COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2169 **Cir. Ct. No. 2005CF1323**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OUATI K. ALI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman, J., and Charles P. Dykman, Reserve Judge.

¶1 SHERMAN, J. Ouati K. Ali appeals an order denying his motion for postconviction DNA testing, pursuant to WIS. STAT. § 974.07 (2009-10),[1] and his motion for postconviction relief, pursuant to WIS. STAT. § 974.06, based upon ineffective assistance of trial and appellate counsel. We affirm.

BACKGROUND

¶2 In 2006, Ali was convicted following a jury trial of first-degree sexual assault of a child under the age of thirteen. Ali appealed his conviction, claiming the circuit court erroneously admitted other acts evidence and erred by denying his motion for a continuance. This court summarily affirmed the judgment of conviction.

¶3 Thereafter, Ali filed a pro se motion for postconviction DNA testing, at his own expense, pursuant to WIS. STAT. § 974.07. In his motion, Ali asked the court to allow Orchid Cellmark Laboratory to test "previously tested samples within the State's custody and/[] or control." Ali alleged that the DNA samples had been previously tested using the Promega PowerPlex 16 amplification kit and that he had been informed that Orchid Cellmark Laboratory would conduct additional testing known as the "Mini-STR," which, according to Ali, "is the newest form of testing since 2008." At the hearing on his motion, Ali argued that the prior DNA testing resulted in a determination that the probability that a randomly selected unrelated individual could be a contributor to the DNA mixture he sought to retest was one in 2000 individuals and, consequently, "there should have been a more substantiated test done on that particular stain."

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 The circuit court denied Ali's motion in an oral ruling. The court ruled that Ali failed to meet the statutory requirements that new testing would provide a reasonable likelihood of more accurate and probative results. *See* WIS. STAT. § 974.07(2)(c). The court also ruled that Ali failed to show that it was reasonably probable that he would not have been prosecuted or convicted had the new DNA evidence been previously available. *See* WIS. STAT. § 974.07(7)(a)2.

¶5 In August 2011, Ali filed a pro se postconviction motion pursuant to WIS. STAT. 974.06, alleging ineffective assistance of trial and appellate counsel. Ali argued that his trial counsel was ineffective for failing to request that Judge Robert DeChambeau, who presided over his trial, recuse himself because the prosecution's case "relied in large part" on a taped interview at Safe Harbor Child Advocacy Office (Safe Harbor), wherein the victim "la[id] out the details of her sexual conduct with [Ali]." Ali stated that the interview was prepared by Judge DeChambeau's wife, assistant district attorney Gretchen Hayward. Ali argued that appellate counsel was ineffective for failing to raise "arguments of judicial misconduct," and in failing to challenge the sufficiency of the evidence in a postconviction motion or on direct appeal.

¶6 In his postconviction motion, Ali also argued that the circuit court failed to "give meaningful consideration to his petition for postconviction DNA testing." The court treated this argument as a motion for reconsideration of its earlier ruling denying Ali's motion for DNA testing.

¶7 The circuit court denied Ali's motion for postconviction relief without conducting a ***Machner***[2] hearing. The court ruled that the issues raised by

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Ali in his postconviction motion could have been raised in his prior appeal and because Ali "proffer[ed] no 'sufficient reason' as to why [those] issues were not contained in his first appeal," those issues were procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The court also denied Ali's motion for reconsideration of the court's denial of his motion for postconviction DNA testing. The court ruled that Ali failed to establish the requirements of WIS. STAT. § 974.07(2)(c), which requires, among other things, a showing that:

> The evidence has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

Ali appeals the order denying his motion for reconsideration of the denial of his motion for postconviction DNA testing and denying his motion for postconviction relief.

DISCUSSION

A. POSTCONVICTION DNA TESTING

¶8 Ali raises multiple challenges to the circuit court's denial of his WIS. STAT. § 974.07 motion for postconviction DNA testing of a biological sample obtained from the crime scene.

¶9 First, Ali contends that he was improperly denied counsel to assist him with his WIS. STAT. § 974.07 motion.

¶10 WISCONSIN STAT. § 974.07(11) provides that when a movant under § 974.07(2) is unrepresented by counsel and "claims or appears to be indigent," the court "shall … refer the movant to the state public defender for determination of indigency and appointment of counsel under [WIS. STAT.] § 977.05(4)(j)." Section 977.05(4)(j) provides that upon referral by a court:

> The state public defender shall … prosecute a … postconviction or postcommitment remedy on behalf of the person before any court, if the state public defender determines the case should be pursued.

The public defender's determination under § 977.05(4)(j) is discretionary. ***State v. Alston***, 92 Wis. 2d 893, 896, 288 N.W.2d 866 (Ct. App. 1979). "[D]iscretion contemplates a process of reasoning to be explicated upon a rational and explainable basis." ***Id.*** at 896-97. The public defender must provide an explanation of its decision not to provide, but that explanation need not be extensive—it need only contain sufficient detail to demonstrate a proper exercise of discretion. *See* ***id.*** at 899.

¶11 The public defender explained that upon review of Ali's motion for postconviction DNA testing and the circuit court record, including the transcripts of the motion hearings, the jury trial, and the sentencing hearing, and after having spoken with Ali's previously assigned appellate counsel, he could not make a determination under WIS. STAT. 977.05(4)(j) that Ali's motion for postconviction DNA testing should be pursued and therefore declined to appoint counsel to represent Ali for the purpose of pursuing that motion.

¶12 Ali does not claim that the public defender erroneously exercised its discretion in declining to appoint him counsel for the purpose of pursuing his motion for postconviction DNA testing. He claims instead that the denial of

appointed counsel denied him his constitutional right to due process. Wisconsin, however, does not recognize a constitutional right to an attorney in state postconviction proceedings beyond a defendant's first appeal of right. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 648-51, 579 N.W.2d 698 (1998). "'[T]he right to appointed counsel extends to the first appeal of right, and no further.'" ***Id.*** at 648 (quoting ***Pennsylvania v. Finley***, 481 U.S. 551, 555 (1987). Thus, Ali did not have the constitutional right to appointed counsel for purposes of his WIS. STAT. § 974.06 postconviction motion and the refusal to appoint him counsel was not a violation of his due process rights

¶13 Ali next contends that his motion was improperly denied because he had difficulty hearing what was being said during the telephonic hearing on the motion. Ali argues that he "informed the court multiple times that he was having difficulty hearing" and that "he did not hear a large portion of the court's reasoning for the denial of the motion." He claims that "[b]ecause he missed this fact, he was unable to challenge the court's use of the incorrect standard which, at a minimum, greatly contributed to the denial of the motion and his inability to overcome the decision on direct appeal."

¶14 The record, however, does not support Ali's claims. The hearing on Ali's motion for postconviction DNA testing was held telephonically, with Ali participating by telephone from the correctional institution where he was incarcerated. At the beginning of the hearing, the circuit court judge asked Ali whether he was able to hear what the judge was saying. Ali informed the judge that "it's loud here. It's like, you know, I am in a prison setting. So it's kind of loud in the background. I've got one finger in my ear, and it's kind of pressed up against the phone. But I can hear, but I can hear pretty clearly. It's no problem, sir." The following exchange then took place:

> THE COURT: … It's important you understand, Mr. Ali, that if there's ever a time you do not hear or understand something that I say or that [the deputy district attorney] says, we'll expect you to speak up and tell us that, even if it means interrupting us, so that we're sure that you hear and understand everything that is said. Is that agreeable, sir?
>
> MR. ALI: Yes, sir. Yes, it is.
>
> THE COURT: Okay. And then I also need to say that if we don't hear from you to the effect that you're having difficulty understanding, we're going to go ahead and assume that you've heard and understood everything that's been said here. Is that fair?
>
> MR. ALI: Yes, sir. That's fair.

