COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2935 **Cir. Ct. No. 1999CF3374**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SILKIE L. NASH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Curley, P.J., Brennan and Brash, JJ.

¶1 PER CURIAM. Silkie L. Nash, *pro se*, appeals a circuit court order that denied his motion for postconviction relief filed pursuant to WIS. STAT.

§ 974.06 (2013-14).[1] The circuit court concluded that Nash's claims are procedurally barred and substantively meritless. We agree and affirm.

BACKGROUND

¶2 The State charged Nash with first-degree intentional homicide following the fatal shooting of another man on July 4th, 1999. A jury found Nash guilty. The circuit court imposed a life sentence and ordered that Nash would be eligible for parole after serving thirty years in prison. *See* WIS. STAT. § 973.014(1)(b) (1999-2000).

¶3 The state public defender appointed Attorney Thomas Erickson to serve as postconviction and appellate counsel for Nash in his appeal of right. With Attorney Erickson's assistance, Nash pursued an appeal challenging the sufficiency of the evidence. We affirmed. *See* ***State v. Nash***, No. 2001AP6-CR, unpublished op. and order (WI App Oct. 8, 1991) (***Nash I***).

¶4 Proceeding *pro se*, Nash moved in 2010 for postconviction relief on two grounds. Relying on ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, he sought a refund of a DNA surcharge imposed at sentencing. Relying on the authority of WIS. STAT. § 974.06 (2009-10), he alleged that his trial counsel and postconviction counsel were ineffective by failing to raise the surcharge issue on his behalf. Nash did not prevail on any of the claims.

¶5 Nash, again *pro se*, next filed the postconviction motion underlying this appeal. He alleged that the sentencing court imposed a parole eligibility date

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

in violation of the constitutional prohibition against *ex post facto* punishment. Specifically, he contended that the statute permitting a circuit court to choose a parole eligibility date for a person serving a life sentence "was a new law passed after the occurrence of the fact or commission of the alleged act of first degree intentional murder committed on July 4, 1999." His case, he alleged, was governed by a prior law that relied on a statutory formula for determining the parole eligibility date of an inmate serving a life sentence. He further alleged that his trial counsel was ineffective in advising him in matters related to his parole eligibility, and that his appellate counsel was ineffective in turn for failing to challenge both the effectiveness of trial counsel and the sentence Nash received.

¶6 The circuit court rejected Nash's claims, concluding they were procedurally barred and lacked merit. Nash appeals.

DISCUSSION

¶7 Preliminarily, we examine the State's suggestion that Nash launched his current round of litigation in the wrong court. Nash alleges ineffectiveness on the part of his "appellate counsel," but, the State argues, challenges to appellate counsel's effectiveness may not be raised in circuit court but must be raised in the court of appeals under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). We conclude that ***Knight*** does not control here.

¶8 Although Nash faults his "appellate counsel" for failing to challenge trial counsel's effectiveness and for failing to challenge the legality of Nash's sentence, "appellate counsel" could not have raised the claims that Nash describes. A defendant who alleges ineffective assistance of trial counsel or who seeks sentence modification must initially raise such claims by postconviction motion in the circuit court. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675,

677-78, 556 N.W.2d 136 (Ct. App. 1996) (describing forum for raising claims of ineffective assistance of trial counsel); ***State v. Walker***, 2006 WI 82, ¶30, 292 Wis. 2d 326, 716 N.W.2d 498 (describing forum for raising sentence modification claims). Thus, despite Nash's references to the errors and omissions of "appellate counsel," Nash's current litigation in fact raises claims that Attorney Erickson was ineffective in his role as postconviction counsel by failing to bring postconviction motions in the circuit court asserting trial counsel's ineffectiveness and seeking sentence modification. *See* ***Rothering***, 205 Wis. 2d at 679.

