COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1633 **Cir. Ct. No. 2007CF6207**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TROY EDWARD LANG,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Troy E. Lang, *pro se*, appeals from a trial court order denying his WIS. STAT. § 974.06 (2011-12) motion for postconviction

relief.[1] He argues that his postconviction counsel provided ineffective assistance by not alleging that his trial counsel provided ineffective assistance in a number of ways, including failing to visit Lang in jail and using coercion to induce Lang to plead guilty. We affirm the order.

BACKGROUND

¶2 In 2010, this court affirmed Lang's conviction for three crimes. In doing so, we summarized the background facts as follows:

> On or about December 22, 2007, the State filed a criminal complaint against Lang, alleging that he participated in numerous drug crimes and received stolen goods. The charges arose following the execution of a search warrant … at Lang's residence…. During the execution of the search warrant, the police seized marijuana, cocaine, scales, $3700 in cash, as well as numerous items police suspected were stolen, including: hand power tools, snow blowers, and bicycles.
>
> Lang was present in the residence during the search. According to the criminal complaint, at some time during the search, Lang told police that the cocaine, marijuana, and cash located in a bedroom in the residence belonged to him, and that the property found in the basement of the residence was property that he had received in exchange for drugs. Lang said that he assumed the property was stolen.

State v. Lang, No. 2009AP2087-CR, unpublished slip op. ¶¶2-3 (WI App Aug. 10, 2010).

¶3 Lang, who privately retained trial counsel, ultimately entered a plea agreement with the State, pursuant to which he pled guilty to: (1) possession with intent to deliver more than 2500 grams but not more than 10,000 grams of

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

marijuana, as a party to a crime, second or subsequent drug offense; (2) receiving stolen property, as a party to a crime; and (3) possession with intent to deliver more than fifteen grams but less than forty grams of cocaine, as a party to a crime, second or subsequent drug offense. An additional count—keeping a drug house, as a party to a crime—was dismissed but read in for sentencing purposes. The State agreed to recommend eight years of initial incarceration and four years of extended supervision on the cocaine charge and probation on the other two charges.

¶4 The trial court engaged in a lengthy and thorough plea colloquy with Lang that spanned over twenty-five pages of the transcript. During that colloquy, the trial court went through each of the crimes with Lang, including the elements of each crime and the maximum penalties. The trial court also referred to the constitutional rights listed on Lang's signed guilty plea questionnaire and asked trial counsel whether he had discussed potential motions with Lang. Trial counsel said that he and Lang discussed several motions but trial counsel determined that none would have merit. Lang personally confirmed that he and his trial counsel discussed potential motions and that Lang knew he would be giving up the right to bring additional motions by pleading guilty. Both trial counsel and Lang also indicated that they had discussed potential defenses.

¶5 The trial court asked Lang if he had been pressured or threatened into pleading guilty; Lang indicated that he had not. The trial court also asked Lang if he was "satisfied with the way that [trial counsel is] representing" him. Lang indicated that he was satisfied with trial counsel's representation and that trial counsel had "satisfactorily answered" Lang's questions.

¶6 The trial court asked Lang about the facts supporting each of the three charges. With respect to the marijuana charge, the trial court had the following exchange with Lang:

> THE COURT: Can you tell me what you did to make you guilty of … being a party to the crime of possession with intent to deliver controlled substance—marijuana?
>
> THE DEFENDANT: I knew about the marijuana, and I had access to it.
>
> THE COURT: How is it that you knew about the marijuana?
>
> THE DEFENDANT: I put it there.
>
> THE COURT: And you knew that it was, in fact, marijuana?
>
> THE DEFENDANT: Yes, I did, Your Honor.
>
> THE COURT: And it was more than 2500 grams?
>
> THE DEFENDANT: Yes. Yes.
>
> THE COURT: And you were going to distribute that; is that correct?
>
> THE DEFENDANT: Yes, Your Honor.

Next, the trial court asked Lang about the cocaine charge:

> THE COURT: And what did you do to make you guilty of being a party to the crime of possession with intent to deliver controlled substance—cocaine?
>
> THE DEFENDANT: I did knowingly possess it and was going to distribute it.
>
> THE COURT: And how is it that you knowingly possessed it? ....
>
> THE DEFENDANT: I had it.
>
> THE COURT: And where did you have it?
>
> THE DEFENDANT: In my room with me.