¶15 Following this exchange, the court discussed Ali's request for an attorney and the public defender's denial of that request. Ali and the prosecutor presented their arguments on Ali's motion for DNA testing, and the court informed the parties of its decision to deny Ali's motion and explained its reasoning, all of which comprises seventeen transcribed pages. Then, the following exchange took place:

> THE COURT: … So for all of those reasons I do deny the motion. I think having denied the motion now under subsection (9), because I'm not ordering this, I'm supposed to determine the disposition of the evidence subject to the following. And I think what all of that adds up to, unless I'm overlooking something --
>
> MR. ALI: I can't hear you, sir.
>
> THE COURT: Okay, I'm sorry. Did you hear up to the part where I was talking about --
>
> MR. ALI: I heard the part where you said that you were denying the motion.
>
> THE COURT: Okay.
>
> MR. ALI: And that was pretty much, and then you mentioned something about now you have to determine the disposition of the evidence.

> THE COURT: Okay. Thank you for telling me that, Mr. Ali….

¶16 The only point in the hearing that Ali indicated that he was having difficulty hearing the proceeding occurred when the judge was explaining that the court's next step was to determine the disposition of the evidence. Ali did not inform the court that he had encountered difficulty hearing what was being said at any other time during the hearing, or that he had not heard the court's explanation for denying Ali's motion. Accordingly, we conclude that the record does not support Ali's claim that he had difficulty hearing what was being said during the hearing and that he "did not hear a large portion of the court's reasoning for the denial of the motion."

¶17 Finally, Ali contends that the circuit court erred in denying his motion because it applied the wrong legal standard. WIS. STAT. § 974.07 provides in relevant part:

> 974.07 Motion for postconviction deoxyribonucleic acid testing of certain evidence.
>
> ….
>
> (2) At any time after being convicted of a crime, adjudicated delinquent, or found not guilty by reason of mental disease or defect, a person may make a motion in the court in which he or she was convicted, adjudicated delinquent, or found not guilty by reason of mental disease or defect for an order requiring forensic deoxyribonucleic acid testing of evidence to which all of the following apply:
>
> (a) The evidence is relevant to the investigation or prosecution that resulted in the conviction, adjudication, or finding of not guilty by reason of mental disease or defect.
>
> (b) The evidence is in the actual or constructive possession of a government agency.
>
> (c) The evidence has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to

another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

….

(6)(a) Upon demand the district attorney shall disclose to the movant or his or her attorney whether biological material has been tested and shall make available to the movant or his or her attorney the following material:

1. Findings based on testing of biological materials.

2. Physical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is biological material.

(b) Upon demand the movant or his or her attorney shall disclose to the district attorney whether biological material has been tested and shall make available to the district attorney the following material:

1. Findings based on testing of biological materials.

2. The movant's biological specimen.

(c) Upon motion of the district attorney or the movant, the court may impose reasonable conditions on availability of material requested under pars. (a)2. and (b)2. in order to protect the integrity of the evidence.

(d) This subsection does not apply unless the information being disclosed or the material being made available is relevant to the movant's claim at issue in the motion made under sub. (2).

(7)(a) A court in which a motion under sub. (2) is filed shall order forensic deoxyribonucleic acid testing if all of the following apply:

1. The movant claims that he or she is innocent of the offense at issue in the motion under sub. (2).

2. It is reasonably probable that the movant would not have been prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent for the offense at issue in the motion under sub. (2), if exculpatory deoxyribonucleic acid testing results had

> been available before the prosecution, conviction, finding of not guilty, or adjudication for the offense.
>
> 3. The evidence to be tested meets the conditions under sub. (2)(a) to (c).

¶18 Whether a movant has the right to obtain and test certain biological material under WIS. STAT. § 974.07 requires the application of § 974.07 to specific facts, which presents a question of law that we review de novo. ***State v. Moran***, 2005 WI 115, ¶26, 284 Wis. 2d 24, 700 N.W.2d 884.

¶19 The court denied Ali's motion because Ali failed to establish that: (1) new testing would provide a reasonable likelihood for more accurate and probative results; and (2) there was a reasonable probability that he would not have been prosecuted or convicted if the new DNA evidence had been previously available. The State concedes that because Ali sought DNA testing at his own expense, Ali did not need to establish that there is a reasonable probability that he would not have been prosecuted or convicted if the new DNA evidence had been available at the time and thus the court erred in denying Ali's motion for the second reason articulated. The State argues, however, that Ali *was* required to establish the first requirement and because he failed to do so, the circuit court did not err in denying Ali's motion for postconviction DNA testing. We agree.

