COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP774 **Cir. Ct. No. 2008CF1600**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE M. NASH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Willie M. Nash, *pro se*, appeals from a circuit court order denying his WIS. STAT. § 974.06 (2011-12) motion for postconviction relief.[1] We affirm.

BACKGROUND

¶2 A jury convicted Nash of second-degree reckless homicide in connection with the death of Sandra Green. We affirmed his conviction. *See* ***State v. Nash***, No. 2010AP1954-CR, unpublished slip op. and order (WI App Jan. 17, 2012). In that opinion and order, we summarized the facts:

> Nash was charged with first-degree reckless homicide for the death of Sandra Green. At trial, the State introduced evidence that Nash struck Green while they were standing in the street, causing Green to fall to the ground, and then kicked her twice in the head before walking to the curb, leaving Green lying in the street. The driver of an approaching vehicle observed Green lying in the left lane, pulled into the right lane beside Green, and stopped to see if she needed help. Another vehicle then struck Green, fatally injuring her. Nash defended on grounds that he did not strike Green or cause her to fall in the street. The defense theory was that Green had been intoxicated and fallen on her own while Nash and Green were crossing the street.

Id. at 2. The jury found Nash guilty of the lesser-included offense of second-degree reckless homicide.

[1] In the same order, the circuit court also denied Nash's separate *pro se* motion to quash the DNA surcharge that was imposed when he was sentenced in March 2009. Nash's notice of appeal did not reference the denial of that motion and he does not raise that issue in his brief. Therefore, we do not address it.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 The issue in Nash's first appeal was whether Nash was "entitled to a new trial in the interest of justice because the circuit court did not provide sufficient instruction to the jury on the causation element during Nash's trial for reckless homicide." ***Id.*** at 1. We rejected Nash's arguments and affirmed. *See* ***id.*** at 6.

¶4 Nash subsequently filed the *pro se* WIS. STAT. § 974.06 motion that is at issue in this appeal. In his motion, Nash alleged that his postconviction counsel provided ineffective assistance by not alleging trial counsel ineffectiveness with respect to numerous issues. The circuit court denied the motion in a written decision, without a hearing. This appeal follows.

DISCUSSION

¶5 At issue is whether Nash's WIS. STAT. § 974.06 motion was properly denied, without a hearing. Whether a § 974.06 motion is sufficient on its face to entitle a defendant to an evidentiary hearing on his or her ineffective assistance of postconviction counsel claim is a question of law that appellate courts review *de novo*. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. ***Balliette*** explained:

> If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the circuit court must hold an evidentiary hearing. However, if the motion does not raise such facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the grant or denial of the motion is a matter of discretion entrusted to the circuit court.

Id. (citations omitted). On appeal, we consider *de novo* whether a postconviction "motion on its face alleges sufficient material facts that, if true, would entitle the

defendant" to an evidentiary hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶6 Where, as here, a defendant alleges that his *postconviction* counsel provided constitutionally deficient representation by failing to allege that the defendant's *trial* counsel performed deficiently, the defendant must first establish that the trial counsel'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). A court need not consider both prongs "if the defendant makes an insufficient showing on one." ***Id.*** at 697. On appeal, the circuit court's findings of fact with respect to ineffective assistance of counsel will not be disturbed unless shown to be clearly erroneous, but whether there was ineffective assistance of counsel is a question of law that this court reviews *de novo*. *See* ***Balliette***, 336 Wis. 2d 358, ¶19.

¶7 Finally, a WIS. STAT. § 974.06 motion filed after a direct appeal may be procedurally barred absent a showing of a sufficient reason why the claims were not raised in a previous motion or on direct appeal. *See* ***State v. Lo***, 2003 WI 107, ¶44 n.11, 264 Wis. 2d 1, 665 N.W.2d 756; ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). The ineffective assistance of postconviction counsel may constitute a sufficient reason for failing to raise a claim on direct appeal. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

¶8 Applying those standards here, we conclude that Nash's motion was not sufficient to warrant a hearing or relief. The circuit court did not erroneously exercise its discretion when it denied Nash's motion.

¶9 Nash's motion alleged that his postconviction counsel provided ineffective assistance by not alleging that trial counsel performed ineffectively by failing or refusing to: (1) read the police reports; (2) interview the State's key witness, Richard Pullen; (3) discuss trial strategy with Nash; (4) call several alleged eyewitnesses to testify that they did not see Nash arguing with the victim; (5) argue that Pullen was not an eyewitness to the crime and presented false testimony; and (6) argue that the State knowingly presented false testimony.

¶10 In its written decision, the circuit court stated that Nash's claims were "wholly conclusory and fail to state a viable claim for relief." The circuit court explained why each of the alleged trial counsel deficiencies lacked merit. For instance, the circuit court noted that one of the witnesses whom Nash claims should have testified was, in fact, called as a witness for the defense. Similarly, the circuit court observed that Nash's allegation that Pullen was not an eyewitness was belied by Pullen's trial testimony that he saw Nash hitting and kicking the victim as she lay on the ground in the street. We agree with the circuit court's analysis of each of Nash's allegations.

¶11 Moreover, even if this court were to conclude that trial counsel performed deficiently in any way, Nash's claims fail because he has not demonstrated prejudice. *See* ***Strickland***, 466 U.S. at 668, 694, 697 (defendant must prove both deficient performance and prejudice, and court may deny relief if defendant fails to show either one) (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. A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Nash's motion baldly stated that he has shown prejudice, but he did not explain how ***Strickland***'s prejudice standard was satisfied. This court will not

develop Nash's argument for him. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Because Nash's motion presented only conclusory allegations that he suffered prejudice, the circuit court had discretion to deny or grant a hearing. *See* ***Balliette***, 336 Wis. 2d 358, ¶18. We discern no erroneous exercise of discretion and affirm the order.

By the Court.—Order affirmed.

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