COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2014

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. 2013AP2590 **Cir. Ct. No. 2009CF2976**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY SIMONE WILSON,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Jerry Simone Wilson, *pro se*, appeals an order of the circuit court denying his WIS. STAT. § 974.06 (2011-12)[1] motion without a

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

hearing. Wilson claimed he was entitled to a new trial because of (1) newly discovered evidence; (2) insufficient evidence; (3) jury bias; and (4) ineffective counsel. We conclude the circuit court properly denied the motion, so we affirm the order.

BACKGROUND

¶2 A jury convicted Wilson on one count of first-degree reckless homicide and two counts of first-degree recklessly endangering safety for firing a handgun into a group of people. He was given consecutive sentences totaling twenty-eight years' initial confinement and twelve years' extended supervision. Wilson, by postconviction counsel, then filed a postconviction motion seeking a new trial, alleging that trial counsel had been ineffective for failing to confirm a possible alibi, investigate possible misidentification of Wilson as the shooter, and adequately cross-examine Antwan Smith-Curran, the State's primary witness. The circuit court denied the motion, deeming the allegations conclusory and insufficient. Wilson appealed; we affirmed. *See* ***State v. Wilson***, No. 2011AP1043-CR, unpublished slip op. (WI App May 15, 2012).

¶3 In November 2013, Wilson filed a *pro se* motion under WIS. STAT. § 974.06, seeking "the entry of an order vacating the judgment of conviction and sentence or ordering a new trial" or other relief. He grouped various arguments under the four headings briefly described above. The circuit court, perceiving Wilson's motion to allege ineffective assistance of postconviction counsel as a sufficient reason for avoiding the procedural bar against successive attempts at postconviction relief, reviewed the claims in the context of ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996).

¶4 The circuit court concluded that Wilson's newly discovered evidence was "based on rank hearsay and lacks corroborating evidence" so it would not have been admitted, meaning neither trial counsel nor postconviction counsel was ineffective for failing to pursue that issue. The circuit court concluded that Wilson's issues of sufficient evidence and juror bias/mistrial would have to be raised in this court by way of a petition for a writ of *habeas corpus* under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). Finally, the circuit court rejected Wilson's challenge to trial counsel's "failure" to seek suppression of out-of-court identifications of Wilson made with photo lineups, explaining why that challenge would have failed. Accordingly, the circuit court denied the motion without a hearing, and Wilson appeals.

DISCUSSION

¶5 To be entitled to a hearing on his motion, Wilson had to allege sufficient material facts which, if true, would entitle him to relief. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. However, if the record conclusively demonstrates that the movant is not entitled to relief, the circuit court may deny the motion without a hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). The sufficiency of a postconviction motion is question of law. *See* ***Balliette***, 336 Wis. 2d 358, ¶18.

¶6 "[A]ny claim that could have been raised on direct appeal" or in in a prior postconviction motion is barred from being raised in a WIS. STAT. § 974.06 motion absent a sufficient reason for not raising it earlier. *See* ***State v. Lo***, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756; *see also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Whether a procedural bar applies

is a question of law. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶7 In some instances, ineffective assistance of postconviction counsel may constitute a "sufficient reason." *See* ***Rothering***, 205 Wis. 2d at 682. A defendant claiming postconviction counsel was ineffective for not challenging trial counsel's effectiveness must establish that trial counsel actually was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Demonstrating ineffectiveness requires a showing that counsel performed deficiently and that the deficiency was prejudicial. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. These are also questions of law. *See* ***Ziebart***, 268 Wis. 2d 468, ¶17.

I. Newly Discovered Evidence

¶8 Wilson's first argument is that trial counsel was ineffective for failing to investigate "exculpatory" witness Lakisha Wallace, who purportedly could "confirm" that Smith-Curran was the shooter. Relatedly, Wilson claims postconviction counsel was ineffective for not raising an issue of trial counsel's failure to present Wallace in time for trial. Wilson further asserts that he has newly discovered evidence, in the form of an affidavit[2] from Wallace, to confirm that Smith-Curran was the shooter; to prove Smith-Curran was drinking and doing

[2] The circuit court noted that Wilson had submitted only a copy of Wallace's affidavit, not the original. We note that Wallace's statement does not appear to be an actual affidavit. "An affidavit is any voluntary ex parte statement reduced to writing *and sworn to or affirmed* before a person legally authorized to administer an oath or affirmation." *See* 3 AM. JUR. 2D *Affidavits* § 1 (1986) (emphasis added). It is essential to an affidavit's validity that it be sworn or affirmed. While Wallace's statement was notarized, the notarial statement merely indicates that the document was "signed before" the notary on July 1, 2013; there is no indication that Wallace's statement was given under oath.

drugs that night, thereby undermining his credibility; and to provide a motive for Smith-Curran to falsely implicate Wilson.

¶9 When moving for a new trial based on newly discovered evidence, the defendant must show by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (quotation marks and citation omitted). "If the defendant is able to make this showing, then 'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.*** (citation omitted). Here, the circuit court noted that Wilson "arguably satisfies the first four of the general requirements" but concluded that he had failed to show a reasonable probability of a different result because Wallace's statement was "based on rank hearsay and lacks corroborating evidence."

