COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2141

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SAMUEL JONES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN E. McCORMICK, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, J.J.

¶1 PER CURIAM. Samuel Jones appeals *pro se* from the trial court's order denying his second motion for postconviction relief pursuant to WIS. STAT.

§ 974.06 (1999-2000).[1] Jones claims that his lawyers—both trial and postconviction—rendered ineffective assistance by not raising the following issues: 1) alleged jury misconduct; 2) that the first jury trial in this matter ended in a mistrial because of judicial overreaching; 3) that his retrial was barred by double jeopardy; and 4) that the prosecutor's decision to amend the information constituted prosecutorial vindictiveness. He also claims that postconviction counsel was ineffective for not alleging that he was denied the right to present his theory of defense because trial counsel did not call an alibi witness and the trial court restricted his cross-examination of a witness. We affirm.

I. BACKGROUND

¶2 Jones was convicted by a jury of attempted first-degree intentional homicide, while armed, as a party to a crime. *See* WIS. STAT. §§ 940.01(1), 939.63, 939.32 and 939.05 (1995-96). Jones's conviction is the result of his second jury trial; the first trial ended when the trial court granted Jones's request for a mistrial. Following his second trial, Jones filed a motion for postconviction relief, pursuant to WIS. STAT. § 974.06, seeking either a new trial or dismissal. The trial court denied the motion. Jones appealed, claiming: (1) the evidence was not sufficient to support his conviction of attempted first-degree intentional homicide while armed; (2) he was deprived of his right to a speedy trial; and (3) the trial court erred in not holding an evidentiary hearing on a claim of jury misconduct. We rejected these claims and affirmed the trial court's findings. *See* ***State v. Jones***, No. 97-2299, unpublished slip op. (Wis. Ct. App. Dec. 15, 1998). Jones, acting *pro se*, subsequently filed a second postconviction motion renewing his claim of jury misconduct, and raising additional claims of ineffective

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

assistance of trial counsel. The trial court denied this motion without a hearing. He now appeals from the denial of the second postconviction motion.

II. DISCUSSION

¶3 A WIS. STAT. § 974.06 motion cannot be used as a substitute for direct appeal and is limited to constitutional and jurisdictional questions. ***State v. Nicholson***, 148 Wis. 2d 353, 360, 435 N.W.2d 298, 301 (Ct. App. 1988). Further, under § 974.06(4), a convicted defendant who has pursued a direct appeal cannot obtain collateral review of a constitutional or jurisdictional claim that could have been raised as part of the direct appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 186, 517 N.W.2d 157, 164 (1994); WIS. STAT. § 974.06(4). The only exception is where the defendant demonstrates a "sufficient" reason for failing to raise it or for not adequately raising it on direct appeal. ***Escalona-Naranjo***, 185 Wis. 2d at 186, 517 N.W.2d at 164; WIS. STAT. § 974.06(4).

A. Alleged Jury Misconduct.

¶4 At sentencing, Jones's trial lawyer informed the trial court that, although he saw what he perceived to be an intoxicated juror, he was not able to bring it to court's attention before the verdict was reached. Trial counsel also informed the court that another juror told counsel that "jury members had to explain things" to the "intoxicated" juror. Jones alleges that he was prejudiced by his trial lawyer, who, he claims, had "sufficient reasons" to timely investigate this incident, but instead waited until sentencing to say something. Jones further

claims that postconviction counsel should have raised trial counsel's failure to challenge the verdict in a timely and adequate manner.[2]

