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July 29, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP2692

State of Wisconsin v. Anthony G. Meyers (L.C. # 2009CF205)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Anthony G. Meyers appeals pro se from an order denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm the order of the circuit court.

In April 2009, Meyers was charged with first-degree intentional homicide for fatally stabbing Shon Potschaider. During the jury instructions conference, the defense asked that the

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

jury be instructed on self-defense, second-degree intentional homicide, and first-degree reckless homicide. The circuit court granted the request. The jury eventually returned a verdict finding Meyers guilty of first-degree reckless homicide.

On direct appeal, Meyers argued that the evidence was insufficient to support his conviction. He also accused his trial counsel of ineffective assistance for (1) failing to request a second-degree reckless homicide instruction; (2) failing to request an instruction on retreat; and (3) waiving Meyers' right to elicit testimony of Potschaider's violent past. This court rejected Meyers' arguments and affirmed his conviction. *State v. Meyers*, No. 2011AP2230-CR, unpublished slip op. (WI App Dec. 19, 2013).

In October 2014, Meyers filed a pro se motion for postconviction relief under WIS. STAT. § 974.06. In it, he alleged that the jury was not properly instructed that the State had to disprove self-defense beyond a reasonable doubt. In an attempt to overcome the procedural bar to his successive claim, Meyers maintained that his postconviction counsel was ineffective for failing to assert that his trial counsel was ineffective for failing to challenge the first-degree reckless homicide instruction. The circuit court denied Meyers' motion without a hearing. This appeal follows.

To be entitled to a hearing on a postconviction motion, the defendant must allege "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion alleges sufficient facts, a hearing is required. *Id.* If the motion is insufficient, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may exercise its discretion in deciding whether to grant a hearing. *Id.*

A motion brought under WIS. STAT. § 974.06 is typically barred, if filed after a direct appeal, unless the defendant shows a sufficient reason why he or she did not, or could not, raise the issues in a motion preceding the first appeal. See *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Claims of ineffective assistance of trial counsel “cannot be reviewed on appeal absent a postconviction motion in the trial court.” *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). Thus, ineffective assistance of postconviction counsel may sometimes constitute a sufficient reason for not raising an issue on direct appeal. *Id.* at 682.

However, an attorney is not ineffective for failing to pursue a meritless issue. See *State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996); *State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987). Thus, in order to show that postconviction counsel was ineffective for not challenging trial counsel’s performance and thus be entitled to relief, Meyers must demonstrate that trial counsel actually was ineffective. See *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

With these standards in mind, we turn to Meyers’ argument. As noted, Meyers’ substantive complaint is that the jury was not properly instructed that the State had to disprove self-defense beyond a reasonable doubt. In support of his argument, Meyers relies on *State v. Austin*, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833.

In *Austin*, the circuit court instructed the jury that if the defendant reasonably acted in self-defense, his conduct was not criminally reckless. *Id.*, ¶7 n.4. However, the court did not instruct the jury that the State was required to prove that the defendant did not act reasonably in self-defense. *Id.*, ¶11. This court concluded that the instruction was insufficient because it

implied that the defendant had to satisfy the elements of self-defense and removed the burden from the State to prove criminal recklessness beyond a reasonable doubt. *Id.*, ¶17.

Although Meyers suggests that his case is nearly identical to *Austin*, we disagree. Unlike the jury in *Austin*, the jury in Meyers' case was properly instructed on the issue of self-defense. Here, the circuit court specifically instructed the jury on what constitutes self-defense and that the State is the only party with the burden of proof. The court also instructed the jury on what the State must prove in order to find that Meyers was not acting reasonably in self-defense. These instructions came immediately before the first-degree reckless homicide instruction, which provided in relevant part, "If the defendant was acting reasonably in the exercise of the privilege of self-defense, his conduct did not create an unreasonable risk to another."

Accordingly, if Meyers' postconviction counsel had raised Meyers' substantive complaint via a claim of ineffective assistance of trial counsel, the issue would have been denied as meritless. That is because the jury instructions collectively make clear that the State had the burden to prove that Meyers did not act reasonably in self-defense and that this applied to the crime of first-degree reckless homicide. Because an attorney is not ineffective for failing to pursue a meritless issue, Meyers cannot show that his postconviction counsel was ineffective. Therefore, he cannot overcome the procedural bar against successive claims, and the record conclusively demonstrates that he is not entitled to relief. For these reasons, we are satisfied that the circuit court properly denied his motion.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to
WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals