COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1434 **Cir. Ct. No. 2008CF2643**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTIN L. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN A. Di MOTTO, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Justin L. Anderson, *pro se*, appeals an order denying his motion for postconviction relief brought under WIS. STAT. § 974.06

(2011-12).[1] He alleges that his trial counsel was ineffective for failing to seek relief from the joinder of his trial with that of his co-defendant, Paris Billups, following Billups's testimony during his cross-examination. Anderson alleges that his postconviction counsel was ineffective in turn for failing to challenge trial counsel's effectiveness. The circuit court determined that the claims are procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. We affirm.

BACKGROUND

¶2 According to the State, Anderson and Billups forced their way into an apartment on May 14, 2008, sexually assaulted the female occupant, T.B., battered the male occupant, G.J., and then fled with various items from the apartment. The State charged Anderson and Billups with six felonies as a party to a crime, namely, burglary, false imprisonment, first-degree sexual assault, two counts of robbery by use of force, and one count of substantial battery. Additionally, the State charged each man with one count of first-degree sexual assault as a principal actor.

¶3 Anderson gave custodial statements that the circuit court suppressed on the ground that the police obtained them in violation of ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).[2] The circuit court found, however, that Anderson

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Before questioning a suspect in custody, officers must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one. *See* ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).

confessed voluntarily in his second interview with police and that the State could therefore use the statements made in that interview for impeachment and rebuttal purposes if Anderson took the stand at trial and testified in a way that conflicted with his extrajudicial statements. After the circuit court ruled on the admissibility of Anderson's statements, all parties agreed that no basis existed to sever Anderson's trial from Billups's, and the matters proceeded to a joint trial.

¶4 T.B. testified that two men she did not know broke into her apartment late in the evening of May 14, 2008, had forced sexual contact with her, and fled with cash and other items, including several electronic devices. G.J. testified that he was asleep in the apartment that he shared with T.B. when he was awakened by intruders kicking and beating him. G.J. said that when the attackers fled the apartment, they stole his cell phone.

¶5 A police detective described using telephone records to determine the telephone numbers dialed from G.J.'s cell phone after it was allegedly stolen. The investigation revealed that a woman named Samantha Carr received calls from the stolen cell phone. Carr testified next. She said that she knew Anderson and his friend Billups, and she identified Anderson as the person who called her using the stolen cell phone. Additional police officers testified about locating Anderson and Billups and collecting samples of their DNA for analysis. A forensic scientist testified that the DNA profiles of Anderson and Billups matched the DNA profiles of the men who deposited semen found on T.B. when she was examined early in the morning of May 15, 2008.

¶6 Billups took the stand in his own defense. He told the jury that he and Anderson met T.B. for the first time near a parking lot on May 14, 2008, and she agreed to have sex with each of them in Billups's car. Billups said that after

the sexual encounters, T.B. agreed that Anderson could use the bathroom in her apartment. When a man in the apartment confronted Billups and Anderson, they attacked and beat the man. Billups denied that he stole anything when he left the apartment, and he said that he did not see Anderson take anything either.

¶7 During cross-examination, the State questioned Billups about calls to his cell phone numbers that originated from G.J.'s allegedly stolen cell phone. While Billups did not dispute that his telephone numbers appeared on telephone records as numbers that received calls from G.J.'s stolen cell phone, Billups denied any knowledge of the calls and testified that he could not explain them.

¶8 Neither Anderson nor Billups presented any other witnesses. Anderson declined to testify. During closing argument, both Anderson and Billups conceded that they were guilty of substantial battery and otherwise maintained their innocence.

¶9 The jury found both men guilty of substantial battery, and the jury additionally found Anderson guilty of one count of robbing G.J. by use of force. The jury found Anderson and Billups not guilty of the remaining charges.

¶10 In postconviction proceedings, Anderson unsuccessfully challenged a DNA surcharge imposed at sentencing. His appellate counsel then filed a notice of appeal and a no-merit report in this court under the procedures set forth in WIS. STAT. RULE 809.32. Anderson himself filed a document that identified no issues but asked us to review the record. We affirmed. ***State v. Anderson***, No. 2010AP2227-CRNM, unpublished op. and order (WI App Apr. 12, 2011) (***Anderson I***). Proceeding *pro se*, Anderson next filed a petition for a writ of *habeas corpus* alleging his appellate counsel's ineffectiveness. *See* ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). We addressed and

rejected some claims and determined that he brought others in the wrong forum. ***Anderson v. Pugh***, No. 2012AP1831-W, unpublished slip op. (WI App Nov. 19, 2012) (***Anderson II***).

¶11 Anderson next filed the postconviction motion underlying this appeal, renewing the claims that we declined to reach in ***Anderson II***. He alleged that Billups's trial testimony incriminated him in the theft of G.J.'s cell phone, that his trial counsel therefore was ineffective for failing to seek relief from prejudicial joinder during trial, and that his postconviction counsel was ineffective in turn for failing to challenge trial counsel's effectiveness and instead pursuing a no-merit appeal. The circuit court concluded that the claims were both procedurally barred and substantively meritless. Anderson appeals.

DISCUSSION

¶12 "We need finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. Therefore, a convicted defendant may not bring postconviction claims under WIS. STAT. § 974.06 if the defendant could have raised the issues in a previous postconviction motion or on direct appeal unless the defendant states a "sufficient reason" for failing to raise those issues. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. Whether a defendant's claims are barred by ***Escalona-Naranjo*** in any particular case presents a question of law that this court reviews *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶13 Preliminarily, we note that a postconviction motion seeking relief from a DNA surcharge does not bar a defendant from pursuing claims under WIS. STAT. § 974.06. *See* ***State v. Starks***, 2013 WI 69, ¶46, 349 Wis. 2d 274, 833 N.W.2d 146. Further, we determined in ***Anderson II*** that Anderson could not pursue the claims he brings now in the forum he selected for that proceeding, so

Anderson II does not bar his current litigation. *See* ***Anderson II***, No. 2012AP1831-W, unpublished slip op. at 7. We turn to whether the no-merit proceedings conducted in ***Anderson I*** constitute a procedural bar.

¶14 When we consider the preclusive effect of no-merit proceedings under WIS. STAT. RULE 809.32, our review includes an assessment of whether appellate counsel and this court followed the no-merit procedures and whether those procedures warrant confidence in their outcome. *See* ***Tillman***, 281 Wis. 2d 157, ¶20. In this case, appellate counsel filed a no-merit report and Anderson had an opportunity to respond. *See* ***Anderson I***, No. 2010AP2227-CRNM, unpublished op. and order at 1. Our opinion in ***Anderson I*** reflects that we considered the no-merit report and Anderson's submission, and we independently examined the record. *See* ***id.*** In affirming the convictions, we discussed the sufficiency of the evidence, the circuit court's exercise of sentencing discretion, and the order imposing a DNA surcharge. ***Id.*** at 2-3. We concluded that neither those issues nor any others constituted a basis for an arguably meritorious appeal. ***Id.*** at 3. Appointed counsel and this court thus followed the no-merit procedures precisely. *See* RULE 809.32. We therefore have confidence in the proceedings underlying ***Anderson I***. ***Escalona-Naranjo*** governs here.

¶15 Because ***Escalona-Naranjo*** is applicable to this case, Anderson may pursue his current claims only if he presents a sufficient reason for an additional postconviction proceeding. Anderson indicates that he has such a reason, stating that, because he lacks legal training, he did not raise his current claims during the proceedings underlying ***Anderson I*** and instead relied on this court and his lawyer to identify potential appellate issues. This reason is insufficient to overcome the procedural bar to serial litigation. Most litigants lack legal training and rely on their lawyers. Moreover, all litigants in no-merit appeals may anticipate receiving

the benefit of this court's independent review. *See* ***Tillman***, 281 Wis. 2d 157, ¶17. The procedural bar of ***Escalona-Naranjo*** would be meaningless if a prisoner could avoid it based on these considerations. Thus, a convicted defendant's decision during the no-merit proceedings to rely on counsel and this court is a reason to apply, not to disregard, the bar. "Failure of a defendant to respond to both a no-merit report and the decision on the no-merit report firms up the case for forfeiture of any issue that could have been raised." ***State v. Allen***, 2010 WI 89, ¶72, 328 Wis. 2d 1, 786 N.W.2d 124 (emphasis omitted).

¶16 Anderson offers an alternative reason for serial litigation, namely postconviction counsel's alleged ineffectiveness in failing to identify a purportedly meritorious claim that trial counsel was ineffective. *See* ***Allen***, 328 Wis. 2d 1, ¶85 (ineffective assistance of postconviction counsel may constitute sufficient reason for additional postconviction proceeding). To demonstrate ineffective assistance of postconviction counsel here, however, Anderson must show that his trial counsel was, in fact, ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶17 A defendant claiming ineffective assistance of counsel must show both that counsel performed deficiently and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Both components of the analysis present questions of law. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. ***Strickland***, 466 U.S. at 697. To demonstrate that filing a no-merit report constituted deficient performance, the defendant must identify an issue of arguable merit that counsel failed to discover and brief. *See* ***Smith v. Robbins***, 528 U.S. 259, 285 (2000). To demonstrate prejudice, the defendant must show "a

reasonable probability that, but for [postconviction] counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." ***Id.*** An attorney is not ineffective for failing to pursue a claim that would have been denied. ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110.

¶18 In this case, Anderson believes that the jury convicted him of robbery "based solely on the testimony of Billups that the stolen cell phone called his cell phone." In Anderson's view, Billups's testimony about the cell phone calls thus prejudiced Anderson, thereby entitling him to relief from joinder pursuant to WIS. STAT. § 971.12(3).[3] Relying on this premise, Anderson argues that his trial counsel was ineffective for failing to seek severance, a mistrial, or some alternative relief, and that postconviction counsel was ineffective for filing a no-merit report instead of challenging trial counsel's effectiveness. Anderson's premise is wrong. He did not have a statutory entitlement to relief from joinder.

