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DISTRICT III

May 5, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2018AP859

State of Wisconsin v. Dennis L. Mitchell (L. C. No. 2014CF507)

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

Summary disposition orders 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).

Dennis Mitchell, pro se, appeals an order denying his WIS. STAT. § 974.06 (2017-18)¹ motion for postconviction relief. Mitchell argues he is entitled to a new trial on various grounds. Based upon our review of the briefs and records, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We conclude that Mitchell's

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

claims are procedurally barred under § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and on this basis we summarily affirm the order.

In January 2015, a jury found Mitchell guilty of one count each of attempted kidnapping and soliciting prostitution in two separate incidents that occurred in May and July of 2014. The circuit court sentenced Mitchell to ten years' initial confinement and ten years' extended supervision for attempted kidnapping, and a consecutive ninety-day jail term for soliciting prostitution. The court also ordered Mitchell to register as a lifetime sex offender because the attempted kidnapping was sexually motivated.

Mitchell filed a postconviction motion alleging his trial counsel was ineffective by failing to object to the introduction of certain photographs into evidence at trial. Mitchell also renewed a challenge to the circuit court's denial of his motion to sever the two charges for trial, and he further argued the sentencing court erroneously exercised its discretion by ordering Mitchell to register as a sex offender. After a *Machner*² hearing, the court denied Mitchell's postconviction motion. On direct appeal, Mitchell did not renew his postconviction challenge to his trial counsel's effectiveness. He argued only that the court erred when it denied his motion to sever and when it ordered him to register as a sex offender. This court affirmed the judgment and order. *State v. Mitchell*, No. 2016AP816-CR, unpublished slip op. (WI App May 2, 2017).

In November 2017, Mitchell filed the underlying WIS. STAT. § 974.06 postconviction motion, alleging the circuit court erred by excluding exculpatory DNA evidence consisting of stray hairs found inside a trash bag that Mitchell tried to put over the head of one of his victims.

² *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1997).

Mitchell also claimed the State failed to disclose the exculpatory DNA evidence; the prosecutor engaged in misconduct; and both his trial and postconviction counsel were ineffective based on their purported knowledge that “DNA evidence” excluded Mitchell “from being the attacker.” Mitchell also asserted his attorneys made other, unspecified errors in representing him.

The circuit court denied the motion without a hearing, concluding the alleged exculpatory DNA evidence was not withheld by the State. The court further determined that even if the DNA evidence had been admitted at trial, the other evidence of Mitchell’s guilt was so overwhelming that the DNA evidence would not have changed the outcome at trial. The court also held that Mitchell had failed to sufficiently allege that his trial and postconviction attorneys were ineffective because the record conclusively showed he could not prove prejudice. This appeal follows.

As an initial matter, the State asks this court to summarily affirm the order based on Mitchell’s failure to comply with the rules of appellate procedure governing the form of an appellant’s brief, WIS. STAT. RULE 809.19(1), including inadequate citations to the record, a deficient appendix, and a failure to discuss the procedural status of the case or the disposition in the circuit court. We are not persuaded that summary affirmance on this basis alone is warranted, but we admonish Mitchell that future violations of our appellate rules may result in sanctions, including the striking of noncompliant briefs. *See* WIS. STAT. RULE 809.83(2). We will address Mitchell’s arguments as best we can discern them, but we have no duty to address undeveloped arguments or to develop arguments on a party’s behalf. *See Industrial Risk Insurers v. American Eng’g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

When, as here, a WIS. STAT. § 974.06 motion follows a prior postconviction motion, a defendant must show a “sufficient reason” for failing to previously raise the issues in the current motion. See *Escalona-Naranjo*, 185 Wis. 2d at 184-85. We determine the sufficiency of a defendant’s reason for failing to previously raise the issue by examining the “four corners” of the subject postconviction motion. *State v. Allen*, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. Ineffective assistance of postconviction counsel may, in some circumstances, be a “sufficient reason” as to why an issue was not raised earlier. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996).

A claim of ineffective assistance of counsel must establish that counsel’s performance was deficient and that the defendant was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When the relief sought is a new trial based upon an allegation that postconviction counsel failed to raise material issues before the circuit court, a defendant must establish that the issues he or she believes counsel should have raised were clearly stronger than the claims counsel pursued on direct review. *State v. Romero-Georgana*, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668. In doing so, the defendant must allege “sufficient material facts—e.g., who, what, where, when, why, and how—that, if true, would entitle him to the relief he seeks.” *Id.*, ¶58. As the *Romero-Georgana* court recognized, the “clearly stronger” pleading standard applies when evaluating the deficiency prong of the *Strickland* test. *Id.*, ¶45. The prejudice inquiry asks whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 566 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

A defendant may not rely on conclusory allegations in his or her postconviction motion, hoping to supplement them at an evidentiary hearing. See *State v. Bentley*, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). Further, where a defendant alleges postconviction counsel was ineffective by failing to pursue a claim of ineffective assistance of trial counsel, the defendant must establish that his or her trial counsel was, in fact, ineffective. See *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Whether a WIS. STAT. § 974.06 motion alleges a sufficient reason for failing to raise an issue earlier is a question of law that we review independently. *State v. Kletzien*, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

Here, the issues raised in Mitchell’s WIS. STAT. § 974.06 motion could have been raised on direct review. Therefore, to circumvent *Escalona-Naranjo*’s procedural bar, Mitchell was required to establish the ineffectiveness of his postconviction counsel in failing to raise the issues earlier. Mitchell’s motion, however, fails to allege sufficient material facts regarding postconviction counsel’s performance, and it presents only conclusory allegations of trial court error, prosecutorial misconduct, and ineffective assistance of his trial counsel. An evidentiary hearing is not a “fishing expedition,” and the circuit court and the State “are entitled to know what is expected to happen at the hearing, and what the defendant intends to prove.” *State v. Balliette*, 2011 WI 79, ¶68, 336 Wis. 2d 358, 805 N.W.2d 334.

Mitchell’s various claims are based on his conclusory allegation that the DNA evidence, had it been presented to the jury, would have resulted in acquittal. His motion, however, fails to allege the “who, what, where, when, why, and how” that, if true, would entitle him to the relief sought. See *Romero-Georgana*, 360 Wis. 2d 522, ¶58. Because Mitchell cannot establish that the arguments raised in his WIS. STAT. § 974.06 motion were clearly stronger than the claims postconviction counsel raised on direct review, he has failed to show a sufficient reason to

circumvent the procedural bar. Therefore, the circuit court properly denied the motion without a hearing. *See Allen*, 274 Wis. 2d 568, ¶9 (a circuit court may deny a postconviction motion without a hearing if the motion presents only conclusory allegations or if the record otherwise conclusively demonstrates the defendant is not entitled to relief).

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals