COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP850 **Cir. Ct. No. 2008CF1519**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARTELL D. ROGERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Martell Rogers appeals a circuit court order denying his motion to vacate his sentence. He contends he received ineffective assistance of postconviction counsel because that counsel did not raise ineffective assistance of trial counsel issues. We disagree. Rather, Rogers' postconviction

counsel made a strategic decision only to litigate certain issues and not others. While a defendant can and should have some input into what issues he or she wants raised on appeal, the postconviction attorney ultimately decides which path to take. Rogers' postconviction counsel acted within his role by developing the strategy he thought was most likely to be successful. The law does not fault those attorneys who decide not to raise issues they see as frivolous or likely to hurt the overall appeal. Therefore, we affirm.

Background

¶2 In 2008, the State charged Rogers with committing a string of armed robberies, burglaries, and abductions in 2006. A jury found Rogers guilty as a party to a crime of one count of armed robbery, two counts of false imprisonment, two counts of forceful abduction of a child, and one count of armed burglary. The circuit court sentenced Rogers to twenty-seven years of initial confinement.

¶3 Rogers appealed his conviction. But, this court affirmed the circuit court's decision and our supreme court denied his petition for review. Rogers moved to vacate his sentence under WIS. STAT. § 974.06 (2013-14).[1] The circuit court denied Rogers' motion, holding that the law procedurally barred the claims he asserted. Rogers appeals the circuit court's decision.

Analysis

¶4 We review the circuit court's decision not to grant Rogers a ***Machner***[2] evidentiary hearing de novo. ***State v. Bentley***, 201 Wis. 2d 303, 310,

[1] All references to the Wisconsin statues are to the 2013-14 versions.

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

548 N.W.2d 50 (1996). We must determine whether Rogers alleged facts that, if true, would have entitled him to relief. ***Id.*** However, if Rogers failed to allege sufficient facts to entitle him to relief, we use the erroneous exercise of discretion standard. ***Id.*** at 310-11.

¶5 The circuit court denied Rogers' motion to vacate his sentence on ***Escalona***[3] grounds. *See* WIS. STAT. § 974.06(4). However, Rogers alleges a "sufficient reason" why he did not previously raise the grounds he seeks relief on now. *See* § 974.06(4); *see also* ***State v. Allen***, 2010 WI 89, ¶46, 328 Wis. 2d 1, 786 N.W.2d 124. We will assume without deciding that he did not have the ability to raise arguments different than those made by his postconviction counsel. Therefore, we proceed to the merits to determine whether Rogers received ineffective assistance of postconviction counsel. *See* ***State v. Balliette***, 2011 WI 79, ¶¶60-64, 336 Wis. 2d 358, 805 N.W.2d 334. Rogers must show his counsel made errors so serious that the representation was deficient under the level guaranteed by the Sixth Amendment and also prejudiced the defense. *See* ***id.***, ¶64; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Postconviction counsel is ineffective when he or she ignores issues that are "clearly stronger than those presented." *See* ***State v. Starks***, 2013 WI 69, ¶¶57, 60, 349 Wis. 2d 274, 833 N.W.2d 146 (citation omitted).

¶6 On his direct appeal, Rogers raised two issues for this court to consider. First, he argued that one witness's testimony constituted impermissible character evidence. ***State v. Rogers***, No. 2011AP2428, unpublished slip op. ¶5 (WI App Oct. 10, 2012). Second, Rogers argued that the circuit court should have

[3] ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

granted his request for a mistrial, instead of opting for a curative instruction, based on inadmissible evidence offered by a witness during trial. ***Id.***, ¶¶13-17. Now, Rogers presents us with three issues he believes his postconviction counsel should have raised, all of them sounding in ineffective assistance of counsel claims. We will address each issue in turn.

¶7 First, Rogers argues that his trial counsel should have objected to the State choosing not to indict him through a grand jury proceeding in violation of the Fifth Amendment. However, his trial counsel did not commit any error in this regard. The law is well-established that:

> the Fifth Amendment, which provides that no person should be held to answer for a criminal offense unless on presentment or indictment of a grand jury, was not by way of the Fourteenth Amendment applicable to the states and therefore did not limit the power of a state to proceed by information rather than by indictment.

State v. Lehtola, 55 Wis. 2d 494, 496, 198 N.W.2d 354 (1972); *see also* ***Malloy v. Hogan***, 378 U.S. 1, 5 n.4 (1964). The United States Supreme Court has held that the states can decide on their own system for ensuring that probable cause exists to charge someone with a crime by filing an information, using a grand jury, or via some other means. ***Gerstein v. Pugh***, 420 U.S. 103, 119 (1975). Our legislature deemed that the State can charge a defendant when the district attorney's office files a complaint in a circuit court and the court decides not to dismiss the complaint for lacking probable cause. *See* WIS. STAT. §§ 968.02, 968.03. Therefore, the law does not require the State to use a grand jury to charge Rogers. So, his trial counsel was not ineffective for failing to raise this issue. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to raise an issue of law is not deficient performance if the legal issue is later

determined to be without merit."). Because this claim is meritless, it is not "clearly stronger" than those issues raised on direct appeal.

¶8 Second, Rogers argues that his trial counsel was ineffective for failing to object when the State filed a second amended complaint reintroducing a charge the court had previously dismissed without prejudice. In December 2008, the district attorney's office filed the first complaint against Rogers. Count Six was a charge of felony armed robbery. In May 2009, the circuit court conducted a preliminary examination under WIS. STAT. § 970.03 to determine probable cause for the charged offenses. At this hearing, the court dismissed Count Six after the assistant district attorney said she did not have enough evidence to show probable cause on this charge. In September 2010, the district attorney's office filed a second amended complaint that reintroduced the dismissed charge.

¶9 When the district attorney has unused evidence, he or she can file a second complaint to levy additional charges against a defendant. *See* WIS. STAT. § 970.04, *see also* ***State v. Brown***, 96 Wis. 2d 258, 265-66, 291 N.W.2d 538 (1980). Rogers argues that his trial counsel was ineffective because he did not object to the district attorney's office filing a second amended complaint without a second preliminary examination being held on the new charge. The proper procedure when the district attorney's office issues a second complaint is for the circuit court to hold a second preliminary examination. *See* § 970.04. However, even though the assistant district attorney asked the court to dismiss the armed robbery count at the May 2009 hearing, she still had sufficient, unused evidence to charge Rogers. Therefore, Rogers' argument fails under the second prong of the ***Strickland*** analysis because his trial counsel's failure to object would not have prejudiced his defense. *See* ***Strickland***, 466 U.S. at 687. If Rogers' trial counsel had objected and the court had held another preliminary examination, the outcome

of this case would have been the same. Since we hold the error did not prejudice the defense, we need not address whether Rogers was denied the counsel guaranteed under the Sixth Amendment. *See* ***id.*** Again, because trial counsel was not ineffective, this issue is not "clearly stronger" than those raised on direct appeal.

¶10 Third, Rogers argues that his trial counsel did not object to judicial bias when the court vouched for a witness and allowed "perjured testimony" during trial. Rogers' vouching argument arises from the following exchange between the court, the assistant district attorney, Rogers' trial counsel, and an eleven-year-old victim witness:

> THE COURT: Do you know the difference between telling the truth and a lie?
>
> WITNESS: Um-hum.
>
> THE COURT: Are you prepared to tell the truth today?
>
> WITNESS: (Nods head.)
>
> THE COURT: Are you satisfied?
>
> [ASSISTANT DISTRICT ATTORNEY]: Yes.
>
> THE COURT: [Defense Attorney?]
>
> [DEFENSE ATTORNEY]: I know he's—he gave nonverbal responses but—
>
> THE COURT: We'll make him talk but I'm—
>
> [DEFENSE ATTORNEY]: Okay.
>
> THE COURT: I'm sure that he tells the truth in his answers. Right, [Witness]?
>
> WITNESS: Yeah.

Rogers argues judicial bias arising from the statement, "I'm sure he tells the truth in his answers."[4] However, Rogers cannot isolate this one statement from the rest of the exchange. Clearly, looking at it in context, the court wanted to reinforce in the child witness the need to tell the truth, and the language used was nothing more than encouragement to do so. We do not see any bias in the court's statement to which Rogers' trial counsel should have objected.

¶11 Similarly, there is also no evidence of judicial bias arising out of what Rogers refers to as "perjured testimony." This claim arises out of testimony offered by one of Rogers' accomplices. The accomplice was charged with ten offenses, and she pled guilty to four of them in March 2009 with the State dismissing the other six. The accomplice was still in her appeal period when the State called her to testify, meaning she was at risk of incriminating herself. The State offered the accomplice use immunity for her testimony with regard to three incidents in order to prevent her from asserting her Fifth Amendment right against self-incrimination. During the direct examination of the accomplice, the district attorney asked her if she had received any consideration for her testimony in the form of a reduction in sentence or charges. The accomplice replied "no" to each question asked on this subject. Rogers wrongly equates the State's grant of use immunity to a reduction in charges. The accomplice had already pled guilty and received a sentence for her role in Rogers' crime spree. But, her case was on appeal. The use immunity only prevented the State from using her testimony to somehow negatively impact her appeal. It did not result in any reduction in sentence or charges. Therefore, the accomplice was truthful when she testified

[4] By "judicial bias," we assume Rogers is arguing that the court vouched for the credibility of the child witness in front of the jury.

that she had not received any consideration for her testimony. The court's decision to allow the testimony does not reflect any judicial bias to which Rogers' trial counsel should have objected.

¶12 Rogers did not show that his postconviction counsel was ineffective under the ***Strickland*** standard for failing to raise any of these arguments, as none is "clearly stronger" than those he did raise. *See* ***Starks***, 349 Wis. 2d 274, ¶¶57, 60. Therefore, we hold Rogers' motion did not allege any facts that would entitle him to a ***Machner*** hearing.

By the Court.—Order affirmed.

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