COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 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. 2009AP1095 **Cir. Ct. No. 2002CF002273**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES K. DOWELL,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: M. JOSEPH DONALD and CARL ASHLEY, Judges. *Affirmed.*

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

¶1 PER CURIAM. James K. Dowell appeals from orders denying his postconviction motion, filed pursuant to WIS. STAT. § 974.06 (2007-08),[1] alleging ineffective assistance of counsel. We affirm.

BACKGROUND

¶2 On May 23, 1997, Stacy P. stopped a police officer on the street and reported that a stranger had robbed and sexually assaulted her at gunpoint. During the investigation into her complaint, police found a semen stain on her pants, and a Wisconsin crime laboratory analyst entered the DNA profile of the semen donor into the Wisconsin DNA databank. In 2002, a routine search of the DNA databank revealed a match between Dowell's DNA profile and the DNA profile of the previously unidentified donor of the biological specimen found on Stacy P.'s pants.

¶3 On April 25, 2002, the State filed a criminal complaint charging Dowell with assaulting and robbing Stacy P. A court commissioner reviewed the complaint, concluded that it showed probable cause to believe that Dowell committed the offenses described, and signed a warrant for his arrest. Additionally, because Dowell was on parole, a parole officer authorized his detention. Police arrested Dowell on April 30, 2002. The next day, the police obtained a warrant to search Dowell for genetic material. Subsequent testing of the material seized during the search confirmed a match between Dowell's DNA profile and the donor of the biological specimen found on Stacy P.'s pants.

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

¶4 A jury convicted Dowell of multiple offenses against Stacy P., and Dowell appealed. He claimed that the circuit court erred by enforcing several pretrial stipulations and by dismissing a juror for cause. We rejected his contentions and affirmed. *See* ***State v. Dowell***, No. 2003AP2059-CR, unpublished slip op. (WI App Apr. 9, 2004). The supreme court denied Dowell's petition for review and later denied his petition for a writ of *habeas corpus*.

¶5 Dowell, proceeding *pro se*, next filed the motion pursuant to WIS. STAT. § 974.06 that underlies this appeal. He claimed that his trial counsel performed ineffectively by failing to seek suppression of the DNA sample taken from him after his arrest, by advising him to reject an advantageous plea bargain, and by advising him to give false testimony at trial. He asserted that his postconviction counsel performed ineffectively in turn by failing to raise these challenges to the performance of his trial counsel. Dowell asked the circuit court to appoint an attorney to represent him in pursuing his allegations.

¶6 The circuit court first considered Dowell's claim that his trial counsel performed ineffectively by failing to litigate a viable suppression motion, and the circuit court denied the claim without a hearing. The court scheduled a hearing on the remaining claims, and made a discretionary appointment of an attorney to assist Dowell in pursuing the litigation.

¶7 The State moved to limit the issues at the hearing. Dowell's attorney filed a letter response agreeing with the State that the hearing should address only the question of whether Dowell's postconviction counsel performed ineffectively. The attorney did not contest the State's position that testimony from Dowell's trial counsel was not needed at the hearing. Accordingly, only Dowell and his postconviction counsel testified.

¶8 At the conclusion of the hearing, the circuit court determined that Dowell did not receive ineffective assistance from his postconviction counsel and that he therefore was not entitled to any postconviction relief. Dowell appeals, contending that the circuit court: (1) improperly denied him a hearing on the claim that his trial counsel performed ineffectively by failing to file a suppression motion; and (2) improperly conducted the hearing on his remaining claims by limiting the issues he could pursue and the witnesses he could present.[2]

DISCUSSION

¶9 The familiar two-pronged test for ineffective assistance of counsel claims requires a convicted defendant to prove: (1) deficient performance; and (2) prejudice from the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. We need not address both prongs of the ***Strickland*** test if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697.