¶9 Claims of ineffective assistance of counsel should normally be raised in the court where the allegedly ineffective conduct took place. *See* ***id.*** The supreme court has recently confirmed the ongoing vitality of this rule. *See* ***State ex rel. Kyles v. Pollard***, 2014 WI 38, ¶38, 354 Wis. 2d 626, 847 N.W.2d 805 (opining that "claims of ineffective assistance of counsel should generally be brought in the forum where the alleged error occurred"). Nash therefore was required to raise his current claims in circuit court unless that court could not provide a remedy for those claims. *See* ***id.***

¶10 A circuit court is fully capable of providing remedies for both ineffective assistance of trial counsel, *see* ***State v. Balliette***, 2011 WI 79, ¶32, 336 Wis. 2d 358, 805 N.W.2d 334, and sentencing errors, *see* ***Walker***, 292 Wis. 2d

326, ¶30. Accordingly, Nash properly filed his claims in the circuit court, and the circuit court correctly reviewed them.[2]

¶11 The circuit court concluded that Nash's claims are procedurally barred. Whether claims are procedurally barred in any particular case presents a question of law for this court's independent review. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). For the reasons that follow, we agree with the circuit court.

¶12 Nash raises constitutional claims in this proceeding: he asserts he did not receive the effective assistance of counsel guaranteed to him under the 6th Amendment of the United States Constitution and that his sentence constitutes an *ex post facto* punishment prohibited by both article I, section 12 of the Wisconsin Constitution and Article I, Section 10, Clause 1 of the United States Constitution. Because Nash has exhausted his direct appeal rights, WIS. STAT. § 974.06 is the

[2] We acknowledge for the sake of completeness that in ***State v. Starks***, 2013 WI 69, 349 Wis. 2d 274, 833 N.W.2d 146, *reconsideration denied*, 2014 WI 91, 357 Wis. 2d 142, 849 N.W.2d 724, the supreme court appeared to call into question the existing framework for selecting the forum for alleging ineffective assistance of postconviction and appellate counsel established by ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996) and ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). We conclude, however, that in light of clarifying supreme court pronouncements, Nash properly filed his claims in the circuit court:

> no one on the court disputes the basic correctness of the holdings in ***Knight*** and ***Rothering*** as to where to file a petition for a writ of *habeas corpus* challenging the effectiveness of appellate counsel or a § 974.06 motion challenging the effectiveness of postconviction counsel, for not challenging ... the alleged ineffective assistance of trial counsel.

Starks, 357 Wis. 2d 142, ¶49 (Prosser, J., concurring in the denial of reconsideration); *see also* ***State ex rel. Kyles v. v. Pollard***, 2014 WI 38, ¶38, 354 Wis. 2d 626, 847 N.W.2d 805 (stating that claims of ineffective assistance of counsel should normally be brought in the forum where the ineffective conduct allegedly occurred).

mechanism for him to bring his constitutional claims. *See* ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. Nash's opportunity to bring such claims is limited, however, because "[w]e need finality in our litigation." *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A convicted prisoner such as Nash is procedurally barred from bringing claims under § 974.06 if the prisoner could have raised the claims in a previous postconviction motion or on direct appeal unless the prisoner states a '"sufficient reason"' for failing to raise those issues previously. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82 (citing § 974.06(4)).

¶13 Nash claims he has a sufficient reason for serial litigation, namely, Attorney Erickson's allegedly prejudicial failure when litigating ***Nash I*** to raise the issues Nash raises now. A lawyer's ineffectiveness in postconviction proceedings can constitute a reason to allow an additional postconviction motion. *See* ***Rothering***, 205 Wis. 2d at 682. In this case, however, Nash pursued a *pro se* postconviction motion in 2010, long after we resolved the issue he presented with the assistance of Attorney Erickson in ***Nash I***. Attorney Erickson's alleged ineffectiveness in ***Nash I*** does not explain why Nash did not pursue his current claims when he previously sought *pro se* postconviction relief.

