

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 20, 2010

David R. Schanker
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. 2009AP187

Cir. Ct. No. 2001CF627

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY RUSSO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Johnny Russo, pro se, appeals an order denying his WIS. STAT. § 974.06 motion for postconviction relief.¹ Russo argues his § 974.06

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

counsel was ineffective for raising ineffective assistance of appellate counsel claims in the circuit court and for not filing a timely notice of appeal from the denial of his § 974.06 motion. Russo also claims the circuit court lacked the authority to deny his § 974.06 motion because it included claims of ineffective assistance of appellate counsel. Finally, Russo contends his trial counsel was ineffective for failing to move for substitution of judge. We reject Russo's arguments and affirm the order.

BACKGROUND

¶2 In May 2002, Russo was convicted upon a jury's verdict of one count of repeated sexual assault of the same child contrary to WIS. STAT. § 948.025(1). On direct appeal, Russo argued (1) the evidence was insufficient to support the conviction; (2) the State was permitted to ask inappropriate questions to potential jurors during voir dire; and (3) the jury was erroneously allowed during deliberation to listen to a tape recording of a phone conversation between Russo and the victim. This court affirmed the judgment, concluding the evidence was sufficient to sustain the conviction, any error during voir dire was harmless and the court properly exercised its discretion by allowing the tape into the jury room. *See State v. Russo*, No. 2003AP726-CR, unpublished slip op. (Nov. 18, 2003).

¶3 Russo, by retained counsel, then filed a WIS. STAT. § 974.06 motion for postconviction relief, claiming the ineffective assistance of both trial and "appellate" counsel. With respect to the "appellate" counsel claims, the motion alleged appellate counsel was ineffective for failing to challenge the effective assistance of trial counsel and for failing to challenge Russo's sentence as

“unusually cruel and harsh.” Russo’s motion was denied orally after a *Machner*² hearing.

¶4 Russo’s counsel subsequently moved this court to extend the time for filing a notice of appeal. This court denied the motion, noting that the time for filing a notice of appeal in a § 974.06 action cannot be enlarged. *See* WIS. STAT. RULE 809.82(2)(b). Russo then filed a pro se motion to reinstate his appeal rights, alleging his retained counsel was ineffective for failing to timely file a notice of appeal from the denial of his § 974.06 motion. This court denied the motion, noting that the timely filing of a notice of appeal is required to confer jurisdiction on this court and Russo “is not entitled to counsel, much less effective counsel” in a § 974.06 action.

¶5 Russo petitioned for review, and the State responded that the circuit court had not reduced its oral ruling to writing as required for an appeal. The State consequently asked our supreme court to vacate this court’s order and direct Russo to obtain a written order from the circuit court. The supreme court adopted the State’s suggestion, Russo moved the circuit court to enter a written order and this appeal follows.

DISCUSSION

¶6 Russo argues he was denied the effective assistance of counsel in his WIS. STAT. § 974.06 proceedings. Russo’s claim fails. As this court has noted, because § 974.06 is a civil remedy, Russo is not entitled to counsel, much less

² *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (“it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel”).

effective counsel. *See, e.g., Prihoda v. McCaughtry*, 910 F.2d 1379 (7th Cir. 1990) (“There is no right to assistance of counsel in waging a collateral attack. ... Perforce there is no right to ‘effective’ assistance of counsel.”); *see also State ex rel. Payton v. Kolb*, 135 Wis. 2d 202, 207, 400 N.W.2d 285 (Ct. App. 1986) (“The State is not required to provide counsel for proceedings beyond an appeal as of right from a conviction.”). Although Russo attempts to make a distinction between retained and appointed counsel, this distinction is irrelevant and does not change the fact that the right to counsel does not extend to § 974.06 proceedings.

¶7 Even were we to reach the merits of Russo’s arguments, his challenge to the effectiveness of his retained counsel fails. First, Russo contends counsel was deficient for raising ineffective assistance of appellate counsel claims in the circuit court rather than this court. Although the WIS. STAT. § 974.06 motion challenges the effectiveness of “appellate” counsel, challenges to the effective assistance of trial counsel and Russo’s sentence required counsel to file a postconviction motion in order to preserve those arguments for appeal. *See* WIS. STAT. RULE 809.30(2)(h); *see also State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). The use of the “appellate counsel” label notwithstanding, the § 974.06 motion actually complains about the effectiveness of postconviction counsel, not appellate counsel. Retained counsel therefore properly directed those claims to the circuit court under *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). To the extent Russo nevertheless insists these are errors of appellate counsel that should have been directed to this court pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), appellate counsel cannot be deficient for failing to raise issues that are not preserved for appeal.

¶8 Next, Russo claims retained counsel was deficient for failing to timely file a notice of appeal. As noted above, counsel's attempt to appeal was premature rather than untimely. Moreover, Russo was not prejudiced by his counsel's failure to properly pursue an appeal from the denial of his WIS. STAT. § 974.06 motion, as he was ultimately able to appeal on his own. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) (to establish ineffective assistance of counsel, defendant must show both that counsel's representation was deficient and that deficiency prejudiced him or her).

¶9 Finally, citing comments made by trial counsel during the *Machner* hearing, Russo contends counsel had a conflict of interest with the trial judge and was, therefore, deficient for failing to seek a substitution of judge. In the context of explaining why he did not move for a change of venue, counsel testified he did not believe there was a legal basis for doing so and he wanted Judge Atkinson to preside at Russo's trial. Counsel stated:

I think there was almost no publicity in this case, and if there was, it wouldn't have risen to the level that I would have worried about it or thought that I had a basis for change of venue, but ... I didn't want a change of venue. If you ask for that and then get it, who knows who the judge is going to be[?] I wanted Judge Atkinson to be the judge. I didn't want some judge from some other county, like one of the crazy judges from Shawano County, to be my trial judge. So, those things are dangerous. The devil you know is better than the devil you don't.

¶10 Russo contends his counsel "believe[d] Judge Atkinson to be a devil and this is not in Russo's best interest." We patently reject this argument because it is based on Russo's literal interpretation of a metaphor. Russo nevertheless argues that regardless whether this was "just a figure of speech or a play on words[,] [w]hat matters is that by this kind of thought, [trial counsel was] either" too close to Judge Atkinson or did not defend Russo at his trial adequately. We

are not persuaded. Counsel explained his strategic decision to keep the case in Brown County and the metaphor utilized to bolster his explanation evinces neither a conflict of interest nor an inappropriately close relationship with the judge.

By the Court.—Order affirmed.

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

