COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP228 **Cir. Ct. No. 2000CF698**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PERRY R. NEAL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Perry Neal appeals an order denying his WIS. STAT. § 974.06 motion for postconviction relief, his fourth such motion following

his direct appeal from a judgment of conviction in 2000 for various domestic violence offenses.[1] We conclude all the issues Neal raises are procedurally barred under WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because he has not demonstrated a sufficient reason for his failure to raise them in a prior postconviction motion. Accordingly, we affirm.

BACKGROUND

¶2 In 2000, the State charged Neal with ten domestic violence offenses. The offenses, which took place between 1999 and 2000 and involved Neal's then-wife, included several counts of battery, substantial battery and false imprisonment, and one count each of first-degree recklessly endangering safety and second-degree sexual assault. All counts were charged as a repeater.

¶3 The case proceeded to a two-day bench trial, which commenced on November 2, 2000. Neal was represented by defense counsel, and assistant district attorney John Luetscher appeared on behalf of the State. Neal was found guilty of all charges at the conclusion of the trial. The circuit court found the victim's testimony regarding the alleged assaults credible and deemed Neal's testimony "not credible … and … not believable." Neal was sentenced to forty-eight years' initial confinement and twenty years' extended supervision.

¶4 Neal, then represented by a public defender, filed a motion for postconviction relief under WIS. STAT. RULE 809.30. He argued he did not validly waive his right to a jury trial and the sentences imposed on certain of the counts

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

were excessive. Neal also filed a pro se postconviction motion days later, seeking a new trial in the interest of justice and raising a bevy of issues, including ineffective assistance of trial and postconviction counsel, prosecutorial misconduct, and insufficient evidence.[2] The circuit court concluded the sentences on certain of the counts exceeded the maximums authorized by law, commuted those sentences to the maximum authorized, and ordered the judgment of conviction to be amended accordingly. It denied relief on the remainder of Neal's claims.

¶5 Neal pursued a direct appeal with new counsel, arguing he should receive a new trial in the interest of justice and there was insufficient evidence at trial because the victim was incredible as a matter of law. We issued a summary order rejecting those arguments and affirming the judgment of conviction. *See* ***State v. Neal***, No. 2002AP623-CR, unpublished op. and order (WI App Mar. 4, 2003).

¶6 On February 20, 2004, Neal filed the first of several pro se WIS. STAT. § 974.06 motions. In that motion, he alleged his trial, postconviction, and appellate counsel had all rendered constitutionally ineffective assistance; the victim and Neal's parole agent committed perjury; and Luetscher knowingly presented perjured testimony during the State's case. Neal claimed his trial counsel failed to ascertain the precise number of Neal's prior convictions, failed to call critical witnesses at trial, and failed to file pretrial motions to review the victim's medical records. Neal asserted his postconviction counsel was ineffective

[2] We regard the public defender's filing and Neal's pro se filing as one postconviction motion for purposes of this opinion.

for failing to challenge trial counsel's conduct, and his appellate counsel was ineffective for failing to challenge postconviction counsel's conduct.[3] The circuit court denied the motion without a hearing because it consisted of only conclusory allegations and all alleged grounds for relief could have been raised in the first postconviction motion or on direct appeal. Neal appealed and we affirmed, holding Neal was not prejudiced by any claimed deficiency on the part of his attorneys and no hearing was required because the record conclusively demonstrated Neal was not entitled to relief. *See* ***State v. Neal***, No. 2004AP1251, unpublished slip op. ¶¶13-15 (WI App Mar. 29, 2005). The supreme court denied Neal's petition for review.

¶7 Neal filed his second WIS. STAT. § 974.06 postconviction motion (his third overall postconviction motion) on August 11, 2005. He again argued his trial counsel and postconviction counsel were ineffective. Among other things, Neal argued his trial counsel was ineffective for failing to perform an adequate investigation, including his failure to interview Neal's parole agent and "to review [Neal's Department of Corrections] file within the parole agent[']s possession as requested by [Neal.]" The circuit court concluded Neal's motion was procedurally barred because Neal could have raised the issue as part of his ineffective assistance arguments in the previous motions and had not presented a sufficient reason for his failure to do so.

