COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2016AP1317 **Cir. Ct. Nos. 2011CF1752**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENYATTA SOBEASR CLINCY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Kenyatta Sobeasr Clincy, pro se, appeals from an order denying his petition for a writ of habeas corpus. Clincy argues that the

circuit court erred in denying his petition without an evidentiary hearing and that under WIS. STAT. § 782.09 (2015-16)[1] he is entitled to receive $1000 from each of the two circuit court judges who reviewed his petition. We disagree and affirm.

¶2 Clincy pled no contest to misdemeanor theft and first-degree reckless injury. Prior to sentencing, Clincy learned that trial counsel had only recently obtained and reviewed the search warrant that resulted in the seizure of inculpatory evidence. Clincy moved to withdraw his pleas on the ground that trial counsel's failure to investigate the circumstances of his search and seizure prior to the entry of Clincy's pleas constituted a fair and just reason for plea withdrawal. Successor trial counsel was appointed to represent Clincy for purposes of his presentence plea withdrawal motion. Following a hearing, the circuit court denied the motion and the matter proceeded to sentencing. Thereafter, appointed postconviction counsel unsuccessfully moved for plea withdrawal under both the presentence and postconviction standards.

¶3 With the assistance of appointed counsel, Clincy appealed. We affirmed the judgments of conviction and order denying postconviction relief. ***State v. Clincy***, No. 2014AP1153-CR, unpublished slip op. (WI App Mar. 12, 2015). We concluded that the circuit court properly exercised its discretion in denying the presentence plea withdrawal motion, explaining that "[t]he mere possibility, regardless of how remote, that an adequate inquiry into the suppression issue would have produced a viable challenge is simply too speculative to be an 'adequate reason'" for plea withdrawal. We also rejected

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

Clincy's claim that trial counsel rendered ineffective assistance by failing to advise that he had a valid suppression argument. Clincy's theory was that the police exhibited "flagrant disregard" for the search warrant by seizing irrelevant items that were beyond the warrant's scope. Explaining that the circumstances of Clincy's case did not provide grounds for the suppression of inculpatory evidence, we concluded that Clincy's ineffective assistance of trial counsel claim failed because it "hinge[d] on the [incorrect] proposition that there was in fact a meritorious challenge to incriminating evidence that his trial counsel failed to identify." The Wisconsin Supreme Court denied Clincy's petition for review.

¶4 In May 2016, Clincy filed a petition for a writ of habeas corpus in the circuit court which reraised his search and seizure issues and also alleged that postconviction counsel provided ineffective assistance by failing to raise claims including judicial bias and a speedy trial violation. Attached to Clincy's habeas petition was a letter he wrote to postconviction counsel during the course of his direct appeal suggesting several potential issues along with postconviction counsel's responsive letter analyzing those issues and advising which claims counsel was willing to pursue.[2] The letter advised Clincy:

> Briefly, you have three options: (1) continue to have me represent you and raise the issues I have concluded are arguably meritorious, waiving the others; (2) raise all of the issues you have identified with the help of another (privately retained) attorney if you find one who sees things differently than I do; or (3) raise all of the issues you wish to raise pro se.

Clincy chose the first option.

[2] Postconviction counsel's letter labeled and addressed the following potential issues: (1) search warrant issues, (2) speedy trial, (3) complaint deficiency, (4) judicial bias, (5) plea withdrawal, (6) factual basis for plea, (7) ***Brady*** violation, and (8) missing transcript.

¶5 The circuit court denied Clincy's habeas petition, concluding that the issues therein were previously raised and decided, lacked merit, or were not clearly stronger than those raised as part of his direct appeal. The circuit court determined that neither trial counsel nor postconviction counsel provided ineffective assistance. Clincy appeals.

