

**COURT OF APPEALS  
DECISION  
DATED AND FILED  
April 10, 2012**

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. 2011AP824  
STATE OF WISCONSIN**

Cir. Ct. No. 2003CF1913

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ARTURO HERNANDEZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
CARL ASHLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Arturo Hernandez, *pro se*, appeals from a circuit court order denying his WIS. STAT. § 974.06 (2009-10) postconviction

motion.<sup>1</sup> He argues that his postconviction counsel provided ineffective assistance by not alleging trial counsel ineffectiveness with respect to five issues. We reject his arguments and affirm.

## BACKGROUND

¶2 A jury found Hernandez guilty of one count of delivery of a controlled substance—cocaine (more than 40 grams), as party to a crime, contrary to WIS. STAT. §§ 961.16(2)(b)1., 961.41(1)(cm)4. and 939.05 (2003-04). The trial court sentenced Hernandez to thirteen years of initial confinement and ten years of extended supervision.<sup>2</sup> Hernandez retained postconviction counsel, who filed an unsuccessful postconviction motion alleging that trial counsel provided ineffective assistance. Hernandez appealed.

¶3 In his direct appeal, Hernandez argued that he was entitled to a *Machner*<sup>3</sup> hearing concerning his allegations that his trial counsel provided ineffective assistance by failing to: “(1) obtain, prior to the trial for Hernandez’s review, a copy of the body-wire tape conversation between Hernandez and the undercover officer; (2) object to defective jury instructions; and (3) object to the undercover officer’s ‘persistent and improper speculation regarding Hernandez’[s] knowledge and intent.” See *State v. Hernandez*, No. 2006AP750-CR, unpublished slip op. ¶1 (WI App Jan. 30, 2007). Hernandez also sought a new

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

<sup>2</sup> The Honorable John Siefert presided over the trial and sentenced Hernandez, while the Honorable Dennis P. Moroney denied Hernandez’s first postconviction motion. The Honorable Carl Ashley denied the postconviction motion at issue in this appeal.

<sup>3</sup> See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

trial in the interest of justice on grounds that the real controversy was not tried and there was a miscarriage of justice. *See id.* We rejected his arguments and affirmed. *See id.*, ¶2.

¶4 Hernandez subsequently filed the *pro se* WIS. STAT. § 974.06 motion that is at issue in this appeal. He argued that his postconviction counsel should have alleged trial counsel ineffectiveness with respect to five issues.<sup>4</sup> The circuit court (hereafter, “postconviction court”) denied Hernandez’s motion in a written order, without a hearing, for reasons detailed below. This appeal follows.

### LEGAL STANDARDS

¶5 A defendant cannot raise an argument in a subsequent postconviction motion that was not raised in a prior postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994); *see also* WIS. STAT. § 974.06(4) (“[a]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived ... in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion,” absent sufficient reason). A defendant can attempt to overcome the *Escalona-Naranjo* bar by arguing that an issue was not raised due to postconviction counsel’s ineffectiveness. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (“It may be

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<sup>4</sup> Hernandez’s postconviction motion specifically argued postconviction counsel was ineffective for not alleging that trial counsel was ineffective for not alleging a *Miranda* violation. *See Miranda v. Arizona*, 384 U.S. 436 (1966). The trial court’s written order stated that it would “liberally construe the motion and assume that [Hernandez] intended all claims to be filed under the context” of *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). We will do the same.

in some circumstances that ineffective postconviction counsel constitutes a sufficient reason as to why an issue which could have been raised on direct appeal was not.”).

¶6 Where a defendant alleges that his postconviction lawyer provided ineffective assistance by failing to allege that the defendant’s trial lawyer performed deficiently, the defendant must first establish that the trial lawyer’s representation was constitutionally deficient. *See State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. The defendant must show: (1) deficient performance; and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not discuss both prongs “if the defendant makes an insufficient showing on one.” *Id.* at 697.

¶7 Not all postconviction motions require a hearing. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. *Allen* explained:

Whether a defendant’s postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, 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, the circuit court has the discretion to grant or deny a hearing.

*Id.* (citations omitted). Appellate courts “review a circuit court’s discretionary decisions under the deferential erroneous exercise of discretion standard.” *See id.*

## DISCUSSION

¶8 Hernandez argues that his postconviction counsel should have alleged trial counsel ineffectiveness with respect to five main issues.<sup>5</sup> We address each in turn, ultimately concluding that the postconviction court did not erroneously exercise its discretion when it denied Hernandez’s postconviction motion without a hearing. *See id.*

### I. Failure to allege a *Miranda* violation.

¶9 Hernandez argued in his postconviction motion that he did not intelligently waive his *Miranda* rights during his interrogation because he does not understand English and the interrogation was conducted in English.<sup>6</sup> Hernandez asserted that his postconviction counsel should have argued that trial counsel should have alleged a *Miranda* violation.

¶10 The postconviction court rejected this argument, noting that the trial court *sua sponte* conducted a *Miranda* hearing before Hernandez testified. The trial court found that Hernandez understood English and that his waiver of *Miranda* rights was knowingly, voluntarily, and intelligently made. The

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<sup>5</sup> To the extent Hernandez raises additional subissues, or raises issues for the first time on appeal, they are rejected. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (“The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal.”); *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not consider inadequately developed arguments).

