COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2688 **Cir. Ct. No. 2007CF1714**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RUDOLPH D. POWELLS,

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. Rudolph D. Powells, *pro se*, appeals an order of the circuit court that denied his postconviction motion for relief under WIS. STAT.

§ 974.06 (2011-12)[1] without a hearing. Powells complains that the circuit court violated his right to confrontation by allowing certain testimony at trial and that trial counsel was ineffective for not challenging that testimony or the State's ballistics expert's testimony. We conclude that the circuit court properly denied the motion, so we affirm the order.

BACKGROUND

¶2 On August 7, 2005, police were dispatched to an apartment on Mill Road. Two intruders wearing black masks had kicked in the apartment door, demanding money and marijuana from the residents. During the course of the robbery, one of the intruders shot and killed a resident. Police recovered a .40-caliber shell casing from the scene. They also recovered a piece of fabric that might have been a mask. The fabric was swabbed for possible DNA, then sent to the Wisconsin Crime Laboratory for analysis. At the time, police had no real suspects because the robbery victims had not been able to see anything more than the intruders' eyes.

¶3 In October 2006, the Milwaukee Police Department's gang squad executed a search warrant on 44th Street. They recovered several firearms, including a .40-caliber handgun. One of the gang members "rounded up" during the warrant execution told police that the gun had been sold to another member by Powells.

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

¶4 In February 2007, the crime lab matched DNA from the fabric found at the homicide scene to Powells. Detective Steven Caballero investigated Powells further and discovered there had been a domestic violence incident on August 18, 2005—a mere eleven days after the homicide. A 911 call had come in from a phone registered in Powells' name, and shots had been fired. A shell casing was recovered from the incident, and Caballero sent it to the crime lab, along with the casing from the homicide and the gun recovered by the gang squad.

¶5 In March 2007, the crime lab reported that the shell casings from the homicide and the domestic violence incident came from the same gun as a test shot made with the .40-caliber handgun recovered by the gang squad. Powells was arrested and charged with first-degree reckless homicide and two other offenses, with various enhancers. A jury convicted Powells on all charges, and he was sentenced to an aggregate fifty years' initial confinement and thirty years' extended supervision.

¶6 Powells sought postconviction relief, which was denied. He appealed and raised five issues in his brief. We rejected his challenges and affirmed the convictions. *See* ***State v. Powells***, No. 2010AP533-CR, unpublished slip op. (WI App Jan. 13, 2011).

¶7 In September 2012, Powells filed the *pro se* postconviction motion that underlies this appeal, seeking a new trial. His primary concern was alleged confrontation clause violations. The victim in the domestic violence incident, Monique C., had failed to respond to her subpoena for the homicide trial. As a result, certain testimony was excluded: the jury was not permitted to know that police responded specifically to a domestic violence incident, nor was it informed that Monique C. told police that Powells had, and had fired, a gun.

¶8 Officers were, however, allowed to testify generally that they had responded to a call, that the computer-aided dispatch (CAD) report indicated the 911 call came from a phone in Powells' name, and that a shell casing was recovered and sent for testing. Powells asserted that because all of this information stemmed from Monique C.'s report, allowing any derivative testimony violated his right to confrontation. Powells also claimed trial counsel had been ineffective for not objecting to this violation of his rights and for not objecting to the State's ballistics expert's testimony matching the shell casings and gun "to a degree of scientific certainty."

¶9 The circuit court rejected Powells' motion for several reasons. It noted that the admissibility of the CAD report and shell casing had already been raised and rejected in Powells' first appeal. It noted that Powells was also complaining about appellate counsel's failure to challenge that evidence in the context of a confrontation clause violation, but a challenge to appellate counsel's performance must be pursued under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), not WIS. STAT. § 974.06. Assuming a challenge to postconviction counsel instead, the circuit court concluded that there was "not a reasonable probability the motion would have been favorable to the defendant" because the shell casing could have been found by police without Monique C. pointing it out, and the CAD report was independent of her statement. Accordingly, there was no confrontation clause violation for trial counsel to challenge, and no ineffective assistance from postconviction counsel. The circuit court also concluded that Powells had not shown the State's expert's conclusions were faulty, so any claim of error was conclusory and unsupported. Powells now appeals, essentially renewing the same claims in this court that he made in the circuit court.

DISCUSSION

¶10 To be entitled to a hearing on his motion, Powells had to allege sufficient material facts which, if true, would entitle him to relief. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. However, if the motion is insufficiently pled, or if the record conclusively demonstrates that the movant is not entitled to relief, the circuit court may deny the motion without a hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). The sufficiency of a postconviction motion is a question of law. *See* ***Balliette***, 336 Wis. 2d 358, ¶18.

¶11 "[A]ny claim that could have been raised on direct appeal" or in a prior postconviction motion is barred from being raised in a subsequent WIS. STAT. § 974.06 motion absent a sufficient reason for not raising it earlier. *See* ***State v. Lo***, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756; *see also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Whether a procedural bar applies is a question of law. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶12 On appeal, Powells presents no express argument regarding a sufficient reason for not raising his current issues earlier, though he did include such a section in his motion. The circuit court assumed that Powells was alleging ineffective assistance of postconviction counsel because, in some instances, ineffective assistance of postconviction counsel may constitute a "sufficient reason." *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). A defendant claiming postconviction counsel was ineffective for not challenging trial counsel's effectiveness must establish that trial counsel actually was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268

Wis. 2d 468, 673 N.W.2d 369. Demonstrating ineffectiveness requires a showing that counsel performed deficiently and that the deficiency was prejudicial. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433.

I. The Confrontation Clause Issue

¶13 Both the United States and Wisconsin Constitutions "guarantee criminal defendants the right to confront the witnesses against them." *See* ***State v. Hale***, 2005 WI 7, ¶43, 277 Wis. 2d 593, 691 N.W.2d 637. The confrontation clause "bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" ***Davis v. Washington***, 547 U.S. 813, 821 (2006) (quoting ***Crawford v. Washington***, 541 U.S. 36, 53-54 (2004)). A threshold question in a confrontation clause case "is whether the State is proffering 'testimonial' hearsay evidence." ***Hale***, 277 Wis. 2d 593, ¶53. Only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." ***Davis***, 547 U.S. at 821. While a circuit court's decision to admit evidence is generally left to that court's discretion, we independently review whether that evidence violates the confrontation clause. *See* ***Hale***, 277 Wis. 2d 593, ¶41.

¶14 Prior to trial, Powells sought to exclude "evidence of the defendant's involvement in a domestic violence incident on August 18, 2005." Monique C. had specifically alleged that Powells fired a handgun. In addition, she directed police to the location of the shell casing that was ultimately recovered. Thus, the evidence Powells sought to exclude included the casing and the CAD report generated by the 911 call. The circuit court agreed that, under ***Crawford*** and the confrontation clause, none of Monique C.'s direct statements were admissible.

However, "[t]he fact that the officer picked up a casing from the ground at that location is what is admissible."

¶15 On appeal, Powells takes issue with two officers' testimony. First is the testimony of Detective Caballero, who testified that after the crime lab matched the DNA on the fabric from the homicide with Powells, he did not take the case to the district attorney right away. Instead, he "continued looking into Mr. Powells as a possible suspect … [and] located an incident that was investigated a very short time after this homicide was investigated." Caballero explained that "the responding officers that were originally sent to [the incident] had conducted an investigation and located a piece of evidence." Specifically, they had located "a cartridge casing, and it was the exact same kind as the one that came from the homicide investigation. It was a .40-caliber S & W, Smith & Wesson, Federal brand casing." Caballero told the jury that he "took that casing and sent it to the Wisconsin Regional Crime Lab and had them check it against the casing that I had recovered during the homicide investigation."

¶16 Powells takes issue with this testimony because "it [implied] that Powells was directly involved with this incident and cartridge casing found" but "[t]he only person who can testify as to Powells being involved in the 2005 [domestic violence] incident was Ms. C[.]" Further, Powells complains that Caballero got his information from another officer, who got it from Monique C.

¶17 As noted, the confrontation clause is concerned with testimonial hearsay statements. *See* ***Davis***, 547 U.S. at 821; *see also* ***State v. Deadwiller***, 2013 WI 75, ¶20, 350 Wis. 2d 138, 834 N.W.2d 362. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3).

Nothing about Caballero's testimony is hearsay. Even to the extent that Caballero's testimony can be traced back to some statement, his testimony was not offered for the truth of the matter (i.e., that Powells had fired a shot during the incident Monique C. reported) but merely to explain how Caballero came to be in control of multiple pieces of evidence and why he sent them for evaluation. *Cf.* ***Deadwiller***, 350 Wis. 2d 138, ¶24. The actual relevance of the shell casing found at the domestic violence incident and its link to Powells and the homicide was established by other, circumstantial evidence. There is no confrontation clause violation from Caballero's testimony.

¶18 Powells also complains about the testimony of Officer Jill Riley, who responded to Monique C.'s 911 call. She testified about responding to a West Donna Court apartment and that "[o]ne .40 caliber Smith & Wesson casing" was recovered there. The State showed Riley a document that she identified as "a detailed history of a police call for" August 18, 2005, and asked her whether, "without getting into what the call said," she could determine where the call originated. Riley responded affirmatively, explaining that the "call is listed as being created from an emergency 9-1-1 line which lists the number that it derived from as well as the address and the person that is registered to that phone number at that address." Such information is generated automatically when a call comes in: "the number comes up as well as the address and the name that it's registered to. It appears on the computer for you to view" almost instantaneously. The information generated in this case was a "[p]hone number … listing to the address of 7620 West Donna Court, Apartment Number 8, listing to last name Powells, first name Rudolph, and it's [l]isting as a residence." Riley also testified that "[t]he casing was recovered [by another officer] at the address of 7710 West Dean[, an adjacent street,] on the sidewalk in front of that apartment building."