¶8 Neal then filed in this court a forty-two-page petition seeking a writ of habeas corpus, which petition was stricken because it exceeded the applicable

[3] Neal stated his claims were based on, among other things, a review of his Department of Corrections "social services file."

page limitation and was not verified. We also denied a ***Knight*** petition[4] Neal had filed alleging ineffective assistance of postconviction and appellate counsel. Neal filed a motion for reconsideration, which we denied, and the supreme court denied Neal's petition for review.

¶9 On December 4, 2007, Neal filed his third pro se WIS. STAT. § 974.06 motion (his fourth overall postconviction motion). Neal again raised claims of ineffective assistance of trial counsel and perjury by the victim and Neal's parole agent. He also added claims of newly discovered evidence and actual innocence. The circuit court denied the motion following an evidentiary hearing and also denied Neal's motion for reconsideration. We summarily affirmed the circuit court's decision, concluding that "all of Neal's claims either were or could have been raised in his earlier motions" and the evidence at issue, which consisted of the testimony of Neal's daughter and her mother, was not newly discovered evidence because Neal's trial counsel was aware of their statements in 2000. *See* ***State v. Neal***, No. 2008AP405, unpublished op. and order (WI App Mar. 10, 2009). We also rejected various arguments challenging the circuit court's exercise of discretion. *See* ***id.*** Neal filed a reconsideration motion, which we denied. Neal's petition for supreme court review was denied.

¶10 The present appeal involves Neal's fourth pro se WIS. STAT. § 974.06 postconviction motion (his fifth overall postconviction motion), which he filed on March 10, 2014, together with his affidavit. The motion alleged that Neal obtained documents of an exculpatory nature from his Department of Corrections

[4] *See* ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

file through an open records request in 2012.[5] These documents included, among other things, a letter purportedly typewritten by the victim on October 3, 2000, and sent to Neal's parole agent, which Neal claimed demonstrated the victim was lying and had manufactured the allegations at his parole officer's urging. Neal again claimed the victim and Neal's parole officer committed perjury at trial, Luetscher had committed prosecutorial misconduct for knowingly soliciting perjured testimony, and his trial counsel was ineffective for failing to conduct an adequate investigation.

¶11 The State filed a response brief and submitted three affidavits to counter Neal's claims. The State argued Neal fabricated the typewritten letter from the victim to Neal's parole agent, as well as another typewritten letter purportedly from the victim to a social worker, and inserted both letters into his Department file during an earlier review of the file. The victim, by affidavit, denied authoring, typing or signing either letter, denied recanting her allegations against Neal, and asserted she never lied to Neal's parole officer or to Luetscher about the offenses. Luetscher, by affidavit, asserted the statements contained in the letters were false, and the Department files contained no record of having included the typewritten letters. Finally, Neal's parole officer averred he had never seen the letters purportedly written by the victim and the letters contained false statements.

[5] It is unclear whether this is the same Department file Neal referred to in his previous postconviction motions. If so, it is apparent Neal had, in the course of filing his prior motions, seen the file, and he also previously challenged his trial counsel's supposed failure to request the file. These facts would supply an independent basis in the present appeal for affirming the circuit court's conclusion that Neal is not entitled to relief.

¶12 The circuit court denied Neal's motion without a hearing. It concluded Neal was not entitled to postconviction relief or a ***Machner*** hearing[6] given the totality of the record, including Neal's submissions and the affidavits submitted by the State. The court made laudatory comments about Luetscher, including his "reputation for impeccable ethics," accepted the State's affidavits as "factual findings" of the court, and adopted the State's arguments as its own. The court also stated Neal's "attempt to perpetrate a blatant lie against an honorable man is despicable. Perry Neal is not credible."

DISCUSSION

¶13 On appeal, Neal's primary argument is that the circuit court erred by denying his postconviction motion without holding an evidentiary hearing. A defendant is entitled to a hearing on a WIS. STAT. § 974.06 motion if he or she alleges sufficient material facts that, if true, would entitle him or her to relief. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. Whether a defendant has alleged such facts is a question of law we review de novo. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion does not raise such facts or presents only conclusory allegations, or if the record conclusively demonstrates the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. ***Id.*** We review a circuit court's discretionary decisions for an erroneous exercise of discretion. ***Id.***

¶14 Neal's fifth postconviction motion raised numerous claims, including newly discovered evidence, a ***Brady*** violation,[7] perjury at trial by his

[6] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[7] ***Brady v. Maryland***, 373 U.S. 83 (1963).

