COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2619 **Cir. Ct. No. 2004CF599**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL MARIO MILLER, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Michael Mario Miller, Jr., *pro se*, appeals the order denying his motion for postconviction relief pursuant to WIS. STAT. § 974.06

(2011-12).[1] He argues his trial counsel and postconviction counsel were ineffective for failing to challenge the admissibility of his inculpatory statement on Sixth Amendment grounds. Additionally, he asserts his postconviction counsel was ineffective for failing to adequately argue that Miller's statement should have been suppressed as a result of a warrantless search. We affirm, albeit based on reasoning that differs from that offered by the postconviction court.

BACKGROUND

¶2 The underlying facts were set forth in our prior decision resolving Miller's direct appeal, and as such, we will not repeat them here. *See* ***State v. Miller***, No. 2010AP399-CR, unpublished slip op. ¶¶2-11 (WI App Mar. 15, 2011). Suffice it to say that after we rejected the no-merit report submitted by his originally appointed attorney, Miller's newly appointed postconviction counsel filed a WIS. STAT. RULE 809.30 postconviction motion on Miller's behalf. Postconviction counsel argued that Miller's trial counsel was ineffective for failing to seek to suppress Miller's inculpatory statement on grounds that it resulted from a warrantless entry into a home where Miller was an overnight guest. Additionally, postconviction counsel argued that Miller's trial counsel was ineffective for failing to argue the issue of whether Miller invoked his right to counsel at the outset of his interrogation by police.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. The Honorable Jeffrey A. Conen entered the order denying Miller's WIS. STAT. Rule 809.30 postconviction motion, which is discussed later in this opinion. The Honorable Jeffrey A. Wagner entered the order denying the WIS. STAT. § 974.06 postconviction motion that is the subject of this appeal.

¶3 A ***Machner*** hearing was held where both Miller and his trial counsel testified.[2] The postconviction court subsequently concluded that Miller's trial counsel was not ineffective. Miller appealed, and we affirmed. ***Miller***, No. 2010AP399-CR, ¶1.

¶4 In October of 2012, Miller, *pro se*, filed the WIS. STAT. § 974.06 postconviction motion underlying this appeal. He again argued his trial counsel was ineffective for failing to file a motion to suppress his statement to police made after he invoked his right to counsel. Additionally, Miller argued his postconviction counsel was ineffective for failing to adequately argue that Miller's statement should have been suppressed as a result of the warrantless search. In making the latter argument, Miller acknowledged that his postconviction counsel had raised this claim previously—but asserted that he did so "inadequately."

¶5 The postconviction court denied Miller's motion without a hearing. It also denied Miller's motion for reconsideration. This appeal follows. Additional background details will be set forth below as necessary.

ANALYSIS

A. *Ineffective assistance of trial counsel and postconviction counsel for failing to challenge the admissibility of Miller's statements on Sixth Amendment grounds.*

¶6 Although Miller would lead this court to believe his Sixth Amendment right to counsel was never raised by postconviction counsel, our

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

review of the record reveals that it was.[3] In Miller's WIS. STAT. RULE 809.30 postconviction motion, his postconviction counsel argued that Miller's trial counsel was ineffective for failing to adequately present the invocation of counsel issue. In the motion, postconviction counsel detailed an email he had sent to Miller's trial counsel addressing this very issue:

> Miller claims that Mike Jack[e]l[e]n was his lawyer at the time of his arrest in the homicide. He showed me notes written by [a district attorney] to the effect that on the day of the second arrest [the district attorney] called [a detective] and told him that Miller had a lawyer. [Detective] Gilbert Hernandez, himself, testified that Miller said he had a lawyer but did not want him present for the interrogation. None of this was brought up at the ***Miranda-Goodchild*** hearing.[4] Did you know about this evidence? If so, what was the reason for not using it at the hearing on the motion to suppress the statement?

Postconviction counsel relayed that Miller's trial counsel never responded to his request for an explanation.

¶7 In the memorandum supporting the WIS. STAT. RULE 809.30 postconviction motion, postconviction counsel specifically argued:

> In ***State v. Dagnall***, 2000 WI 82 (Wis. 2000), a case with facts almost identical to Miller's case, the Wisconsin Supreme Court held:
>
> > We hold that Dagnall was not required to invoke the right to counsel in this case because he had been formally charged with a crime and counsel had been retained to represent him on that charge. Because

[3] We disagree with Miller's assertion that when he raised the right to counsel in his WIS. STAT. RULE 809.30 postconviction motion and direct appeal, it was under the Fifth Amendment.

[4] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

> Dagnall was an accused person under the Sixth Amendment who had an attorney to represent him on the specific crime charged, and because the attorney had informed the police of his representation of Dagnall and admonished them not to question his client about that crime, any subsequent questioning about that crime was improper. In addition, we conclude that Dagnall did not waive his Sixth Amendment right to counsel by talking to the detectives after he had been given the ***Miranda*** warnings. We therefore hold that, under these facts, Dagnall's motion to suppress the inculpatory statements should have been granted. [***Dagnall***, 236 Wis. 2d 339, ¶4.]