¶10 Most of Wallace's "proof" that Smith-Curran was the shooter is based on things he supposedly said to others. This is hearsay, and hearsay evidence is generally not admissible at trial. *See* WIS. STAT. § 908.02. Inadmissible evidence cannot provide a basis for challenging a conviction. *See* ***State v. Bembenek***, 140 Wis. 2d 248, 253, 409 N.W.2d 432 (Ct. App. 1987). Also, Wallace claimed she saw Smith-Curran drinking and doing drugs and offered a motive for him to identify Wilson as the shooter. However, this evidence is merely impeachment evidence, which requires corroboration. *See* ***Greer v. State***, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968).

¶11 We therefore agree with the circuit court's conclusion that Wilson has not established a reasonable probability of a different result with Wallace's

testimony. Accordingly, he cannot establish prejudice from trial counsel's failure to pursue Wallace, *see* ***Allen***, 274 Wis. 2d 568, ¶26 (prejudice requires showing reasonable probability of different result but for counsel's error), and he cannot establish postconviction counsel was ineffective for failing to challenge trial counsel's performance regarding Wallace, *see* ***Ziebart***, 268 Wis. 2d 468, ¶14 (counsel is neither deficient nor prejudicial for failing to pursue a legal challenge that would have been rejected).

II. Sufficiency of the Evidence and Jury Bias

¶12 Wilson's second argument is that "the State simply failed to present even a particle of evidence" to support his convictions. His third argument is that the trial court "failed to protect his right to an impartial jury by not fully inquiring into what impact … threats had on the jury" when concerns were raised during trial.[3] The circuit court declined to grant relief on either issue, holding that "[a] record already exists" on those issues and, thus, "these claims must be raised in the context of a habeas corpus petition in the Court of Appeals" under ***Knight***.

¶13 In many circumstances, postconviction counsel will need to file a postconviction motion to raise and preserve issues as a precursor to raising them on appeal. *See, e.g.*, ***Rothering***, 205 Wis. 2d at 677-78 (postconviction motion necessary to preserve claims of ineffective trial counsel). However, a postconviction motion is not a necessary predicate for appellate challenges to sufficiency-of-the-evidence challenges or to issues that have already been raised and, thus, preserved in the trial court. *See* WIS. STAT. § 974.02(2); ***Rothering***, 205

[3] Nowhere in the postconviction motion or the appellate brief does Wilson identify the substance of the threats.

Wis. 2d at 678 n.3. Therefore, both sufficiency of the evidence and jury bias could have been raised in Wilson's appeal.

¶14 To the extent that Wilson believes that appellate counsel was ineffective for failing to raise those issues, the circuit court correctly noted that the remedy for such claims is a petition for a writ of *habeas corpus* filed in this court, not a WIS. STAT. § 974.06 motion. *See* ***State v. Starks***, 2013 WI 69, ¶35, 349 Wis. 2d 274, 833 N.W.2d 146; ***Knight***, 168 Wis. 2d at 520. The circuit court therefore appropriately refused to grant relief on these two issues by way of the postconviction motion.[4]

III. Ineffective Trial and Postconviction Counsel

¶15 Wilson's final argument is that trial counsel was ineffective for not seeking to suppress identifications of him made by four witnesses viewing photo arrays. Wilson further contends that postconviction counsel was ineffective because he did not pursue and preserve this issue for appeal.

¶16 The circuit court explained why Wilson's arguments regarding the photo arrays were erroneous. The six-photo reference sheets had Wilson's photo in one of six positions but, for each array, the individual photographs were printed, placed in folders, and shuffled, before being shown to witnesses. This meant that

[4] In his postconviction motion and brief, Wilson argues that his sufficiency of the evidence issue cannot be subject to the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), because "[e]ven though the issue might properly have been raised on appeal, it presents an issue of significant constitutional proportions and, therefore, must be considered in this motion for post-conviction relief." Although ***Escalona*** is not the reason for rejecting Wilson's sufficiency argument, we note that the language Wilson quoted comes from ***Bergenthal v. State***, 72 Wis. 2d 740, 748, 242 N.W.2d 199 (1976), and was expressly overruled in ***Escalona***. *See* ***Escalona***, 185 Wis. 2d at 181.

"the order of the photographs on the [reference] charge do not necessarily correspond with the order of the folders[.]" Wilson suggests that he was misidentified because the photo numbers from the reference sheets do not match the numbers for the individual photos in which he was identified.

¶17 However, the individual used by the circuit court in its example had initialed Wilson's single photograph, clearly identifying him, even though that photo was in a different numbered folder (four) than its spot in the reference sheet (three). This method of presenting photo arrays to witnesses is common and was well-explained by police testimony at trial. As the circuit court concluded, a motion to suppress would have been a meritless challenge, so neither trial counsel nor postconviction counsel was ineffective for failing to pursue it. The circuit court properly denied Wilson's motion without a hearing.

By the Court.—Order affirmed.

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