> [WISCONSIN STAT. §] 971.12(3), Stats., provides that a trial court shall grant a severance if the prosecution intends to use the statement of a codefendant which implicates another defendant in the crime charged. This statute is a codification of ***Bruton v. United States***, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), which held that use of a *nontestifying codefendant's extrajudicial statements* in determining a defendant's guilt violates the right of cross-

[3] WISCONSIN STAT. § 971.12(3) provides:

> RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the [S]tate is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

> examination provided by the confrontation clause of the sixth amendment to the United States Constitution.

State v. Smith, 117 Wis. 2d 399, 410-11, 344 N.W.2d 711 (Ct. App. 1983) (emphasis added, footnotes omitted). Billups was not a "nontestifying co-defendant." *See* ***id.*** at 411. He took the stand in his own defense, and he was fully available for cross-examination. Further, Billups did not give an extrajudicial statement. The record is uncontroverted that he declined to talk to police before trial. Accordingly, § 971.12(3) did not mandate any form of relief here.[4]

¶19 Anderson also asserts that his trial counsel should have sought relief from joinder because he was "prejudice[d] by the actual conduct of Billups'[s] defense." In support, he directs our attention to federal authority, specifically, ***United States v. Ziperstein***, 601 F.2d 281, 286 (7th Cir. 1979). ***Ziperstein*** holds that a defendant could be "prejudiced by the actual conduct of a co-defendant's defense," but states that this basis for severance depends on "the entire course of the trial prior to the challenged conduct." *See* ***id.*** As subsequent decisions clarify, to "'demonstrat[e] undue prejudice resulting from the joint trial ... [the defendant] must establish that the joint trial was unfair.'" *See* ***Stomner v. Kolb***, 903 F.2d 1123, 1128 (7th Cir. 1990) (citation and one set of brackets omitted). Anderson fails to show that his trial was unfair as a result of Billups's testimony.

¶20 "[A] fair trial does not include the right to exclude relevant and competent evidence." ***Zafiro v. United States***, 506 U.S. 534, 540 (1993). Here,

[4] In asserting a right to relief from joinder, Anderson appears to place substantial reliance on his reading of ***Pohl v. State***, 96 Wis. 2d 290, 291 N.W.2d 554 (1980). ***Pohl*** involves a joint trial in which the State introduced, without objection, a testifying co-defendant's out-of-court statement incriminating the defendant. ***Id.*** at 297-98. The case offers no guidance here because the testifying co-defendant, Billups, did not give an out-of-court statement.

Anderson makes no showing that Billups's testimony was irrelevant or incompetent. "A defendant normally would not be entitled to exclude the testimony of a former co-defendant if the [circuit] court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant." ***Id.*** Further, the rule is well-settled in Wisconsin that "[w]here the evidence is admissible as to both defendants, there is no prejudice [from joinder], since such evidence could be introduced at separate severed trials." ***State v. Jennaro***, 76 Wis. 2d 499, 505, 251 N.W.2d 800 (1977). Because Anderson does not demonstrate that Billups's testimony about the cell phone calls would have been inadmissible at a separate trial against Anderson alone, he shows no prejudice flowing from admission of Billups's testimony in the joint trial.

¶21 Moreover, the record as a whole reveals that Anderson was not prejudiced by a joint trial. The record simply does not support his contention that the jury convicted him "o[f] the robbery charge based solely on the testimony of Billups that the stolen cell phone called his cell phone." As the State aptly explains in its brief, "[a]ny suggestion that Anderson had made those calls [from the stolen telephone] did not come from Billups, who explicitly denied that Anderson stole anything[,] and instead came from a different witness, Samantha Carr, who testified that calls she received from the stolen telephone were calls from Anderson."

¶22 Indeed, the record as a whole reveals that Anderson benefitted from Billups's defense. Anderson called no witnesses and offered no reason why T.B., a woman who did not know him, had semen on her body on May 15, 2008, matching his DNA profile. Any testimony that Anderson might have offered to suggest—as Billups did—an innocent explanation for the presence of Anderson's

semen on T.B. would have been impeached with Anderson's confession to police that he and Billups forced their way into a residence on May 14, 2008, that Anderson forced the female occupant, T.B., to have sexual intercourse with him, and that Anderson and Billups then fled with stolen items, including a cell phone. *See* ***State v. Franklin***, 228 Wis. 2d 408, 412, 596 N.W.2d 855 (Ct. App. 1999) (holding that voluntary statements secured in violation of ***Miranda*** may be used to impeach a defendant's conflicting testimony).

¶23 Anderson thus does not demonstrate that his trial counsel erred by foregoing a mid-trial motion for relief from joinder. Accordingly, postconviction counsel correctly did not challenge trial counsel's effectiveness. *See* ***Berggren***, 320 Wis. 2d 209, ¶21.

¶24 In sum, we are satisfied that Anderson offers no basis for further litigation in this matter.[5] For all of these reasons, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

[5] When we accept a no-merit report and summarily affirm a criminal conviction pursuant to WIS. STAT. RULE 809.32, our affirmance reflects our conclusion that further appellate proceedings would be frivolous. *See* RULE 809.32(3). Anderson has pursued two pieces of litigation in this court since we reached that conclusion. We caution Anderson that we will not countenance further squandering of scarce judicial resources on meritless claims.