> THE COURT: And it was yours?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you were going to distribute that?
>
> THE DEFENDANT: Yes, I was, Your Honor.
>
> THE COURT: And you knew it was cocaine?
>
> THE DEFENDANT: Yes, I did, Your Honor.
>
> THE COURT: And was it more than 15 grams?
>
> THE DEFENDANT: Yes, it was, Your Honor.
>
> THE COURT: And, again, you acknowledge you had been convicted of that previous controlled substance charge that I read before; is that correct?
>
> THE DEFENDANT: That's correct, Your Honor.

Finally, the trial court asked about the stolen property charge:

> THE COURT: With regard to being a party to the crime of receiving stolen property, what did you do that made you a party to the crime of that charge?
>
> THE DEFENDANT: I did accept it knowing that it was stolen property.

¶7 The trial court accepted Lang's pleas and found him guilty.[2] At sentencing, the trial court imposed a longer sentence than was recommended by either party, explaining that Lang's crimes were serious, his criminal history was significant, and "there needs to be a strong, strong message of deterrence to yourself and to people like situated to know that this conduct will not be tolerated." The trial court sentenced Lang to fifteen years of initial confinement

[2] The Honorable Daniel L. Konkol accepted Lang's pleas, sentenced him, and denied the postconviction motion he filed before his direct appeal. The Honorable Stephanie Rothstein denied the WIS. STAT. § 974.06 motion that is at issue in this appeal.

and eight years of extended supervision for the cocaine charge, consecutive to a revocation sentence Lang was already serving. It imposed a concurrent sentence of six years of initial confinement and three years of extended supervision on the marijuana charge. Finally, it imposed a concurrent nine-month sentence for receiving stolen property.

¶8 Postconviction counsel was appointed for Lang. She filed a postconviction motion asserting that trial counsel had provided ineffective assistance by not "investigat[ing] the facts and law regarding the validity of the search warrant" and failing to move to suppress the evidence and Lang's subsequent custodial statement on grounds that the search warrant was issued without probable cause. The trial court denied the motion without a hearing[3] and we affirmed, concluding that there was "sufficient probable cause to support the search warrant" and that "Lang's trial counsel did not act deficiently by failing to file a motion to suppress." *See* ***id.***, ¶30.

¶9 Three years later, Lang filed the WIS. STAT. § 974.06 postconviction motion that is the subject of this appeal.[4] He alleged that his postconviction counsel had provided ineffective assistance by not alleging that trial counsel provided ineffective assistance in a number of ways, including: (1) meeting with Lang only when he was brought from the jail for court; (2) failing to provide Lang with a copy of discovery; (3) failing to "fully investigate the case" and "properly

[3] The trial court did grant Lang's request to vacate the fines that were assessed against him.

[4] Lang's motion was titled "HABEAS CORPUS § 974.06." The motion states that it was brought pursuant to WIS. STAT. § 974.06 and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). We will treat the motion as a filing under § 974.06.

inform Mr. Lang of any defenses and the effects of pleading guilty"; (4) inducing Lang to plead guilty through the use of coercion; and (5) having a conflict of interest: the advancement of his own interests over Lang's.[5] In support, Lang provided documentation showing that he complained about his trial counsel to the Office of Lawyer Regulation ("OLR") and that trial counsel ultimately agreed to a public reprimand by consent based on: (1) his failure to provide Lang with a copy of the discovery materials; (2) his failure to provide Lang with a written fee agreement; and (3) his indication during the OLR investigation "that he had visited [Lang] in jail but the jail no longer had records of his visit, when in fact the jail had records of [Lang's] visitors during the relevant time but those records did not reflect a visit from [trial counsel]." Lang also provided his postconviction counsel's handwritten notes indicating that Lang complained to postconviction counsel about trial counsel's lack of communication and the pressure Lang felt to plead guilty.

¶10 The trial court denied the WIS. STAT. § 974.06 motion without a hearing, concluding that Lang's motion was "conclusory at best and without sufficient factual or legal basis."[6] The trial court said that Lang had "provide[d] very few facts to show what a 'complete investigation' would have divulged." It

[5] Lang's lengthy handwritten motion described his complaints about trial counsel's performance in a variety of ways. We have listed what appeared to be Lang's primary concerns.