<sup>6</sup> Hernandez’s motion alleged another issue related to his interrogation. He argued that the police officers violated WIS. STAT. § 968.073 when they failed to make an audio and visual recording of Hernandez’s custodial interrogation. The postconviction court rejected this argument because § 968.073, which was enacted in 2005, was not in effect in 2003 when Hernandez was interrogated. We agree with the postconviction court that this claim is without merit for that reason.

postconviction court concluded: “Postconviction counsel was not ineffective for failing to raise the issue on appeal because this issue was addressed and a ruling was made. Had the issue been raised in postconviction proceedings, there is not a reasonable probability that the outcome would have been any different.” We agree with this analysis. A *Miranda* hearing was conducted, and Hernandez has not convinced us that there would have been any merit to challenging the trial court’s findings and credibility assessments.<sup>7</sup> See *State v. Carter*, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695 (appellate court defers to trial court’s credibility assessments and findings of fact unless clearly erroneous). Postconviction counsel is not deficient for failing to pursue a meritless claim. See *State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. The postconviction court did not erroneously exercise its discretion when it denied Hernandez’s claim without a hearing. See *Allen*, 274 Wis. 2d 568, ¶9 (circuit court has discretion to grant or deny a hearing where “record conclusively demonstrates that the defendant is not entitled to relief”).

## II. Trial counsel’s reference to Hernandez as a “small-time dealer.”

¶11 Hernandez’s postconviction motion asserted that his trial counsel provided ineffective assistance by telling the jury that Hernandez was a “small-time [drug] dealer.” The postconviction court concluded that Hernandez was not prejudiced by trial counsel’s statement and that trial counsel employed a reasonable strategy. The postconviction court explained:

There was evidence that [Hernandez] formerly delivered small amounts of cocaine, and therefore, counsel’s

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<sup>7</sup> In fact, Hernandez does not acknowledge that the trial court held a *Miranda* hearing, much less argue that the trial court’s specific findings were clearly erroneous.

reference to the defendant's small-time dealing in [his] opening statement did not prejudice [Hernandez's] case. Moreover, the court believes it was arguably the best strategy that could have been utilized because there is not a reasonable probability that an all or nothing strategy would have yielded a different result.

(Footnote omitted.) On appeal, the State also notes that at trial, Hernandez did not dispute the testimony that he handed an undercover officer a folded five-dollar bill containing cocaine.<sup>8</sup> Further, Hernandez's signed statement to the police contained an admission that he previously sold cocaine. Thus, the State argues: "[I]t was hardly prejudicial for defense counsel to describe Hernandez as a small-time drug dealer. By doing so, defense counsel was still able to argue to the jury that Hernandez had nothing to do with the transaction in question, which involved a large sale of cocaine." We agree with the postconviction court and the State. Hernandez has not shown that he was prejudiced by trial counsel's statement and, therefore, postconviction counsel was not ineffective for not alleging trial counsel effectiveness on this issue. The postconviction court did not erroneously exercise its discretion when it rejected this issue without a hearing. *See id.*

### **III. Failure to play the entire body-wire tape at trial.**

¶12 Hernandez's postconviction motion asserted that trial counsel "was ineffective for not playing the [body-wire] tape in [its] entirety to the jury, so [Hernandez] could prove his innocence." The postconviction court rejected this argument. It noted that trial counsel said at trial that "most of the tape was unintelligible," and it concluded that Hernandez had "not identified any reason how playing the entire tape would have added to or benefited his defense." We

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<sup>8</sup> Hernandez's defense at trial was that he never intended to be involved in the sale of a kilo of cocaine, which carried a much greater punishment.

conclude that the postconviction court properly exercised its discretion when it denied Hernandez a hearing on this issue. *See id.* (circuit court has discretion to grant or deny a hearing if “motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations”).

#### **IV. Failure to adequately review discovery.**

¶13 Hernandez’s postconviction motion alleged that trial counsel “was deficient for failing to review discovery with the client or inform[] him of new developments by communicating with the accused.” He claimed that a full investigation “would have exposed [a] ... 5th Amendment violation, possible police misconduct, and that there were jurisdictional claims.” Hernandez did not provide any details about what would have been discovered and how it would have affected his case. Accordingly, the postconviction court concluded that this argument was “wholly conclusory” and denied Hernandez a hearing on this issue. We agree with the postconviction court, and we conclude that it did not erroneously exercise its discretion when it denied Hernandez a hearing. *See id.*

#### **V. Failure to correct the presentence investigation report.**

¶14 Hernandez’s postconviction motion asserted that there were errors in the presentence investigation report, that he told his trial counsel about them, and that trial counsel failed to address them with the trial court. As a result, he claims he was not sentenced based on accurate information. However, Hernandez’s postconviction motion did not identify what information was erroneous, except to say that there was information in the report that concerned a different man named Hernandez. The postconviction court concluded that Hernandez had not supported his allegations and rejected his argument. We agree; the postconviction motion is



wholly conclusory.<sup>9</sup> We conclude that the postconviction court did not erroneously exercise its discretion. *See id.*

*By the Court.*—Order affirmed.

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

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<sup>9</sup> We also note that at sentencing, trial counsel discussed the fact that during the trial, the State confused Hernandez with another man with an extensive criminal history. There was no similar confusion at sentencing, and trial counsel's argument emphasized that Hernandez had never previously been convicted of a crime.