¶20 In ***Moran***, the supreme court explained that WIS. STAT. § 974.07 gives a movant the right to conduct DNA testing on physical evidence containing biological material which is in the actual or constructive possession of a government agency, provided the movant: (1) shows that the evidence meets the conditions under WIS. STAT. § 974.07(2); (2) complies with all reasonable conditions imposed by the court to protect the integrity of the evidence; and (3) conducts the testing of the evidence at his or her own expense. ***Id.***, ¶3.

¶21 WISCONSIN STAT. § 974.07(2)(c) provides that in order for a movant to be entitled to postconviction DNA testing of evidence that was previously tested, the scientific technique sought to be used, which was not available or utilized at the time of the prior testing, must provide a "reasonable likelihood of more accurate and probative results."

¶22 Ali asserts that the MiniSTR DNA testing procedure which Orchid Cellmark Laboratory would use to test the evidence is "particularly good at testing degraded samples as compared to the Powerplex test that was originally used by the police." Ali also asserted that the new test would "possibly provide a more accurate picture of how the stain was created."

¶23 Ali has not directed this court to any evidence in the record indicating that the evidence he sought to retest was degraded. He also has not made a showing that there is a reasonable likelihood that the new test would provide a more accurate and probative result. Accordingly, we conclude that Ali has not established that the evidence meets all of conditions under WIS. STAT. § 974.07(2).

B. DENIAL OF MOTION FOR POSTCONVICTION RELIEF

¶24 The circuit court denied Ali's postconviction motion on the basis that it was procedurally barred under ***Escalona-Naranjo***, 185 Wis. 2d 168, which holds that a defendant is required to raise all grounds for relief in his or her initial postconviction motion or on direct appeal, unless the defendant can show a "sufficient reason" for not raising an issue. *See* ***State v. Allen***, 2010 WI 89, ¶¶25-26, 328 Wis. 2d 1, 786 N.W.2d 124. The circuit court ruled that because the issues raised in Ali's subsequent postconviction motion could have been raised on direct appeal but were not, he could not base his postconviction motion on those

issues. The State asserts that it does "not argue on appeal that Ali's [WIS. STAT.] § 974.06 motion is procedurally barred under ***Escalona-Naranjo***." The States observes that Ali alleged in his § 974.06 motion that his appellate counsel was ineffective for failing to raise issues concerning trial counsel's effectiveness and concedes that "ineffective assistance of postconviction counsel may provide a sufficient reason for not raising an issue in a previous appeal." Because the State does not assert that Ali's § 974.06 motion is procedurally barred under ***Escalona-Naranjo***, we will assume without deciding that it is not.

¶25 As related above, Ali's postconviction motion, which was based on ineffective assistance of trial and appellate counsel, was denied without a ***Machner*** hearing. Because a hearing was not held on his motion, we must determine whether Ali's postconviction motion alleged facts that, if proven, show that he was entitled to relief on his ineffective assistance of counsel claim. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334, *cert. denied*, 132 S. Ct. 825 (2011). The sufficiency of a postconviction motion is a question of law, which we review de novo. ***Id.*** If the motion does not raise facts that entitled the defendant to relief, "'or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,' the grant or denial of the motion is a matter of discretion entrusted to the circuit court." ***Id.*** (citation omitted).

¶26 To succeed on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inactions constituted deficient performance and that the deficiency prejudiced the defendant. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. To prove deficient performance, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."

State v. Johnson, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prove prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Love***, 284 Wis. 2d 111, ¶30.

¶27 Whether a defendant received ineffective assistance of counsel is a mixed question of fact and law. ***Johnson***, 153 Wis. 2d at 127. Whether counsel's performance was deficient and prejudicial to the defense are questions of law, which this court reviews de novo. ***Id.*** at 128. However, we will not overturn the circuit court's historical findings of fact unless they are clearly erroneous. ***Id***. at 127.

