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DISTRICT IV

March 17, 2016

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

2014AP2832

State of Wisconsin v. Delmarco M. Turner (L.C. # 2008CF2157)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Delmarco Turner appeals from an order denying his WIS. STAT. § 974.06 (2013-14),¹ motion. He argues that his trial counsel was ineffective in two respects. 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. We conclude that Turner's claims are barred by WIS.

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

STAT. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

We affirm the order.

After a jury trial, Turner was convicted as a party to the crime of two counts of armed robbery with the threat of force, felon in possession of a firearm, and theft of movable property. Turner filed a postconviction motion under WIS. STAT. § 809.30 alleging ineffective assistance of trial counsel for failing to challenge the timeliness of the trial and for failing to object to identification testimony, as well as circuit court errors. The motion was denied. The judgment of conviction and order denying the postconviction motion were affirmed on appeal. *State v. Turner*, No. 2011AP2865-CR, unpublished slip op. (WI App Mar. 28, 2013).

Turner's motion for postconviction relief under WIS. STAT. § 974.06 alleged that trial counsel was ineffective when counsel failed to object to the prosecutor's rebuttal closing argument that a photo array was a "make-believe lineup" and a "make-believe picture," and to the prosecutor's alleged "golden rule" comment in closing argument.² The circuit court concluded that the prosecutor's arguments were not objectionable and denied the motion without a hearing.

On appeal Turner argues that he is entitled to an evidentiary hearing on his claims of ineffective assistance of trial counsel. However, a threshold question is whether Turner's claims are procedurally barred having previously filed a postconviction motion under WIS. STAT.

² Prior to the filing of the described WIS. STAT. § 974.06 motion, Turner filed a pro se § 974.06 motion. On appeal from the denial of that motion, we granted Turner's motion for remand to permit an amended § 974.06 motion to be filed by retained counsel. No issues from Turner's pro se § 974.06 motion are argued on appeal.

§ 809.30. When a defendant files a WIS. STAT. § 974.06 motion after having filed a previous postconviction motion or direct appeal, the claim is barred unless the circuit court ascertains that a sufficient reason exists for the failure to raise the issue earlier. *Escalona-Naranjo*, 185 Wis. 2d at 181-82; WIS. STAT. § 974.06(4). Whether a sufficient reason is stated is a question of law subject to the de novo standard of review. *State v. Romero-Georgana*, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668.

As a sufficient reason, Turner asserts ineffective assistance of postconviction counsel. See *State v. Balliette*, 2011 WI 79, ¶37, 336 Wis. 2d 358, 805 N.W.2d 334 (“[I]n some circumstances ... ineffective postconviction counsel’ may constitute ‘sufficient reason as to why an issue which could have been raised on direct appeal was not.’” (quoting *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996))). A claim of ineffective assistance of counsel requires the defendant to establish both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When a defendant claims ineffective assistance of postconviction counsel, he must show that the issues raised in his present motion are clearly stronger than the issues his postconviction counsel presented. *Romero-Georgana*, 360 Wis. 2d 522, ¶4.

In the face of Turner’s allegation that there was improper closing argument to which trial counsel should have objected, the circuit court determined that no improper argument was given. We agree.

The line between permissible and impermissible closing argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury arrive at a verdict by considering factors other than the evidence. *State v. Draize*, 88 Wis. 2d 445, 454, 276

N.W.2d 784 (1979). When the prosecutor argued that a witness had been presented with a “make believe line-up, with a make believe picture,” he was referring to evidence in the record that the photo array presented to the witness by the defense investigator did not comply with protocols for conducting a valid photo array identification, a point also established by the evidence. Although the prosecutor’s characterization was clumsy, it was not misleading to the jury because the photo array was admitted into evidence and there was no possibility that the jury thought there were cartoon or made-up pictures in the array. The jury would have understood that the prosecutor was referring to the fact in evidence that the witness was shown a photo array that did not include a photo of Turner.

Turner also alleged that an improper “golden rule” argument was made when the prosecutor said that the victims “have placed their faith in this system, in your common sense, and in your hands. I ask you to please give them the justice that they deserve and convict this defendant.” “In a criminal case, a golden rule argument asks the jurors to place themselves in the victim’s shoes.” *State v. DeLain*, 2004 WI App 79, ¶23, 272 Wis. 2d 356, 679 N.W.2d 562, *aff’d*, 2005 WI 52, 280 Wis. 2d 51, 695 N.W.2d 484. Such statements are not allowed because they appeal to the jurors’ sympathy for crime victims. *Id.* We agree with the circuit court that the prosecutor’s words simply do not fit the golden rule prohibition.

Having determined that Turner’s claims of improper closing argument are meritless, it follows that postconviction counsel could not be ineffective for not raising claims of ineffective trial counsel that were meritless. *See State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. It also follows that the meritless claims raised in Turner’s WIS. STAT. § 974.06 motion were not clearly stronger than the issues raised in his first postconviction motion and on appeal. Because postconviction counsel was not ineffective, Turner has not established a

“sufficient reason” for the failure to raise his claims of ineffective assistance of trial counsel earlier. Thus, Turner has not overcome the *Escalona-Naranjo* procedural bar to raising his claims of ineffective assistance of trial counsel.

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