[6] The trial court also offered an alternate basis for denying the motion: Lang did not provide a sufficient reason why he did not raise these issues when he previously filed a *pro se* postconviction motion to vacate the DNA surcharge. After the trial court's decision was issued in this case, the Wisconsin Supreme Court held that a motion brought to challenge a DNA surcharge pursuant to ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, does not bar a subsequent WIS. STAT. § 974.06 motion. *See* ***State v. Starks***, 2013 WI 69, ¶32, 349 Wis. 2d 274, 833 N.W.2d 146 ("[F]iling a ***Cherry*** motion does not procedurally bar a defendant from filing a future WIS. STAT. § 974.06 motion."). Accordingly, our affirmance is not based on the theory that Lang's motion is barred because he previously filed a ***Cherry*** motion.

also recognized Lang's assertion that a full investigation would have revealed that he was simply storing the drugs and stolen property for another man. In response, the trial court said that Lang had lost "sight of the fact that he was charged as [a] party to a crime." The trial court rejected Lang's claims that he was coerced into pleading guilty on grounds that his claims were "conclusory, without basis, and totally belied by the record." This appeal follows.

DISCUSSION

¶11 We begin by addressing the posture of this case. As noted, Lang had a direct appeal and subsequently filed the WIS. STAT. § 974.06 motion that is before us on appeal. A motion brought under § 974.06 is typically barred when filed after a direct appeal unless the defendant shows a sufficient reason why he or she did not or could not raise the issues previously. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel may constitute a sufficient reason. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

¶12 Where a defendant alleges that his *postconviction* counsel provided ineffective assistance 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. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. To do so, the defendant must show that the attorney's action or inaction constituted deficient performance and that the deficiency prejudiced the defendant. *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. To prove deficiency, the defendant must establish that the attorney's conduct fell "below an objective standard of reasonableness."

Id. To demonstrate prejudice, the defendant must show "'a reasonable probability that, but for [the lawyer's] unprofessional errors, the result of the proceeding would have been different.'" ***Id.*** (citations and one set of quotation marks omitted). If we conclude that a defendant has failed to demonstrate one of the prongs, we need not address the other. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

¶13 "A defendant is not automatically entitled to a hearing on a postconviction motion." ***Ziebart***, 268 Wis. 2d 468, ¶33. As the Wisconsin Supreme Court has explained:

> If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the [trial] 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 [trial] court.

State v. Balliette, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334 (citations omitted). Sufficiency of the motion is a question of law we review *de novo*. *See* ***Love***, 284 Wis. 2d 111, ¶26. If the motion is insufficient, the decision to grant or deny a hearing is left to the trial court's discretion, which we review only for an erroneous exercise of that discretion. *See* ***id.***

¶14 With those standards in mind, we turn to Lang's arguments. We note at the outset that Lang has chosen not to pursue some of the arguments he made in his WIS. STAT. § 974.06 motion, and he appears to raise some new assertions that were not in his motion. Issues that are not briefed on appeal are deemed abandoned, ***Reiman Assoc., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981), and we will not address arguments

raised for the first time on appeal, *see* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997).

¶15 As noted, Lang attempts to circumvent the ***Escalona-Naranjo*** procedural bar by asserting that his *postconviction* counsel provided ineffective assistance by not arguing that his *trial* counsel provided ineffective assistance. Lang's motion offered a host of reasons why he believed his trial counsel was ineffective. On appeal, he focuses on his allegations that trial counsel: (1) failed to fully investigate the case; (2) coerced Lang into pleading guilty by telling him that the trial court would likely follow the plea agreement, that his co-defendants would testify against him, that he would get the maximum sentence if he went to trial, and that the trial court liked him; (3) failed to spend adequate time with Lang, failed to meet with him in the jail, and failed to provide him with a copy of discovery materials; and (4) "exaggerated" the amount of time he spent with Lang when the trial court asked questions at the plea hearing about the topics trial counsel discussed with Lang.

¶16 We conclude that Lang was not entitled to an evidentiary hearing because his motion presented conclusory allegations concerning the prejudice he allegedly suffered from his trial counsel's performance and because "'the record conclusively demonstrates that the defendant is not entitled to relief.'" *See* ***Balliette***, 336 Wis. 2d 358, ¶18 (citation omitted).

