COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP887 **Cir. Ct. No. 2003CF6686**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHOMAS T. WINSTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Shomas T. Winston appeals *pro se* from an order denying his claims for postconviction relief brought pursuant to WIS. STAT. § 974.06 (2007-08).[1] We affirm.

BACKGROUND

¶2 The police arrested Winston after Corey T. Dace was shot and killed. Winston gave a custodial confession in which he admitted that he shot Dace after robbing him in the parking lot of a check cashing store. The State charged Winston with first-degree intentional homicide and armed robbery with use of force. Winston filed a pretrial motion to suppress his confession, but the circuit court denied the motion after a ***Miranda-Goodchild*** hearing.[2] The case proceeded to trial, and a jury found Winston guilty. The circuit court imposed a life sentence for the homicide with eligibility for extended supervision after forty years, and the circuit court imposed a concurrent forty-year term of imprisonment for the armed robbery.

¶3 With the assistance of appointed counsel, Winston challenged his conviction and sentence in a postconviction motion and a direct appeal. He alleged that his trial counsel performed ineffectively by failing to: (1) subpoena an alibi witness; (2) inform Winston about the progress of the case; (3) object when an African-American woman was struck from the jury for cause; and (4) remove from the jury a person Winston knew as a substitute teacher at his high

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

school. ***State v. Winston***, No. 2005AP923, unpublished slip op., ¶¶6, 12 (WI App June 27, 2006) (***Winston I***). Winston also challenged the sufficiency of the evidence and the circuit court's exercise of sentencing discretion. ***Id.***, ¶1. We affirmed.

¶4 Winston next filed a *pro se* petition seeking a writ of *habeas corpus* on the ground that his postconviction and appellate attorney was ineffective in several ways. We addressed the merits of Winston's contention that his appellate counsel was ineffective, and we denied the claim. *See* ***State ex rel. Winston v. Pollard***, No. 2008AP332-W, unpublished slip op. at 3 (WI App Mar. 5, 2008) (***Winston II***). We denied on procedural grounds Winston's claims that his postconviction attorney performed ineffectively because such claims must be launched in the circuit court, not the court of appeals. *See* ***Winston II***, No. 2008AP332-W, unpublished slip op. at 4-5.

¶5 Winston returned to circuit court and filed the motion underlying this appeal. He alleged that his trial counsel was ineffective in three ways during the pretrial and trial proceedings. Winston asserted that his postconviction counsel was ineffective in turn by failing to raise two of the three potential challenges to trial counsel's performance during the direct appeal process and by inadequately litigating the third claim. The circuit court denied Winston's motion in its entirety, and this appeal followed.

DISCUSSION

¶6 Winston may not raise his two new claims of ineffective assistance of trial counsel because these claims are procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Pursuant to ***Escalona-Naranjo***, a defendant may not raise claims in a motion filed under WIS. STAT.

§ 974.06, that the defendant could have raised in an earlier postconviction motion or direct appeal unless the defendant provides a sufficient reason for not raising the claims previously. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. Winston asserts that he has a sufficient reason for his earlier failure to raise his new claims, namely, the ineffective assistance of postconviction counsel. *See* ***State ex. rel Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (ineffective assistance of postconviction counsel may constitute sufficient reason for failing to raise claims in first postconviction motion). Winston, however, does not demonstrate that his postconviction counsel performed ineffectively.

¶7 We assess claims of ineffective assistance of counsel applying the two-element test in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). *See* ***State ex rel. Schmelzer v. Murphy***, 201 Wis. 2d 246, 253, 548 N.W.2d 45 (1996). The test requires a defendant to show both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Id.*** A defendant shoulders a difficult task when challenging postconviction counsel's performance based on failure to raise particular claims. *See* ***Smith v. Robbins***, 528 U.S. 259, 288 (2000). Postconviction counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among [the available claims] in order to maximize the likelihood of success on appeal." ***Id.*** (parentheses in original, bracketed text added). Therefore, a defendant generally must demonstrate that an ignored issue is "clearly stronger" than the issues that were raised during the direct appeal process in order to show that postconviction counsel performed deficiently by not raising the claim. *See* ***id.***

¶8 We first examine Winston's assertion that his postconviction counsel was ineffective by failing to challenge trial counsel's performance during the

Miranda-Goodchild hearing. "[A]t a ***Miranda-Goodchild*** hearing the issues to be decided are the voluntariness of the [custodial] statements, the proper giving of the ***Miranda*** warnings and the intelligent waiver of the ***Miranda*** rights." ***Norwood v. State***, 74 Wis. 2d 343, 362, 246 N.W.2d 801 (1976). Trial counsel litigated these issues, but the circuit court found that Winston "freely, understand[ing]ly, knowingly, and intelligently waived [his Constitutional] rights" and that he voluntarily gave a custodial statement. In Winston's view, his postconviction counsel should have faulted trial counsel for not offering as evidence at the hearing Winston's high school records showing his low level of reading comprehension and his poor academic performance during the several years that he spent in ninth grade. Winston believes that his records would have persuaded the circuit court that he was not sufficiently intelligent to understand the ***Miranda*** warnings or to confess voluntarily.

¶9 Winston's proposed challenge to trial counsel's performance at the ***Miranda-Goodchild*** hearing lacks merit. Winston testified at the hearing and he acknowledged that, although he was seventeen years old, he had not yet completed the ninth grade. He also conceded that his school attendance "wasn't all that good." The circuit court accepted Winston's admissions. The high school records Winston submitted to support his current claim do not contain any significant additional information. The records show low grades, not low intelligence. Winston's unsatisfactory academic performance may have stemmed from any number of causes, including his truancy. Thus, the information in Winston's high school records would have had little relevance and would not have added to the testimony offered during the suppression hearing. Because Winston's proposed challenge to trial counsel's performance at the suppression hearing is meritless, the claim is not stronger than the issues pursued by Winston's postconviction counsel.

¶10 Winston next complains that his trial counsel conducted an ineffective cross-examination of a citizen witness at trial and that his postconviction counsel performed ineffectively by not pursuing the issue. This claim, too, is meritless.

¶11 Ruby Adams testified that she saw a "boy" in a hooded coat robbing a man outside of the check cashing store on the day that Dace was killed. During cross-examination, trial counsel asked Adams to describe the robber's skin color and she stated: "I think it was dark skin if I'm not mistaken." She testified that she could not see the robber's face because it was obscured by his hood.

¶12 Winston believes that his trial counsel should have asked Adams whether she viewed Winston as "a black male with dark skin complexion" (emphasis in original). This is a complaint that trial counsel did not ask Adams if Winston's skin looked like the robber's, but Winston fails to show how Adams would have answered the question.[3] "A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed." ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999). Winston also faults his trial counsel for not asking Adams "if she recognised [sic] the [d]efendant as being the assailant." Adams's testimony established that she could not identify anyone as the robber, so cross-examining Adams about whether she recognized Winston as the robber would not have advanced Winston's defense. In sum, Winston does not show any

[3] Winston submitted a booking photograph with his postconviction motion, and he argues that the photograph shows that he is "a black male" whose skin is not "dark." The booking photograph is completely irrelevant. It does not disclose Adams's subjective opinion about the darkness of Winston's skin.

shortcomings in trial counsel's cross-examination of Adams. A motion for postconviction relief grounded on this issue would have been frivolous.

¶13 Winston failed to show that his postconviction counsel ignored issues that were clearly stronger than those pursued on direct appeal. Because he has not demonstrated that his postconviction counsel performed ineffectively in selecting the issues to raise during the direct appeal process, he has not established a sufficient reason for raising new claims that were not raised previously. Therefore, his new claims are barred. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

¶14 Winston bases his final claim on an allegation that his trial counsel was ineffective by allowing a person who formerly taught at his high school to sit on the jury. Postconviction counsel raised this issue in ***Winston I***, complaining that "a former teacher of Winston's with whom Winston claimed he did not have a good relationship, remained on the jury." ***Winston I***, No. 2005AP923-CR, unpublished slip op. ¶4. We rejected Winston's claim, holding that "Winston was entitled to a fair and impartial jury, and he received such a jury. Thus, his contention that his attorney was ineffective for failing to strike this juror was properly denied by the trial court." ***Id.***, ¶12. Winston now argues that postconviction counsel was ineffective by failing to secure documentary evidence "that would have proven one of defendant's jurors knew defendant personally." This claim is precluded because Winston previously litigated the determinative issue and we decided it against him in ***Winston I***.

¶15 When a defendant alleges that postconviction counsel was ineffective in challenging trial counsel's effectiveness, the defendant cannot prevail without establishing that trial counsel was, in fact, ineffective. *See* ***State v.***

Ziebart, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. In ***Winston I***, we determined that Winston's trial counsel was not ineffective by permitting a teacher from Winston's high school to remain on the jury. ***Winston I***, No. 2005AP923-CR, unpublished slip op. ¶12. Our conclusion is the law of this case and cannot be collaterally attacked in a subsequent postconviction motion. *See* ***State v. Casteel***, 2001 WI App 188, ¶15, 247 Wis. 2d 451, 634 N.W.2d 338 ("A decision on a legal issue by an appellate court establishes the law of the case that must be followed in all subsequent proceedings in the case in both the circuit and appellate courts."). Because ***Winston I*** establishes that trial counsel performed effectively in permitting the teacher to remain on the jury, Winston cannot claim that postconviction counsel was ineffective in mounting a challenge to this aspect of trial counsel's performance.[4] *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

[4] Were we to address the claim that Winston's postconviction counsel was ineffective in challenging trial counsel's performance during jury selection, we would deny the claim as meritless. Winston believes that his postconviction counsel should have offered documentary evidence to prove that a juror knew Winston but he does not show that such evidence exists. Rather, he argues that "there may be documentation" in his school's records reflecting interaction between Winston and the juror. This assertion does not aid him. "A defendant must base a challenge to counsel's representation on more than speculation." ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. Moreover, Winston fails to show that the outcome of the postconviction proceedings would have been different had his postconviction counsel documented that a juror knew Winston or formerly taught at his high school. *See* ***id.*** (defendant who alleges that counsel failed to investigate must show how the investigation would have altered the outcome of the case). This court acknowledged in ***Winston I*** that the jury contained one of Winston's former high school teachers and that Winston claimed he had a poor relationship with this teacher. ***Winston I***, No. 2005AP923-CR, unpublished slip op. ¶4. Accordingly, Winston suffered no prejudice from any failure of postconviction counsel to document the juror's employment at Winston's high school. *See* ***State ex rel. Schmelzer v. Murphy***, 201 Wis. 2d 246, 253, 548 N.W.2d 45 (1996) (defendant alleging ineffective assistance of counsel must demonstrate that any claimed deficiency was prejudicial).

By the Court.—Order affirmed.

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