¶6 Habeas Corpus is an extraordinary remedy that may not substitute for an appeal. ***State v. Pozo***, 2002 WI App 279, ¶8, 258 Wis. 2d 796, 654 N.W.2d 12. In postconviction proceedings, a writ of habeas corpus is not available when (1) the petitioner raises claims that he failed to assert in a prior appeal and he does not offer a proper reason for doing so or (2) the petitioner attempts to relitigate claims that were the subject of a previous appeal or postconviction motion. ***Id.***, ¶9. *See also* WIS. STAT. § 974.06(4); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 184-85, 517 N.W.2d 157 (1994).[3]

¶7 We first dispense with the search and seizure issues addressed in Clincy's prior appeal. Clincy continues to complain about trial counsel's failure to obtain and investigate the search warrant prior to Clincy's no-contest pleas, or to

[3] The availability of relief by motion under WIS. STAT. § 974.06 would appear to preclude Clincy's habeas petition. *See* ***State v. Pozo***, 2002 WI App 279, ¶8, 258 Wis. 2d 796, 654 N.W.2d 12 (habeas relief is not available when there exists another adequate remedy at law); § 974.06(8) ("A petition for writ of habeas corpus … in behalf of a person who is authorized to apply for relief by motion under this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced the person ….") . However, we may look beyond the label that a pro se prisoner applies to his or her litigation to determine if relief is warranted. *See* ***Bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). Our analysis of Clincy's substantive claims does not turn on whether they were brought as part of a habeas petition or a § 974.06 postconviction motion. Under either rubric, Clincy may not relitigate prior claims and is barred from raising new ones absent a "valid" or a "sufficient" reason excusing the failure to raise it earlier. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 184-85, 517 N.W.2d 157 (1994) (in context of § 974.06 postconviction motion); ***Pozo***, 258 Wis. 2d 796, ¶9 (in context of habeas petition).

move to suppress inculpatory evidence seized pursuant to the warrant. We previously concluded that trial counsel was not ineffective because there was no meritorious challenge to the search warrant. A matter already litigated may not be relitigated in a subsequent proceeding no matter how artfully the defendant may rephrase the issue.[4] ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). To the extent Clincy suggests for the first time that trial counsel was ineffective for failing to determine if cause existed for the issuance of a no-knock warrant, we disagree. As explained in postconviction counsel's letter, "although the [no-knock] box was checked, the warrant was not *executed* as a no-knock warrant." Rather, Clincy's girlfriend let police into the apartment. Because Clincy has not established that trial counsel was constitutionally ineffective, his ineffective assistance of postconviction counsel claim must fail. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶8 Turning to the claims not raised during the course of his direct appeal, namely, his judicial bias and speedy trial claims, Clincy acknowledges that absent a sufficient reason he is procedurally barred from raising issues in a habeas petition or a WIS. STAT. § 974.06 postconviction motion that could have been raised in a prior motion or on direct appeal. *See* WIS. STAT. § 974.06(4); ***Pozo***, 258 Wis. 2d 796, ¶9; ***Escalona-Naranjo***, 185 Wis. 2d at 184-85. His proffered sufficient reason is the ineffective assistance of postconviction counsel. As such, Clincy must set forth with particularity facts showing that postconviction

[4] We consider the following claims in Clincy's petition to be repackaged versions of the search and seizure issues decided in Clincy's prior appeal: the State's alleged ***Brady*** violation, the questioning of original trial counsel at the plea withdrawal hearing, trial counsel's failure to conduct an adequate investigation, and trial counsel's alleged misrepresentations about the search warrant papers.

counsel's performance was both deficient and prejudicial. ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). In addition, Clincy must demonstrate that the claims he wishes to bring are viable and are clearly stronger than the claims postconviction counsel actually brought. ***State v. Starks***, 2013 WI 69, ¶¶6, 57, 349 Wis. 2d 274, 833 N.W.2d 146. "[N]o hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157. Whether a pleading alleges a sufficient reason for failing to bring available claims earlier is a question of law subject to de novo review. ***State v. Romero-Georgana***, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668.

¶9 Clincy asserts that postconviction counsel improperly "identified and overlooked" a claim that he suffered a violation of his right to a speedy trial. Though the arguments in his habeas petition and appellate brief are difficult to follow, Clincy appears to suggest that postconviction counsel was ineffective because she did not challenge trial counsel's failure to object to various adjournments. We are not persuaded.