¶14 We recognize, of course, that in the 2010 litigation, Nash sought a refund of a DNA surcharge under ***Cherry*** and that "a ***Cherry*** motion, standing alone, can never bar a defendant from later filing a [WIS. STAT.] § 974.06 motion." ***State v. Starks***, 2013 WI 69, ¶47, 349 Wis. 2d 274, 833 N.W.2d 146, *reconsideration denied*, 2014 WI 91, 357 Wis. 2d 142, 849 N.W.2d 724 (emphasis omitted). That holding, however, does not assist Nash. He did not file a ***Cherry*** motion "alone." His *pro se* motion not only invoked the authority of ***Cherry***, but also alleged ineffective assistance of counsel and invoked the authority of

§ 974.06. We are satisfied that Nash failed to satisfy his burden to state a sufficient reason for failing to raise his current claims in his § 974.06 motion.

¶15 Were we to conclude, however, that Nash's allegation of Attorney Erickson's ineffectiveness is a sufficient reason for additional litigation, we would, as did the circuit court, reject Nash's current claims on their merits. We review postconviction claims using the familiar guidelines set forth in ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433. There, our supreme court emphasized that a postconviction motion "requires more than conclusory allegations." *See* ***id.***, ¶15. The defendant "must include facts that 'allow the reviewing court to meaningfully assess the defendant's claim.'" ***Id.***, ¶21 (citation and one set of brackets omitted). Specifically, a postconviction motion should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *See* ***id.***, ¶23.

¶16 When a defendant's postconviction motion raises claims of ineffective assistance of counsel, we assess those claims using another familiar analysis, namely, the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***Balliette***, 336 Wis. 2d 358, ¶28. Under ***Strickland***, a criminal defendant must show both a deficiency in counsel's performance and prejudice as a result. ***Id.***, 466 U.S. at 687. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶17 Nash claimed in his postconviction motion here that Attorney Erickson was ineffective because he failed to challenge trial counsel's alleged errors when advising Nash about a plea bargain. According to Nash, Attorney Erickson knew that trial counsel had not told Nash about the circuit court's broad discretion to establish a parole eligibility date when imposing a life sentence for

first-degree intentional homicide. Further, Nash alleged he likely would have accepted a plea bargain had he understood the circuit court's authority to establish a parole eligibility date far in the future upon his conviction of the charge he faced.

¶18 To pursue the foregoing claim, Nash was required to offer material facts in his postconviction motion sufficient to demonstrate Attorney Erickson's ineffectiveness. *See* ***Balliette***, 336 Wis. 2d 358, ¶¶63-64, 79. Nash's motion, however, wholly lacks any showing of when Attorney Erickson learned about a proposed plea bargain, or why he had reason to believe that trial counsel advised Nash incorrectly in regard to such a matter, or what Attorney Erickson was told about the advisements, or who gave Attorney Erickson the information. Indeed, Nash's submissions do not clearly explain what, if any, plea bargain the State proposed, let alone explain why Attorney Erickson should have challenged trial counsel's effectiveness in handling the alleged offer. For example, Nash indicates at some points that the State offered to amend the charge to "second-degree murder" if he entered a guilty plea; he says at another point that the State "offered a deal of 40 years[,] ... far less than the obvious offer the State was in a position to offer, which was second degree intentional homicide." Because Nash's allegations are nothing more than vague, contradictory, and conclusory assertions, they are insufficient to support a postconviction claim for relief. *See* ***State v. Hudson***, 2013 WI App 120, ¶23, 351 Wis. 2d 73, 839 N.W.2d 147.

¶19 Nash also alleges that Attorney Erickson was ineffective for failing to pursue a claim that Nash's sentence runs afoul of the constitutional prohibitions against *ex post facto* laws. An *ex post facto* law is a "law 'which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the

time when the act was committed.'" ***State v. Thiel***, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994) (citation, two sets of quotation marks, and some punctuation omitted). According to Nash, he committed his crime before WIS. STAT. § 973.014 gave circuit courts authority to select a parole eligibility date for persons sentenced to life in prison. Therefore, he says, Attorney Erickson was ineffective for failing to pursue a claim that the statute is unconstitutional as applied to Nash. He is wrong.