parole agent and the victim, prosecutorial misconduct, and ineffective assistance of his trial counsel. Having filed numerous previous postconviction motions and pursued a direct appeal, Neal is "barred from making a claim that could have been raised previously unless he shows a sufficient reason for not making the claim earlier." ***State v. Romero-Georgana***, 2014 WI 83, ¶35, 360 Wis. 2d 522, 849 N.W.2d 668; *see also* WIS. STAT. § 974.06(4).[8] Neal's postconviction motion offers some clarity in this regard. Neal believes he has a "sufficient reason" for not earlier raising these issues because he claims he was not aware of the information purportedly contained in his Department file until 2012, and all of his current claims derive from that discovery.[9]

¶15 Assuming without deciding that the evidence in Neal's Department file satisfies the test for "newly discovered evidence," *see* ***State v. Vollbrecht***, 2012 WI App 90, ¶18, 344 Wis. 2d 69, 820 N.W.2d 443, we conclude Neal has

[8] WISCONSIN STAT. § 974.06(4) provides:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

[9] Although Neal only vaguely addresses the procedural bar in WIS. STAT. § 974.06(4) or its "sufficient reason" requirement, the argument we have attributed to him can be fairly inferred from his postconviction motion, affidavit in support of that motion, and appellate briefing. As a result, and cognizant of our obligation to liberally construe a pro se litigant's pleadings to state the correct basis for relief, *see* ***State ex rel. Harris v. Smith***, 220 Wis. 2d 158, 164, 582 N.W.2d 131 (Ct. App. 1998), on this specific issue we decline to apply the rule that we ordinarily do not address issues that are inadequately briefed on appeal, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

failed to establish a "sufficient reason" under WIS. STAT. § 974.06(4) for his failure to advance that and his other claims on direct appeal or in his previous postconviction motions. Whether a defendant has presented a sufficient reason for serial litigation is a question of law that we review de novo. ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

¶16 The record does not provide a legitimate basis for Neal to raise an ineffective assistance of counsel claim at this late date. *See* ***State v. Allen***, 2010 WI 89, ¶29, 328 Wis. 2d 1, 786 N.W.2d 124 (adopting the holding in ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), that ineffective assistance of postconviction counsel may constitute a sufficient reason for not raising issues in a previous postconviction motion). Neal specifically averred in his supporting affidavit for the present motion that he told his trial counsel to review his Department file prior to both his November 2000 trial and his December 2000 sentencing. Neal has not suggested he was unaware of his trial counsel's alleged failure to do so, nor has Neal advanced any reason—let alone a sufficient reason—for his failure to previously raise the issue of his trial counsel's allegedly deficient investigation regarding the Department file. Further, even if we assume Neal's postconviction counsel rendered ineffective assistance by failing to challenge trial counsel's effectiveness, Neal could also have challenged his postconviction counsel's representation in the numerous pro se postconviction motions he filed prior to first requesting his Department file in 2006.

¶17 Neal has also not established a sufficient reason for his failure to previously raise other issues cognizable under WIS. STAT. § 974.06 concerning the contents of his Department file. Again, all of these issues have as their premise that Neal did not know what was in his Department file until 2012. Nonetheless,

Neal was aware as early as 2000 that the Department file might contain evidence that would have aided him, as he avers he twice asked his trial counsel to procure the file. Yet according to Neal's affidavit, his first request to personally view the file occurred in 2006, after he had already pursued a direct appeal and filed three postconviction motions. Neal does not offer any explanation for his belated request to review a file he believed contained exculpatory documents. Nor does he account for the time between his initial request to personally review the file in 2006 and May 2012, when he filed another request to have his "parole field file" sent to the correctional institution. In 2007, Neal filed his fourth postconviction motion despite his apparently then-unresolved request for records. Thus, even assuming Neal was unaware of the precise factual basis for the claims he now raises, that unawareness was the result of his clear failure to diligently pursue the matter.[10]

¶18 At some point, there must be finality to litigation. ***Escalona-Naranjo***, 185 Wis. 2d at 185. "[WISCONSIN STAT. §] 974.06(4) was not designed