> Here, whether or not additional evidence on the invocation of right to counsel was presented, the record of the motion to suppress Miller's statement was sufficient to raise the issue of whether, by hiring Jack[e]l[e]n to represent him on his other criminal matters, Miller effectively invoked his right to counsel [i]n the present case. Nonetheless, [trial counsel] did not argue this issue and the court did not make a ruling on whether Miller invoked his right to counsel.

¶8 Postconviction counsel then went on to explain that trial counsel's failure was deficient performance and was prejudicial:

> [I]n the absence of Miller's confession, the jury would have [been] left to weigh the sworn trial testimony of the witnesses that Miller was not involved in the shooting against the detectives' claims that the witnesses said something else on another occasion. This is hardly the sort of evidence that is likely to convince a jury beyond a reasonable doubt.[5]

¶9 After the postconviction court denied his WIS. STAT. RULE 809.30 postconviction motion, Miller appealed, and, as noted above, we affirmed.

[5] Miller quotes this language verbatim in his subsequent WIS. STAT. § 974.06 motion.

¶10 In Miller's WIS. STAT. § 974.06 motion, he raises this same issue of trial counsel ineffectiveness, and on appeal, he additionally asserts that postconviction counsel was ineffective for failing to raise the issue.[6] As highlighted, in the preceding paragraphs, postconviction counsel *did* raise this very issue. Consequently, Miller's present claims fail: "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).

¶11 We further note that Miller criticizes counsel for not citing ***State v. Forbush***, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741. ***Forbush*** was decided by the Wisconsin Supreme Court on April 29, 2011, just over one month after we affirmed Miller's direct appeal. We, like the postconviction court conclude that trial and postconviction counsel were not ineffective for failing to argue a case that had not yet been decided when the trial and WIS. STAT. RULE 809.30 proceedings were underway. However, as the State concedes, even before ***Forbush*** was decided, ***Dagnall*** afforded Miller Sixth Amendment protections. Miller's postconviction counsel argued ***Dagnall*** in the RULE 809.30 motion he submitted on Miller's behalf.[7]

[6] Miller did not clearly argue in his WIS. STAT. § 974.06 postconviction motion that postconviction counsel was ineffective for failing to raise additional issues pertaining to the invocation of his right to counsel during the interrogation process. The postconviction court nevertheless considered his motion as if he had made such an argument. We will do the same.

[7] We note that in addressing the merits of this claim, the State apparently concedes that Miller's Sixth Amendment rights had attached. *See* ***State v. Dagnall***, 2000 WI 82, ¶30, 236 Wis. 2d 339, 612 N.W.2d 680 ("The right to counsel under the Sixth Amendment arises after adversary judicial proceedings have been initiated—in Wisconsin, by the filing of a criminal complaint or the issuance of an arrest warrant.").

¶12 If Miller is challenging not postconviction counsel's but appellate counsel's performance, such a claim is not properly before us. There is a distinction between the roles of postconviction and appellate counsel, even if he or she is the same person. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678-80, 556 N.W.2d 136 (Ct. App. 1996); *see also* ***State v. Starks***, 2013 WI 69, ¶35, 349 Wis. 2d 274, 833 N.W.2d 146 ("A defendant arguing ineffective assistance of *appellate counsel*, … may not seek relief under § 974.06 and must instead petition the court of appeals for a writ of *habeas corpus*.") (emphasis in ***Starks***).

B. *Ineffective assistance of postconviction counsel for failing to adequately argue that Miller's statement should have been suppressed as a result of a warrantless search.*

¶13 In his WIS. STAT. § 974.06 motion, Miller conceded that postconviction counsel previously argued that his trial counsel was ineffective because she failed to challenge the admissibility of Miller's statement made to police after an allegedly illegal search led to his arrest. Miller, however, argues that postconviction counsel did so inadequately.

¶14 To the extent Miller is, in fact, challenging postconviction counsel's performance, we agree with the postconviction court's conclusion that this argument is "irrelevant" given that the State stipulated the search was warrantless. Therefore, postconviction counsel was not ineffective for failing to focus on the entry into the home or the arrest and search. Instead, he focused his questioning on overcoming the State's position that Miller's subsequent statement was sufficiently attenuated from the arrest.

¶15 To the extent Miller is challenging appellate counsel's performance, which has not previously been before us, we reiterate that such a claim is not properly before us now. *See* ***Starks***, 349 Wis. 2d 274, ¶35.

¶16 We therefore affirm the postconviction court, although based on slightly different rationale. *See* ***State v. King***, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984). Insofar as Miller requests that we exercise power of discretionary reversal pursuant to WIS. STAT. § 752.35, we conclude that this is not the case to do so. *See* ***Vollmer v. Leuty***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990) (emphasizing that our power of discretionary reversal is reserved for only the exceptional case).

By the Court.—Order affirmed.

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