unless the defendant shows a sufficient reason for failing to raise it in the prior proceeding(s). See *Escalona-Naranjo*, 185 Wis. 2d at 185. Although the circuit court has now rejected several of his postconviction motions for failure to satisfy this standard, Greer still has not even attempted to provide a single reason for his failure to pursue his current claims in earlier proceedings.⁴

III. EVEN IF NOT BARRED BY ESCALONA-NARANJO, GREER'S CLAIMS ARE WITHOUT MERIT

The first and second issues presented in Greer's brief, that the circuit court erred by denying Greer the right to appeal because his counsel did not respond to him and that his counsel was ineffective for failing to file a notice of appeal are utterly without merit. The record does not contain any of the letters Greer claims to have

⁴ In addition, Greer is prohibited from addressing this issue for the first time in his reply brief. See, e.g., *Matter of Bilsie's Estate*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981); *State v. Schindler*, 146 Wis. 2d 47, 51 n.2, 429 N.W.2d 110 (Ct. App. 1988); *State v. Foley*, 142 Wis. 2d 331, 345 n.7, 417 N.W.2d 920 (Ct. App. 1987); *State v. Lewandowski*, 122 Wis. 2d 759, 763, 364 N.W.2d 550 (Ct. App. 1985); *Henry ex rel. Weis v. General Cas. Co. of Wisconsin*, 225 Wis. 2d 849, 868 n.10, 593 N.W.2d 913 (Ct. App. 1999); *State v. Berggren*, 2009 WI App 82, ¶ 49 n.10, 320 Wis. 2d 209, 769 N.W.2d 110.

submitted to the circuit court, and if it does, they are not referenced in the brief. Greer was also acting as his own counsel, at least by December 18, 2014, during the hearing on his third postconviction motion. (43). It is disingenuous for Greer to argue that his counsel did not do something when he was acting as his own counsel.

The third issue presented in Greer's brief, withdrawal of plea based on prosecutorial misconduct, is also without merit. When a defendant seeks to withdraw a plea after sentencing, he or she must demonstrate by clear and convincing evidence that a manifest injustice exists. See *State v. Bentley*, 201 Wis.2d 303, 311, 548 N.W.2d 50 (1996). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. See *State v. Giebel*, 198 Wis.2d 207, 212, 541 N.W.2d 815 (Ct.App.1995). In order to withdraw a guilty or no contest plea after sentencing, a defendant carries the heavy burden of establishing that the trial court should permit the defendant to withdraw the plea to correct a "manifest injustice." *State v. Washington*, 176 Wis.2d 205, 213, 500 N.W.2d 331 (Ct.App.1993). A trial court's decision on a motion seeking plea withdrawal is discretionary and will be reviewed subject to the erroneous exercise of discretion

standard. *State ex rel. Warren v. Schwarz*, 219 Wis.2d 615, 635, 579 N.W.2d 698 (1998). Greer's brief contains nothing that shows that a manifest injustice occurred or that the circuit court erroneously exercised its discretion.

Greer's brief contains no cites indicating the veracity of his claims that the district attorney had received numerous letters that the victim presented false evidence. (Greer's brief, p. 11). Therefore, the circuit court's denial of Greer's motion(s) should be upheld even if they are found to not be barred by *Escalona-Naranjo*.

CONCLUSION

For the above reasons, the State of Wisconsin asks this court to affirm the circuit court's denial of Greer's postconviction motion(s).

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters
per inch; double spaced; 1.5
inch margin on left side and 1
inch margins on the other 3
sides. The length of this brief
is 13 pages.

Dated: October 22, 2015.

Signed,

Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of October, 2015.

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