COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1121 **Cir. Ct. No. 2007CF5895**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES LAMAR, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: FREDERICK C. ROSA, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Charles Lamar Jr., *pro se*, appeals from a decision and order of the circuit court denying his motion for postconviction relief, filed pursuant to WIS. STAT. § 974.06 (2015-16).[1] Lamar was convicted by a jury in March 2008 of attempted first-degree intentional homicide and false imprisonment, both as a party to a crime and while armed.[2] He directly appealed that judgment of conviction in 2009, with his appellate counsel submitting a no-merit report. We summarily affirmed, finding no issues of arguable merit.

¶2 In this appeal, Lamar first argues that he is not procedurally barred from raising the issues he now advances because the no-merit procedures were not followed. The other issues he raises are: (1) that his right to confront the victim in this case was violated when he was precluded from questioning the victim about his motive to testify; (2) that his trial counsel was ineffective when he failed to introduce into evidence the transcript of the victim's testimony at his own suppression motion hearing, which is related to Lamar's argument regarding the victim's motive for testifying; and (3) that there was judicial bias on the part of the trial court.

¶3 To the contrary, the State contends that this appeal is procedurally barred because Lamar has not met his burden of showing that these issues were not raised and finally adjudicated in his previous no-merit appeal. Furthermore, the State asserts that there is no merit to these additional claims that Lamar has currently raised. We affirm.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The jury trial was before the Honorable Jeffrey A. Kremers; the postconviction motion was heard by the Honorable Frederick C. Rosa.

BACKGROUND

¶4 This case stems from an incident that occurred on November 25, 2007, where Lamar, together with Mark Sterling, his co-defendant, abducted Demetrius Gaines at gunpoint, forced him into their vehicle and threatened to kill him, allegedly in an attempt to get information relating to the location of a particular assault rifle. Gaines escaped, jumping out of the moving vehicle into traffic. He was hit by a vehicle and shot four times by his assailants, but survived.

¶5 Lamar and Sterling were initially charged with first-degree reckless injury along with false imprisonment; the reckless injury charge was later amended to attempted first-degree intentional homicide shortly before the commencement of the trial. Lamar and Sterling were tried together in March 2008, with a jury finding them both guilty of attempted first-degree intentional homicide and false imprisonment, both as a party to a crime while using a dangerous weapon.

¶6 Lamar subsequently appealed that judgment of conviction; his appellate counsel filed a no-merit report in conjunction with that appeal. Lamar responded to the no-merit report, raising over sixty claims of error. This court addressed nine of those claims, but declined to specifically address the other fifty-one claims on the grounds that they were "conclusory and underdeveloped; based on erroneous perception of the law; based on mischaracterization or misreading of the record; related to another case; irrelevant to this case; repetitive; or incomprehensible." ***State v. Lamar***, No. 2009AP290, unpublished slip op. and order at 6-7 (WI App Dec. 18, 2009). Ultimately, we found no issues of arguable merit, and summarily affirmed the judgment of conviction. ***Id.*** at 2.

¶7 Over six years later, Lamar filed the postconviction motion that is the basis for this appeal. The postconviction court denied the motion on the grounds that the claims were procedurally barred in accordance with the holding in ***State v. Tillman***, 2005 WI App 71, ¶2, 281 Wis. 2d 157, 696 N.W.2d 574 (holding that the procedural bar set forth in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), under which a defendant may not bring a claim under WIS. STAT. § 974.06 if that claim could have been raised in a prior motion or direct appeal, may also be applied when a prior appeal was processed under the no-merit procedure). As for Lamar's argument that the requisite no-merit procedures were not properly followed by this court, the postconviction court deferred to this court for a determination of that issue. This appeal follows.

DISCUSSION

Procedural Bar on Claims

¶8 Lamar's first argument addresses the issue of whether the claims he currently raises are procedurally barred from review. "[A] prior no[-]merit appeal may trigger the procedural bar of ***Escalona-Naranjo*** and WIS. STAT. § 974.06(4)." ***Tillman***, 281 Wis. 2d 157, ¶21. In fact, our supreme court has ruled that:

> [S]o long as the court of appeals follows the no-merit procedure required in ***Anders*** [***v. California***, 386 U.S. 738 (1967)], a defendant is barred (absent a sufficient reason) from raising issues in a future WIS. STAT. § 974.06 motion, whether or not he raised them in a response to a no-merit report, because the court will have performed an examination of the record and determined that any issues noted or any issues that are apparent, to be without arguable merit.

State v. Allen, 2010 WI 89, ¶61, 328 Wis. 2d 1, 786 N.W.2d 124.

¶9 One way for a defendant to establish a "sufficient reason" under these circumstances is to demonstrate in a subsequent WIS. STAT. § 974.06 motion that his counsel and the court of appeals did not follow the requisite no-merit procedures. *See* ***Allen***, ¶64, 328 Wis. 2d 1. Lamar argues just that. However, the basis for his argument is the decision of the postconviction court, as opposed to asserting any particular problems with this court's no-merit decision. Specifically, Lamar contends that the postconviction court erroneously exercised its discretion when it deferred this argument to this court for review. The postconviction court stated:

> [This] court is not in a position to examine the submissions that were filed with the [c]ourt of [a]ppeals during the no-merit appeal and cannot comment on whether that court considered the issues the defendant now raises in its independent review of the record of this case when it concluded that there were no issues of arguable merit.

¶10 In other words, Lamar's only argument with regard to this procedural issue is that the postconviction court should have reviewed this court's prior decision to ensure that the no-merit procedures were followed. Nowhere in either his postconviction motion or his appellate brief does Lamar indicate the manner in which he believes that this court did not follow the requisite no-merit procedures. Thus, Lamar has not sufficiently developed this argument for our review, and we decline to develop it for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

¶11 Furthermore, "[u]nlike defendants on direct appeal under WIS. STAT. § (Rule) 809.30, defendants in a no-merit appeal under § 809.32 need not bring issues to the court's attention for the court to address them." ***Allen***, 328 Wis. 2d 1, ¶58. Instead, this court "must perform a 'full examination of all the proceedings' to search for any 'legal points arguable on their merits,'" in order to be in

compliance with the constitutional requirements for no-merit appeals set forth in ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. § (Rule) 809.32. ***Allen***, 328 Wis. 2d 1, ¶58. In other words, even issues that were not raised in a no-merit report or in the defendant's response to that report are presumed to have been reviewed by this court, as long as our review followed the proper procedure as set forth in ***Anders***. *See* ***Allen***, 328 Wis. 2d 1, ¶58. If, however, upon the release of the no-merit decision the defendant believes that this court "fail[ed] to discuss an issue of actual or arguable merit," that defendant may: "file (1) a motion for reconsideration of the decision under WIS. STAT. § (Rule) 809.32(1); (2) a petition for review with [the supreme] court; or (3) an immediate WIS. STAT. § 974.06 motion, identifying any issue of arguable merit that was overlooked." ***Allen***, 328 Wis. 2d 1, ¶71.

¶12 Lamar pursued the third option, the WIS. STAT. § 974.06 motion which is the subject of this appeal. However, it cannot be characterized as being filed "immediately"; the no-merit decision was released on December 18, 2009, while his current motion was not filed until March 30, 2016. Such a delay "can seldom be justified." ***Allen***, 328 Wis. 2d 1, ¶72. The procedures in place relating to no-merit decisions require this court to promptly address any issues that may have been missed, but this first requires action by the defendant. ***Id.*** Lamar's failure to timely respond to the decision on the no-merit report lends support to the argument that any issue that could have previously been raised is waived. *See* ***id.***

¶13 "[W]here a defendant has attempted to obtain relief in an earlier proceeding and where the grounds for relief have either been finally adjudicated or waived," the burden is on the defendant to show that "there is a basis for relief that was either inadequately raised previously or was not raised for some other sufficient reason." ***State v. Braun***, 178 Wis. 2d 249, 253-54, 504 N.W.2d 118 (Ct.

App. 1993). We conclude that Lamar has not met this burden. He has not established that any of the requisite no-merit procedures were not followed in the previous decision by this court, nor has he demonstrated any other sufficient reason for now raising the claims set forth in his current WIS. STAT. § 974.06 motion. Therefore, the issues are procedurally barred from review. *See* ***Allen***, 328 Wis. 2d 1, ¶61.

¶14 Although we find that all of the issues currently raised by Lamar in this appeal are procedurally barred, we will nevertheless address these issues because of the voluminous nature of Lamar's response to the previous no-merit report. However, Lamar's arguments on these issues are unavailing.

Violation of the Right to Confrontation

¶15 First, Lamar argues that he was denied his Sixth Amendment constitutional right to cross-examine Gaines during the trial. Specifically, the trial court precluded a line of questioning relating to Gaines's motivation for testifying. At the time of the trial, Gaines had a criminal case pending, and Lamar's trial counsel sought to cross-examine Gaines about whether he would receive consideration in his own case for testifying against Lamar. The trial court rejected the argument, finding that the evidence being sought by the defense was not relevant.