¶10 Postconviction counsel's letter to Clincy explained that she did not believe Clincy had a viable speedy trial argument because (1) he waived the issue by entering a no contest plea, (2) it was unlikely the delay in his case would be deemed unreasonable especially given that a significant portion could not be directly attributed to the State, and (3) proving prejudice would be difficult because Clincy was in custody on a separate case the entire time. Having been informed of counsel's reasoning and that she would not pursue a speedy trial

claim, Clincy chose to proceed with appointed counsel's representation. Nothing in Clincy's petition persuades us that postconviction counsel's analysis was misguided or infirm. *Cf.* ***State v. Felton***, 110 Wis. 2d 485, 512-13, 516-17, 329 N.W.2d 161 (1983) (counsel performed deficiently by failing to advise defendant about an available and established crucial defense where the omission was based on counsel's ignorance of the law and "was not a reasoned and considered choice"). Further, we agree with the circuit court's determination that this issue was not clearly stronger than those actually raised by postconviction counsel. *See* ***Starks***, 349 Wis. 2d 274, ¶57.

¶11 Similarly, Clincy has failed to demonstrate a sufficient reason for not previously raising his claims of judicial bias and collusion between the circuit court and his trial attorney(s). Clincy's argument is muddled to the point of being nearly incomprehensible. He seems to contend that the circuit court improperly (1) instructed Clincy's second trial attorney not to address the viability of a future suppression motion and (2) engaged in ex parte communication with that attorney. Although the Office of Lawyer Regulation (OLR) determined that there was no improper conduct, Clincy argues that postconviction counsel provided ineffective assistance by failing to make this argument as part of Clincy's direct appeal.

¶12 Clincy's appellant's brief fails to develop coherent arguments that apply relevant legal authority to the facts of record, and instead relies on conclusory assertions coupled with inapplicable legal principles. He does not explain the nature or materiality of any alleged "ex parte communications," or how the cited case law applies to the facts of his case. To the extent Clincy points to disagreements with the circuit court's decisions, unfavorable judicial rulings alone do not constitute judicial bias. *See* ***Liteky v. United States***, 510 U.S. 540, 555 (1994). Further, at no point does he explain why it was constitutionally

deficient for postconviction counsel to determine that a judicial bias claim lacked merit, especially in light of Clincy's failed OLR campaign, or how he would overcome the presumption that postconviction counsel's analysis or selection of issues was objectively unreasonable. Similarly, Clincy's assertion of prejudice—that postconviction counsel's raising of this issue would have led to reversal—is wholly conclusory.

¶13 Finally, Clincy asserts that he is entitled to $1000 from both the judge who rerouted his habeas petition from the civil to the criminal division, and from the judge who denied the petition after the transfer. Pursuant to WIS. STAT. § 782.06, a judge "to whom such petition [for a writ of habeas corpus] shall be properly presented shall grant the same without delay unless it shall appear from the petition or from the documents annexed that the party applying therefor is prohibited from prosecuting the same." Clincy relies on WIS. STAT. § 782.09 which provides: "Any judge who refuses to grant a writ of habeas corpus, when legally applied for, is liable to the prisoner in the sum of $1,000."

¶14 We conclude that Clincy is not entitled to $1000 from either circuit court judge. As mentioned earlier, given the availability of a WIS. STAT. § 974.06 postconviction motion, we are not persuaded that habeas relief was available to Clincy at the time he filed his petition. *See* ***Pozo***, 258 Wis. 2d 796, ¶¶8-9. Regardless, as set forth in this decision, Clincy was not entitled to habeas relief because his petition raised claims that were or could have been brought previously and did not set forth a valid or sufficient reason for failing to do so. ***Id.*** Therefore, he is not entitled to monetary relief under WIS. STAT. § 782.09.

¶15 Clincy asserts that because his petition meets the form requirements described in WIS. STAT. § 782.04, his petition was "legally applied for" and he is

entitled to monetary relief. This defies common sense. If we accept Clincy's argument, every prisoner who files a habeas petition in proper form would be entitled to $1000 upon denial of the petition regardless of the petition's merits.

By the Court.—Order affirmed.

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