¶17 First, Lang's motion complained that his trial counsel "failed to fully investigate the case" because he "failed to seek any information that Mr. Lang had to offer in his defense." The motion asserted that if trial counsel "had all the facts," he "in all likelihood would have been able to present Mr. Lang with an alternative defense other than just pleading guilty." However, Lang's motion did

not identify what that alternative defense would have been. Further, the facts that the motion alleged trial counsel would have discovered—that Lang was "only storing" the stolen goods and cocaine in his home for another man—would not have exonerated Lang, as he would still have been guilty as a party to a crime. Moreover, Lang personally told the trial court that the drugs and stolen property were his, as detailed above. The motion's allegations concerning trial counsel's investigation are conclusory and belied by the record. Lang was not entitled to a hearing or relief.

¶18 Second, Lang's motion alleged that his trial counsel coerced him into pleading guilty by telling him that the trial court would likely follow the plea agreement, that his co-defendants would testify against him, that he would get the maximum sentence if he went to trial, and that the trial court liked him. Not only did Lang's motion fail to demonstrate that trial counsel's opinions were inaccurate, the record belies his claim that he was coerced. The trial court's lengthy and thorough plea colloquy gave Lang numerous opportunities to raise any concerns about his trial counsel's performance, but Lang's responses indicated only satisfaction with the representation. Lang's motion did not provide a basis for relief.

¶19 Lang's third and fourth arguments are that trial counsel failed to spend adequate time with Lang, failed to meet with him in the jail, failed to give him discovery materials, and exaggerated the amount of time he spent with Lang when the trial court asked questions at the plea hearing about the topics trial counsel discussed with Lang. Lang's motion did not adequately explain how those alleged deficiencies affected the outcome of his case. Moreover, the record belies the suggestion that Lang did not understand his plea and felt pressured to plead guilty. At the plea hearing, Lang assured the trial court that no one had

"made any threats or used any pressure to get [him] to plead guilty." He never mentioned any concerns prior to or at sentencing, and he never waivered from his position that he was accepting full responsibility for his crimes.[7] Lang also told the trial court that he was satisfied with trial counsel's representation, and he gave no indication that he did not understand the proceedings or wanted more time with his attorney.

¶20 In summary, we agree with the trial court that Lang was not entitled to an evidentiary hearing or relief on his motion. His allegations that trial counsel's alleged deficiencies prejudiced him fail in each instance because they are conclusory or because the record demonstrates that Lang is not entitled to relief. *See* ***Balliette***, 336 Wis. 2d 358, ¶18. Because Lang has not shown that his trial counsel's performance was constitutionally deficient, it follows that postconviction counsel was not deficient for failing to make the allegations Lang raised in his motion. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

¶21 Lang's motion fails for another reason. It did not demonstrate that the issues he now raises concerning his trial lawyer's performance were "clearly stronger" than the issue his postconviction lawyer chose to raise in a postconviction motion. It is up to the postconviction lawyer to decide which issues to raise, and the lawyer need not "raise every 'colorable' claim." ***Jones v. Barnes***, 463 U.S. 745, 751-54 (1983). "[I]t is still possible to bring a ***Strickland*** claim based on [a lawyer's] failure to raise a particular claim, but it is difficult to

[7] For instance, in a handwritten letter to the trial court that Lang sent before sentencing, he stated: "I know that I am guilty of the charges brought against me and know I should be punished for them." He explained that he was using drugs and "it grew out of control way to[o] fast."

demonstrate that [the lawyer] was incompetent" because "'[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" ***Smith v. Robbins***, 528 U.S. 259, 288 (2000) (citation omitted); *see also* ***State v. Starks***, 2013 WI 69, ¶60, 349 Wis. 2d 274, 833 N.W.2d 146 (adopting "'clearly stronger'" standard for claims that appellate lawyer provided constitutionally deficient representation).

¶22 In this case, Lang's motion baldly asserted that the issues of trial counsel ineffectiveness he raised were "clearly stronger" than those raised by postconviction counsel, but his motion did not demonstrate that. Indeed, we have concluded that Lang's allegations did not even provide a basis for an evidentiary hearing. For these reasons, we affirm the trial court's order denying Lang's WIS. STAT. § 974.06 motion without a hearing.

By the Court.—Order affirmed.

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