¶20 When Nash committed first-degree intentional homicide on July 4, 1999, WIS. STAT. § 973.014 (1999-2000) stated, in pertinent part:

> (1) []when a court sentences a person to life imprisonment for a crime committed on or after July 1, 1988, but before December 31, 1999, the court shall make a parole eligibility determination regarding the person and choose one of the following options:
>
> (a) The person is eligible for parole under s. 304.06(1).[3]
>
> (b) The person is eligible for parole on a date set by the court. Under this paragraph, the court may set any later date than that provided in s. 304.06 (1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 304.06 (1).
>
> (c) The person is not eligible for parole. This paragraph applies only if the court sentences a person for a crime committed on or after August 31, 1995, but before December 31, 1999.

Sec. 973.014(1) (1999-2000) (footnote added). The circuit court selected the option in subsection (b), permitting the circuit court to set a parole eligibility date.

[3] WISCONSIN STAT. § 304.06 (1) (1999-2000) provided, in pertinent part, that "the parole commission may parole an inmate serving a life term when he or she has served 20 years, as modified by the formula under s. 302.11(1) [allowing deductions for good conduct] and subject to extension under s. 302.11(1q) and (2), [governing penalties for certain actions taken by inmates] if applicable." *See* § 304.06(1)(b) (1999-2000).

The substantive provisions of that subsection first took effect on July 1, 1988. *See* 1987 Wis. Act 412, §§ 5,7. The precise language found in § 973.014(1)(b) (1999-2000) first became the law of this state on April 28, 1994. *See* 1993 Wis. Act 289, § 11; WIS. STAT. § 991.11 (1993-94). The circuit court's authority to select a parole eligibility date when imposing a life sentence was thus firmly in place when Nash committed first-degree intentional homicide on July 4, 1999.

¶21 Nonetheless, Nash argues that the law in effect when he committed his crime required that he be declared "eligible for parole as set by WIS. STAT. § 57.06(1), after serving a minimum sentence of 13 years and 4 months." In fact, "WIS. STAT. § 57.06" did not exist on July 4, 1999, and therefore did not control Nash's sentencing for a crime committed on that date.[4]

¶22 Nash's effusion of words asserting that "WIS. STAT. § 57.06" governs this case and objecting to the "retroactive application of WIS. STAT. § 973.014" amounts to nothing more than legal-sounding nonsense. The circuit court properly and lawfully sentenced Nash in accordance with WIS. STAT. § 973.014(1)(b) (1999-2000), the law in effect when he committed first-degree intentional homicide.[5] None of Nash's lawyers were ineffective by foregoing an

[4] WISCONSIN STAT. § 57.06 (1987-88) was renumbered WIS. STAT. § 304.06 and amended effective January 1, 1990. *See* 1989 Wis. Act 31, §§ 1699, 3203(23)(a).

[5] We note—again for the sake of completeness—that Nash's appellate brief appears to suggest that the supreme court overlooked an argument that WIS. STAT. § 973.014 is unconstitutional on its face when that court decided ***State v. Borrell***, 167 Wis. 2d 749, 482 N.W.2d 883 (1992). In ***Borrell***, the supreme court rejected a host of challenges to the statute, ultimately holding that "[§]973.014 is constitutional in all respects." ***Borrell***, 167 Wis. 2d at 759, *other language withdrawn by* ***State v. Greve***, 2004 WI 69, ¶31, 272 Wis. 2d 444, 681 N.W.2d 479. We are bound by the holding of ***Borrell***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Moreover, Nash did not cite ***Borrell*** in his postconviction motion, much less suggest a flaw in its analysis. We do not consider issues raised for the first time on appeal. *See* ***State v. Dowdy***, 2012 WI 12, ¶5, 338 Wis. 2d 565, 808 N.W.2d 691.

argument to the contrary. Lawyers are neither required nor permitted to pursue meritless claims. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

By the Court.—Order affirmed.

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