¶16 "The fundamental inquiry in deciding whether the right of confrontation was violated is whether the defendant had the opportunity for effective cross-examination," which can "expose potential bias" of an adverse witness. ***State v. Barreau***, 2002 WI App 198, ¶47, 257 Wis. 2d 203, 651 N.W.2d 12. "Therefore, while reasonable limitations on 'interrogation that is repetitive or

only marginally relevant' is appropriate, a court may not prohibit *all* inquiry into the possibility of bias." ***Id.*** (citation omitted).

¶17 The discretion of the trial court as to whether to admit or exclude evidence "may not be exercised until the court has accommodated the defendant's right of confrontation." ***Id.***, ¶48. "Whether the limitation of cross-examination violates the defendant's right of confrontation is a question of law that we review *de novo*." ***Id.*** (italics added).

¶18 This exact same issue was raised by Lamar's co-defendant, Sterling, in his direct appeal. *See* ***State v. Sterling***, No. 2009AP815-CR, unpublished slip op. (WI App May 4, 2010). This court rejected Sterling's argument. We found that although ***Barreau*** states that "evidence of pending charges against a witness, even absent promises of leniency, may reveal 'a prototypical form of bias,'" the "factual differences" in ***Sterling*** lead to a conclusion that "bias could not reasonably be inferred from the facts of this case" and thus there was no error on the part of the trial court. ***Id.***, ¶36 (quoting ***Barreau***, 257 Wis. 2d 203, ¶55)

¶19 The primary factual difference was that Gaines was not merely a witness to this incident; he was the victim, who had been terrorized and then shot four times by the defendants. ***Id.***, ¶37. This provided Gaines with a "vested interest" in providing evidence against the defendants to assist in their prosecutions. ***Id.***

¶20 Furthermore, we noted that Gaines's testimony closely tracked the statement that he gave to police shortly after the incident, before his case was pending, when the issue of getting consideration for his testimony was non-existent. ***Id.***, ¶38. Additionally, we found that there was no agreement between Gaines and the prosecutor in his case for leniency; we therefore concluded that

even if a Confrontation Clause violation had occurred it would have been harmless, because the jury would have merely heard that Gaines did not have an agreement with the State in his case for leniency. ***Id.***, ¶¶39-41.

¶21 As Lamar and Sterling were tried together, the same factual differences that we noted in ***Sterling*** that distinguish ***Barreau*** are applicable here. Therefore, the same analysis applies, and Lamar's argument fails.

Ineffective Assistance of Counsel—Failure to Introduce Hearing Transcript

¶22 Lamar next argues that his trial counsel was ineffective for failing to introduce into evidence at the trial the transcript from Gaines's suppression hearing. "To state a claim for ineffective assistance of counsel, the defendant must demonstrate: (1) that his counsel's performance was deficient; and (2) that the deficient performance was prejudicial." ***State v. Romero-Georgana***, 2014 WI 83, ¶39, 360 Wis. 2d 522, 849 N.W.2d 668.

¶23 Lamar claims that Judge Kremers, who presided over Gaines's hearing as well as Lamar's trial, instigated plea negotiations in Gaines's case that led to Gaines testifying against Lamar. Lamar included the transcript of Gaines's suppression motion hearing in his postconviction motion, indicating the statement of the trial court that he found objectionable:

> I will give you a date for projected plea. The only reason seems to me there may be some discussions relative to another case that may have relevance here.

¶24 Lamar's argument takes a statement made by the trial court which referred to Gaines's case as relevant to Lamar's case, and leaps to a conclusion that this is evidence that the trial court participated in Gaines's case to allow for Gaines to testify against Lamar. We do not make such a leap. Rather, we

construe the trial court's statement as simply noting the procedural posture of Gaines's case at that time, in response to Gaines's counsel's statement that the matter did not need to be set on for trial. This does not constitute judicial participation or an "instigation of plea negotiations" on the part of the trial court. *See* ***State v. Hunter***, 2005 WI App 5, ¶9, 278 Wis. 2d 419, 692 N.W.2d 256 (for purposes of case management, the trial court must "be free to inquire of the parties whether they have discussed a resolution or intend to do so, without fear that their comments or inquiries will later be deemed to have constituted 'judicial participation in plea negotiations.'") (citation omitted).

¶25 We will not find that trial counsel was ineffective "for failing or refusing to pursue feckless arguments." ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Therefore, Lamar's argument of ineffective assistance of counsel fails.