¶5 To prevail on a claim of ineffective assistance of counsel, Jones must show that counsel's performance was deficient and that, as a result, he suffered prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Jones may avoid the procedural bar of WIS. STAT. § 974.06(4), and ***State v. Escalona-Naranjo*** on the ground that postconviction counsel was ineffective for failing to present an issue Jones now pursues. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681–682, 556 N.W.2d 136, 139 (Ct. App. 1996). Postconviction counsel, however, *did* raise the jury-misconduct issue—as noted, Jones raised the issue of whether trial counsel was ineffective for not timely alerting the trial court to alleged jury misconduct in his first postconviction motion and in his first appeal to this court. This court rejected his arguments, holding that the information provided by trial counsel was "ambiguous and speculative," and that WIS. STAT. § 906.06(2) precluded the use of "juror testimony or juror statements in support of his argument." ***Jones***, No. 97-2299, unpublished slip op. at 5–6. Consequently,

[2] Jones's postconviction counsel was also appellate counsel in this matter. Jones claims that he received ineffective assistance of "appellate counsel." Wisconsin law distinguishes between postconviction and appellate counsel when addressing ineffective-assistance-of-counsel claims. A claim of ineffective assistance of appellate counsel is generally raised by filing a habeas petition with the appellate court that heard the appeal, *see* ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992), while a claim of ineffective assistance of postconviction counsel is raised either by filing a habeas petition or by WIS. STAT. § 974.06, s*ee* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136, 139 (Ct. App. 1996). Accordingly, because Jones has pursued the latter option, we construe his claim as one for ineffective assistance of postconviction counsel.

Escalona-Naranjo and WIS. STAT. § 974.06(4) preclude further review of this issue.[3]

B. Judicial Overreaching & Double Jeopardy.

¶6 Jones next claims that the trial court committed judicial overreaching and "effectively" denied him due process by violating his right to be free from double jeopardy. During Jones's first trial, while the jury was deliberating, the court answered a question from the jury without either the prosecutor or the defendant present. In addition, the trial court did not allow the jury to view some reports and transcripts. Jones contends that the trial court's actions, as well as its instruction of the first jury, were motivated by bad faith and were intended to provoke Jones's mistrial motion, thus affording the State "a more favorable opportunity to convict the defendant." Jones's claim is without merit.

¶7 Generally, when a defendant successfully obtains a mistrial, the double jeopardy clause does not bar retrial because "the defendant is exercising control over the mistrial decision: since a mistrial ordinarily implicitly means a new trial, the defendant is choosing to be tried by another tribunal."[4] ***State v. Hill***,

[3] In a related argument, Jones claims that trial counsel should have used the testimony of court personnel to prove the juror was intoxicated. This argument, however, is based on mere conjecture as to what that testimony would be; he has not submitted an offer of proof as to which witnesses should have been called and what they would have testified to. *See* ***State v. O'Brien***, 214 Wis. 2d 328, 350, 572 N.W.2d 870, 880 (Ct. App. 1997) (conclusory allegations regarding the potential testimony of proposed witness, "without more, are insufficient to establish ineffective assistance of counsel"); *see also* ***State v. Bentley***, 201 Wis. 2d 303, 309–310, 548 N.W.2d 50, 53 (1996) (conclusory allegations are insufficient to entitle a defendant to a hearing on a claim of ineffective assistance of counsel).

[4] The Double Jeopardy Clause of the United States Constitution provides, in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life and limb." U.S. CONST. amend. V. Similarly, article I, § 8 of the Wisconsin Constitution provides: "[N]o person for the same offense may be put twice in jeopardy of punishment."

2000 WI App 259, ¶11, 240 Wis. 2d 1, 8–9, 622 N.W.2d 34, 38. Double jeopardy bars retrial, however, if prosecutorial or judicial "overreaching" prompts the defendant's mistrial request. ***State v. Harrell***, 85 Wis. 2d 331, 335, 270 N.W.2d 428, 431 (Ct. App. 1978). The Wisconsin Supreme Court has defined "overreaching" as "the culpable intent to deprive the defendant of a complete trial in the first tribunal for the purpose of avoiding an acquittal and to gain the opportunity to have a second and better opportunity to convict or for the malicious purpose of harassment in or by the second trial." ***State v. Copening***, 100 Wis. 2d 700, 724, 303 N.W.2d 821, 833 (1981). The record does not contain any evidence of judicial overreaching that would bar reprosecution. Indeed, the record reflects that the trial court allowed lengthy deliberations and encouraged a verdict from the first jury.