¶10 A postconviction hearing is necessary to sustain a claim of ineffective assistance of counsel. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A defendant's claim that counsel provided

[2] The Honorable M. Joseph Donald entered the order denying Dowell's claim that his trial counsel performed ineffectively by failing to pursue a suppression motion. The Honorable Carl Ashley presided over the hearing on Dowell's remaining claims and entered the order denying them.

ineffective assistance does not, however, automatically trigger a right to a ***Machner*** hearing. *See* ***State v. Curtis***, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). A circuit court may deny a postconviction motion without a hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶11 According to Dowell, he is entitled to a hearing on the claim that his trial counsel was ineffective by not seeking to suppress the DNA evidence seized from him in 2002. We disagree. Dowell's claim against his trial counsel is premised on a meritless theory, namely, that his parole officer acted as a "stalking horse" for the police by imposing a violation-of-parole hold after the State charged him with assaulting Stacy P.[3]

> A "stalking horse" is "[s]omething used to cover up one's true purpose; a decoy." In determining whether a search is a police or probation search, a "stalking horse" is a probation officer who uses his or her authority to help the police evade the warrant requirements of the Fourth Amendment.

State v. Wheat, 2002 WI App 153, ¶20, 256 Wis. 2d 270, 647 N.W.2d 441 (citations omitted). The record conclusively demonstrates that the police did not use Dowell's parole officer to evade the warrant requirements of the Fourth

[3] Pursuant to WIS. ADMIN. CODE § DOC 328.22, a parole agent is authorized to request that a law enforcement officer take a parolee into custody for investigative purposes if the parolee is alleged to have violated the rules of supervision. *Cf.* ***State v. Fitzgerald***, 2000 WI App 55, ¶11, 233 Wis. 2d 584, 608 N.W.2d 391 (discussing application of the administrative rule to probationers).

Amendment in this case. To the contrary, neutral magistrates authorized the police to arrest and search Dowell.

¶12 A court commissioner properly signed an arrest warrant for Dowell on April 25, 2002, after reviewing the criminal complaint charging him with offenses against Stacy P. *See* WIS. STAT. § 968.04(1) ("If it appears from the complaint ... that there is probable cause to believe that an offense has been committed and that the accused has committed it, the judge shall issue a warrant for the arrest of the defendant.").[4] The police therefore lawfully arrested Dowell on April 30, 2002. *See* WIS. STAT. § 968.07(1)(a) (person may be arrested when a law enforcement officer has a warrant commanding the person's arrest).

¶13 The police next sought a warrant to search Dowell. The affidavit in support of the search warrant reflected that Dowell donated his DNA pursuant to WIS. STAT. § 165.76 while he was in prison, that lab technicians obtained DNA profiles from both his donated sample and the biological specimen donated during the alleged assault on Stacy P. in 1997, that a search of the Wisconsin DNA databank revealed that the two DNA profiles matched, and that the police therefore believed that Dowell assaulted Stacy P. The affidavit reflects that law enforcement sought a second sample from Dowell that could be tested to confirm the results of the databank search. A court commissioner found probable cause to believe that evidence of a crime would be found in Dowell's genetic material, and the commissioner signed a search warrant authorizing police to search Dowell for

[4] A court commissioner may perform the judicial duty of issuing warrants for searches and seizures. *See* WIS. STAT. §§ 967.07, 757.69.

genetic evidence. *See* WIS. STAT. § 968.12(1) ("A judge shall issue a search warrant if probable cause is shown.").

¶14 Dowell's trial counsel had no grounds for asserting that the police seized or searched Dowell unlawfully. An attorney is not ineffective for failing to pursue a meritless motion. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Because Dowell offered no viable support for his claim that trial counsel performed ineffectively by failing to litigate a suppression motion, the circuit court properly denied the claim without a hearing.

¶15 Dowell next claims that the circuit court improperly conducted the ***Machner*** hearing held to address Dowell's remaining allegations of attorney ineffectiveness. In Dowell's view, the circuit court wrongly prevented him from calling his trial counsel as a witness unless he first established that his postconviction counsel performed ineffectively. We reject his contention.

¶16 Dowell pursued a direct appeal following his conviction, and he is therefore procedurally barred from raising an issue in later postconviction litigation unless he demonstrates a sufficient reason for failing to raise the issue in the original appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). In some circumstances, ineffective assistance of the defendant's postconviction counsel may be a sufficient reason justifying the defendant's failure to raise the issue of trial counsel's ineffectiveness during the direct appeal process. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). The circuit court in this case afforded Dowell a hearing to show, if he could, that his postconviction counsel performed ineffectively. Had Dowell made that showing, he might have established a sufficient reason for a collateral challenge to his trial counsel's performance. The

circuit court concluded, however, that Dowell failed to show ineffective assistance by his postconviction counsel, and Dowell did not include a challenge to that conclusion in his opening brief on appeal.[5]

¶17 "We need finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. Because Dowell did not establish a sufficient reason for failing to raise his claims against trial counsel during his direct appeal, he was not entitled to present these claims to the circuit court. *See* ***id.***

¶18 Moreover, Dowell agreed to limit the issues that he would pursue during the ***Machner*** hearing. When the State objected to any testimony from trial counsel unless and until Dowell established that postconviction counsel performed ineffectively, Dowell's attorney responded by letter, agreeing with the State's position.[6] If the circuit court erred by conducting the hearing in accordance with the parties' agreement, Dowell invited the error. We generally do not review invited error. *See* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992); *see also* ***State v. Schmaling***, 198 Wis. 2d 756, 762, 543 N.W.2d

[5] In his reply brief, Dowell suggests for the first time in this appeal that the circuit court erred by rejecting his challenge to postconviction counsel's effectiveness. We do not address issues raised for the first time in a reply brief because the opposing party has no opportunity to respond. *See* ***State v. Mata***, 230 Wis. 2d 567, 576 n.4, 602 N.W.2d 158 (Ct. App. 1999).

[6] The appellate record does not contain the letter in which Dowell's attorney agreed that the ***Machner*** hearing should address only the effectiveness of postconviction counsel. The circuit court docket entries reflect, however, that the letter was filed. Dowell included a copy of the letter in the appendix to his appellant's brief, and the State advises that it does not object to our consideration of the letter. Generally, we do not consider documents outside of the appellate record. ***Verex Assurance, Inc. v. AABREC, Inc.***, 148 Wis. 2d 730, 734 n.1, 436 N.W.2d 876 (Ct. App. 1989). In this case, however, both parties request that we take the letter into account, and the docket entries confirm that it was part of the record available to the circuit court. Accordingly, we have considered the letter. *Cf.* ***id.***

555 (Ct. App. 1995) (defense counsel's acquiescence to allegedly erroneous action constitutes waiver of defendant's right to appeal alleged error).

¶19 Dowell asserts that the attorney representing him in the WIS. STAT. § 974.06 proceeding performed ineffectively. Dowell argues that he therefore should not be bound by the attorney's agreement to limit the issues at the ***Machner*** hearing. Dowell cannot make this claim.

¶20 A convicted defendant does not have a constitutional right to counsel in collateral proceedings after a direct appeal. ***Pennsylvania v. Finley***, 481 U.S. 551, 556-57 (1987). A postconviction motion filed under WIS. STAT. § 974.06 is a collateral proceeding, and a defendant therefore has no right to counsel in such a proceeding. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 648-49, 579 N.W.2d 698 (1998). An attorney cannot be constitutionally ineffective in a proceeding where there is no constitutional right to counsel. ***Coleman v. Thompson***, 501 U.S. 722, 752-53 (1991). Thus, Dowell had no constitutional right to effective assistance of counsel in his WIS. STAT. § 974.06 litigation. Accordingly, he bears the risk of any attorney error in the proceeding. *See* ***Coleman***, 501 U.S. at 752-53.

¶21 Finally, Dowell asks this court to exercise its discretionary power under WIS. STAT. § 752.35, and reverse his conviction. We cannot do so. An appeal of an unsuccessful collateral attack under WIS. STAT. § 974.06 does not allow discretionary reversal of the conviction under § 752.35. *See* ***State v. Allen***, 159 Wis. 2d 53, 55-56, 464 N.W.2d 426 (Ct. App. 1990). The supreme court has commented on our holding in ***Allen*** but has not overruled our decision. *See* ***State v. Armstrong***, 2005 WI 119, ¶113, 283 Wis. 2d 639, 700 N.W.2d 98. Therefore,

we must adhere to ***Allen***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

By the Court.—Orders affirmed.

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