Violation of Right to an Impartial Tribunal

¶26 Lamar's final argument is that he was denied the right to an impartial tribunal, because the trial court was biased against Lamar "presumably because he chose to assert his right to a trial by jury." In addition to citing his claim regarding Gaines's plea negotiations as an example of judicial bias, Lamar also asserts that the trial court exhibited bias by "instigat[ing]" a "charging upgrade" from first-degree reckless injury to attempted first-degree intentional homicide. This claim refers to an exchange between the trial court and the State at a hearing prior to trial, where the court asked the State why, based on the facts, a charge of attempted first-degree homicide was not being pursued.

¶27 "There is a presumption that a judge acted fairly, impartially, and without prejudice." ***State v. Herrmann***, 2015 WI 84, ¶3, 364 Wis. 2d 336, 867

N.W.2d 772. However, that presumption of impartiality "is rebuttable." ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. There are two tests for determining judicial bias: (1) a subjective test, which is based on "the judge's own determination of whether he [or she] will be able to act impartially," ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994); and (2) the objective test, which "asks whether a reasonable person could question the judge's impartiality," ***Gudgeon***, 295 Wis. 2d 189, ¶21. In this case, Lamar claims that the trial court displayed objective bias.

¶28 There are two types of objective bias: actual bias and the appearance of bias. ***State v. Goodson***, 2009 WI App 107, ¶9, 320 Wis. 2d 166, 771 N.W.2d 385. Actual bias arises when "'there are objective facts demonstrating ... the trial judge in fact treated [the defendant] unfairly.'" ***Id.*** (citation omitted). In contrast, the appearance of bias "offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." ***Gudgeon***, 295 Wis. 2d 189, ¶24. The question of whether a trial court acted impartially is a matter of law that we review *de novo*. *See* ***Goodson***, 320 Wis. 2d 166, ¶7.

¶29 Lamar has not established either actual bias or the appearance of bias on the part of the trial court. First, with regard to Gaines's plea negotiations, we have already found that the trial court's statement was made for purposes of case management, with no indication whatsoever of bias or a lack of impartiality towards Lamar. Lamar also references an exchange between Lamar's trial counsel and the trial court, where the court had not immediately recognized Gaines's name as being the victim in Lamar's case, nor remembered that Gaines also had a case

pending with the court. However, Lamar does not explain how this demonstrates bias on the part of the trial court. Indeed, with the tremendous caseload facing the trial courts, it is simply not reasonable to expect a judge to remember all of the names associated with each case on his or her calendar, nor is it a requirement of a judge to do so.

¶30 Lamar's other claim of bias, regarding the change in the charge against him from first-degree reckless injury to attempted first-degree intentional homicide, was also argued by Sterling in his direct appeal. In our decision in ***Sterling***, we discussed the exchange to which Lamar is referring, where the trial court, upon noting the charge of first-degree reckless injury, asked the State, "[w]hy not attempted murder?" ***Sterling***, No. 2009AP815-CR., ¶7. We spelled out the rest of the exchange, where the trial court expanded on this question, noting that the facts of the case as set forth in the complaint were in conformity with a charge of attempted first-degree murder "if the State believes this happened the way Mr. Gaines ... said [it] did." ***Id.***

¶31 In our analysis, we stated that the trial court's use of "if" when it asked the State about the charges indicated that the trial court "had no actual opinion on Sterling's guilt." ***Id.***, ¶26. In fact, we found that "the trial court's use of the word 'if' demonstrated that it had not yet rendered an opinion on Sterling's guilt or innocence." ***Id.***, ¶27. We further noted that at the time of the hearing where this exchange occurred, there was only approximately one month before the trial was to commence; thus, the comment of the trial court could reasonably be construed as a reminder to the State of the limited time frame for making changes to the charges. ***Id.***, ¶18. We therefore concluded that "a reasonable person could determine that the trial court's comments were merely meant to ensure that justice proceeded fairly and efficiently." ***Id.***, ¶27. Accordingly, we found that Sterling

had not established that the trial court had exhibited either actual bias or the appearance of bias toward him. ***Id.***, ¶31.

¶32 Again, because Lamar and Sterling were tried together, Lamar's claim is based on the same exchange between the trial court and the State that we analyzed in ***Sterling***. Therefore, as we rejected Sterling's claim of bias by the trial court, we also reject Lamar's claim.

¶33 In sum, we find that Lamar failed to establish a sufficient reason for not raising his current claims in his direct appeal, and they are therefore procedurally barred. Furthermore, even if the claims were not barred, they would be unsuccessful. Therefore, we affirm.

By the Court.—Order affirmed.

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