[10] We reach this conclusion without regard to the authenticity of the documents purportedly found in Neal's Department file. Further, this conclusion does not conflict with our assumption that the documents in Neal's Department file qualify as newly discovered evidence. Evidence is not newly discovered if a defendant was negligent in seeking it. ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590. It is not clear, however, that the subject of that inquiry is the defendant's efforts to obtain evidence *after* the relevant proceeding. *See* ***id.***, ¶15 (defendant "could not have been negligent" in discovering medical research and literature that emerged in the ten years following trial); ***State ex rel. Booker v. Schwarz***, 2004 WI App 50, ¶¶7, 17, 20 n.2, 270 Wis. 2d 745, 678 N.W.2d 361 (noting that the defendant had not explained a four-year delay between discovering allegedly new evidence and filing motion for relief, but holding that this delay in seeking relief was relevant only to whether the defendant's claim was barred by the doctrine of laches; negligence factor "addresses solely the amount of time the movant took to *discover* the evidence"); *but see* ***State v. Behnke***, 203 Wis. 2d 43, 54, 553 N.W.2d 265 (Ct. App. 1996) (holding defendant was not negligent in obtaining evidence following his trial). For purposes of this opinion, we assume without deciding that the relevant time period for analyzing Neal's negligence relative to his discovering new evidence terminated upon the jury's finding of guilt at trial.

so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later." ***Id.*** Rather, a defendant must consolidate all claims of error in one motion or appeal, absent a sufficient reason for failing to do so. ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. Successive motions and appeals concerning issues that were or could have been raised at the same time run counter to the design and purpose of § 974.06. ***Escalona-Naranjo***, 185 Wis. 2d at 185. If Neal suspected the contents of his Department file could give rise to a meritorious § 974.06 claim, it was incumbent upon him to diligently pursue that information before filing his numerous prior postconviction motions. Neal's failure to do so is particularly troubling because many of his previous motions have challenged the credibility and veracity of the State's witnesses, and also the prosecutor's conduct, the very issues again raised now. If there were reasons unrelated to such challenges animating Neal's desire to view the file in 2000, in 2006, or in 2012—thereby perhaps bolstering his position that a sufficient reason exists for only now finding and raising the purported contents of the file—Neal does not articulate such reasons.

¶19 Neal argues the State's response brief in the circuit court failed to address certain documents offered in support of Neal's postconviction motion, and the State has therefore conceded those documents supply a basis for relief on grounds of perjury by his parole agent, prosecutorial misconduct, and ineffective assistance of Neal's trial counsel. His only authority for this proposition refers to the general rule of *appellate* review that a respondent's failure to respond to an issue raised by the appellant is construed as a concession. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Here, on appeal, the State has responded to Neal's arguments by asserting

his claims are procedurally barred under ***Escalona-Naranjo*** and WIS. STAT. § 974.06(4). It is true that the State's focus before the circuit court concerned the authenticity of the documents Neal purportedly found in his Department file.[11] However, a respondent on appeal may raise any argument that would support the circuit court's action, and "[a]n appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court." ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), *superseded on other grounds by statute*. Thus, it was acceptable for the State, as the respondent, to propose that the circuit court's decision be affirmed on different grounds than those argued before the circuit court.[12]

¶20 Finally, Neal argues the circuit court erred by "vouching" for the reputation of the assistant district attorney in its written decision denying the postconviction motion. The court noted it had lengthy and extensive experience with Luetscher, who, according to the circuit court, "has a reputation for impeccable ethics." We agree with Neal that this was an improper rationale upon which to decide Neal's motion. *See* ***Hoeft v. Friedli***, 164 Wis. 2d 178, 189-91, 473 N.W.2d 604 (Ct. App. 1991) (holding it is improper for a circuit court to take judicial notice of a person's reputation). However, in the context of this case, and for the reasons discussed above, the record supports the result ultimately reached

[11] To be fair, this authenticity issue also seems to permeate the State's argument for applying the WIS. STAT. § 974.06(4) procedural bar on appeal. Notwithstanding certain circular reasoning in the State's brief, the State clearly invokes the procedural bar as a complete basis to affirm the circuit court, and we therefore broadly construe the State's arguments in that regard as applying to all claims set forth in Neal's postconviction motion.

[12] In any event, the appellate forfeiture rule is a rule of judicial administration and does not restrict our discretionary authority to address an issue even if it is raised for the first time on appeal. ***Town of Cross Plains v. Kitt's Field of Dreams Korner, Inc.***, 2009 WI App 142, ¶13 n.6, 321 Wis. 2d 671, 775 N.W.2d 283.

by the circuit court independent of this error. *See* ***Holt***, 128 Wis. 2d at 124 ("It is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed.").

By the Court.—Order affirmed.

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