¶19 Powells complains that any testimony about recovering a shell casing is actually Monique C.'s statement because she pointed out the casing's location to police. He also claims that "the State's use of the CAD report to show [he] was involved in the domestic violence incident and with shell casing" violates the confrontation clause.

¶20 Monique C. might have pointed out the shell casing to officers, but an officer's act of recovering the casing, however police came to be aware of its location, is not a statement by Monique C. Moreover, a report stemming from an active 911 call is generally not a testimonial statement, *see* ***Davis***, 547 U.S. at 823-27, and the pretrial motion resulted in exclusion of portions of the report that would be considered testimonial, *see* ***id.*** at 829. There is no confrontation clause violation from Riley's testimony.

¶21 Because there was no confrontation clause violation from either officer's testimony, trial counsel had no basis for objecting further and, thus, was not deficient for failing to do so. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance."). Because trial counsel was not ineffective, postconviction counsel had no reason to challenge his performance. Powells has therefore failed to show a sufficient reason for failing to raise his confrontation-clause challenges earlier.[2]

[2] The circuit court also concluded that Powells had raised these issues in his first appeal, when he argued that the casing and CAD report should not be admitted because they constitute other-acts evidence. *See* ***State v. Powells***, No. 2010AP533-CR, unpublished slip op., ¶4 (WI App Jan. 13, 2011). To the extent the issues are the same, the circuit court is correct: "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

II. Ballistics Evidence

¶22 Mark Simonson, a firearm and toolmark examiner from the crime lab, opined that the casings from the homicide and the West Donna Court location were fired from the same weapon. Powells complains that trial counsel was ineffective for not objecting to Simonson's conclusion that the match was "to a degree of scientific certainty," contending that "recent state and federal cases have held firearm toolmark evidence questionable" and asserting that with proper objections and citations, Simonson's testimony could have been excluded.

¶23 The two main federal cases on which Powells relies are not useful: both rely on the standard set forth in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), for expert testimony. *See* ***United States v. Monteiro***, 407 F. Supp. 2d, 351, 356 (D. Mass. 2006); ***United States v. Green***, 405 F. Supp. 2d 104, 106 (D. Mass. 2005). Wisconsin did not adopt the ***Daubert*** standard until 2011, *see* 2011 Wis. Act 2, § 34M, and it first applied to actions commenced on or after February 1, 2011. *See* 2011 Wis. Act 2, § 45(5). Powells' case commenced in 2007.

¶24 The appropriate standard for the admissibility of expert testimony at the time of Powells' trial was simply one of relevance. *See* ***State v. Jones***, 2010 WI App 133, ¶22, 329 Wis. 2d 498, 791 N.W.2d 390. More specifically, expert testimony was admissible if: (1) the evidence was relevant; (2) the witness was qualified as an expert by knowledge, skill, expertise, training, or education; and (3) the evidence would assist the trier of fact in determining a fact in issue. *See* ***State v. Alger***, 2013 WI App 148, ¶22, 352 Wis. 2d 145, 841 N.W.2d 329.

¶25 While Powells makes multiple complaints about Simonson's testimony that might have some significance under the ***Daubert*** standard, such as

Simonson's level of education and professional certification, those complaints have no such heft here. In fact, in ***Jones***—another case on which Powells relies—the defendant sought "a blanket rule barring as a matter of course all testimony purporting to tie cartridge cases and bullets to a particular gun … [citing] a number of articles and trial-level decisions questioning the efficacy of such evidence." *See* ***id.***, 329 Wis. 2d 498, ¶20. We refused to impose such a rule in light of our then-status as a non-***Daubert*** state. ***Jones***, 329 Wis. 2d 498, ¶¶21-23. Powells' complaints about why Simonson's testimony should have been excluded might, under either standard, go to the weight of his testimony. Under the standard applicable at the time, however, those complaints did not affect the admissibility of the testimony. Trial counsel was not ineffective for failing to pursue a meritless motion. *See* ***State v. Cummings***, 199 Wis. 2d at 747 n.10.

¶26 The circuit court additionally noted that Powells had presented no opinion from some other expert who might have refuted Simonson's conclusions. Accordingly, Powells has not established a reasonable probability that the results of the proceedings could have been different, so he has failed to demonstrate any prejudice from Simonson's testimony, even if counsel should have objected to it.

¶27 Accordingly, we agree with the circuit court's denial of Powells' postconviction motion. Powells has not sufficiently demonstrated any confrontation clause violations, ineffective assistance of trial counsel for failing to claim such violations, ineffective assistance of trial counsel for failing to challenge Simonson's testimony, or ineffective assistance of postconviction counsel for failing to raise claims against trial counsel. The circuit court properly denied Powells' WIS. STAT. § 974.06 motion without a hearing.

By the Court.—Order affirmed.

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