C. Vindictive Prosecution.

¶8 Jones also claims that his lawyers were ineffective for not arguing that the prosecutor's decision to amend the information—on the day of his first trial—from first-degree recklessly endangering safety to attempted first-degree intentional homicide, constituted prosecutorial vindictiveness. Jones alleges that "the prosecutor knew ahead of time that he was going to delay the trials, increase the severity of the charge, and buy more time to pressure the defendant into foregoing a trial."

¶9 To establish a claim of prosecutorial vindictiveness, a defendant must show either a "realistic likelihood of vindictiveness," therefore raising a rebuttable presumption of vindictiveness, or actual vindictiveness. ***State v. Johnson***, 2000 WI 12, ¶17, 232 Wis. 2d 679, 691, 605 N.W.2d 846, 850. To establish actual vindictiveness, "'there must be objective evidence that a

prosecutor acted in order to punish the defendant for standing on his legal rights.'" ***Id.*** at ¶47, 232 Wis. 2d at 704, 605 N.W.2d at 857 (quoted source omitted). "The legal principles surrounding prosecutorial vindictiveness claims present questions of law that we review *de novo*." ***Id.*** at ¶18, 232 Wis. 2d at 691, 605 N.W.2d at 850. The trial court's finding of fact regarding whether a defendant established actual vindictiveness is reviewed under the clearly erroneous standard. ***Id.*** at ¶18, 232 Wis. 2d at 691, 605 N.W.2d at 850.

¶10 Jones has produced no evidence that the prosecutor acted vindictively when he amended the charge prior to the first trial. Presumptions of vindictiveness have not been extended to the pretrial context. ***Id.*** at ¶32, 232 Wis. 2d at 696, 605 N.W.2d at 853 (relying on ***United States v. Goodwin***, 457 U.S. 368 (1982)). "[T]he fact that the prosecutor filed the additional charges during plea negotiations does not create a realistic likelihood of vindictiveness." ***Id.*** at ¶43, 232 Wis. 2d at 703, 605 N.W.2d at 703. Moreover, Jones's claim—that the prosecutor wanted to buy time to pressure him into a plea—is not supported by any objective evidence that the prosecutor amended the information to punish him for exercising his right to trial. *See* ***Goodwin***, 457 U.S. at 384 ("[A] mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule.").

D. Denied Right to Present Theory of Defense.

¶11 Finally, Jones claims that postconviction counsel was ineffective for not alleging that he was denied the right to present his theory of defense because trial counsel did not subpoena an alibi witness and the trial court restricted his

cross-examination of a witness.[5] Although the failure to argue a particular theory of defense may serve as the basis for deficient and prejudicial performance, *see* ***State v. Ambuehl***, 145 Wis. 2d 343, 425 N.W.2d 649 (Ct. App. 1988), Jones did not raise these issues on direct appeal or in his second postconviction motion. Indeed, Jones acknowledges in his main brief that he "failed to raise this issue in the trial court." Jones has not offered a sufficient reason for this failure. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 186, 517 N.W.2d at 164 (defendant must demonstrate "sufficient" reason for failing to raise issue on direct appeal). Thus, we conclude that this issue is barred by ***Escalona-Naranjo*** and WIS. STAT. § 974.06(4).[6]

By the Court.—Order affirmed.

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

[5] Jones's trial lawyer did not timely subpoena the witness. The trial court granted the State's motion in limine, restricting Jones's ability to impeach the victim-witness with references to the victim being a "gun user." The trial court found this evidence irrelevant.

[6] Although Jones admits that he failed to raise this issue, he nevertheless asks that we "exercise [our] inherent powers to entertain the argument." We decline to do so.