¶28 Ali argues his trial counsel was ineffective for failing to request that the circuit court judge who presided over his trial, Judge DeChambeau, recuse himself, and appellate counsel was ineffective for not raising this argument on appeal. Ali asserts that Judge DeChambeau was obligated to recuse himself under WIS. STAT. § 757.19(2)(a) because Judge DeChambeau's wife, Attorney Hayward, "materially participated in the creation and preparation of evidence for trial" by preparing the "[S]afe [H]arbor tape wherein [the victim] lays out the details of her sexual contact with Ali," which Ali claims the prosecution "relied in large part on."

¶29 WISCONSIN STAT. § 757.19(2)(a) provides: "Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs: (a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship."

¶30 In ***State v. Harrell***, 199 Wis. 2d 654, 546 N.W.2d 115, the supreme court addressed under what circumstances a circuit court judge whose spouse is an

assistant district attorney in the same county is required to disqualify himself or herself under WIS. STAT. § 757.19(2)(a). The court held that § 757.19(2)(a) does not "require[] a judge to disqualify himself or herself in such a situation as long as his or her spouse did not participate in, or help prepare, the case." ***Id.*** at 657. Similar to the present case, ***Harrell*** concerned whether Judge DeChambeau was obligated to recuse himself under § 757.19(2)(a) because of his wife's relationship with the district attorney's office. The court in ***Harrell*** stated that the record was clear that Judge DeChambeau's spouse neither appeared in the case nor involved herself in the preparation of the case and consequently, their relationship did "not fall within the scope of WIS. STAT. § 757.19(2)(a)." ***Id.*** at 663.

¶31 Here, the record indicates only that Attorney Hayward was present at the time the victim gave her recorded interview at the Safe Harbor. As pointed out by the State, "[t]here is nothing in the record to suggest that [Assistant District Attorney] Hayward was anything more than an observer at the Safe Harbor interview." Because there is no indication in the record that Attorney Hayward appeared before Judge DeChambeau in this case, or that she involved herself in the actual preparation of the case, we conclude that the relationship between Judge DeChambeau and Attorney Hayward did not fall within the scope of WIS. STAT. § 757.19(2)(a). Consequently, Ali's trial counsel was not deficient in failing to request that Judge DeChambeau recuse himself, and appellate counsel was not deficient in failing to raise this argument on appeal or in a postconviction motion.

¶32 Ali also argues his appellate counsel was ineffective for failing to raise a claim of insufficiency of the evidence.

¶33 A conviction may not be reversed for insufficiency of the evidence unless the evidence, viewed most favorably to the State, "is so insufficient in

probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The supreme court explained in ***Poellinger***,

> If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id.*** at 507.

¶34 At trial, the jury was shown the videotaped interview of the victim at Safe Harbor. Neither the videotape of the interview, nor a transcript of the interview are part of the appellate record; however, Ali does not dispute that during that interview, the victim told the interviewer that she had sexual intercourse with Ali. In addition, after the videotape of the Safe Harbor interview was shown to the jury, the victim testified that she had sexual intercourse with Ali.

> [Prosecutor] After this active intercourse and you put your clothes on and before going into the living room, did you go somewhere else and [do] something in the apartment?
>
> [Victim] I went to the restroom.
>
> [Prosecutor] Did you use the toilet?
>
> [Victim] Yes.
>
> [Prosecutor] Did you wipe yourself with tissue paper?
>
> [Victim] Yes.
>
> [Prosecutor] Or toilet paper. What if anything did you observe, [] when you wiped your body?
>
> [Victim] I noticed I was bleeding.

> [Prosecutor] I believe you indicated in the interview with the social worker that when he put his penis in you that it hurt a little.
>
> [Victim] Yes.

¶35 Despite this evidence, Ali argues that the evidence was insufficient because there is "serious doubt" as to the veracity of the victim's testimony because the victim "confided in [his] step-daughter [] that she was lying about having sexual [intercourse] with [him]" and "only admitted to sexual contact with [him] under pressure from her mother and a psychologist when questioned about the voice mails [sic] on [his] phone." Ali does not provide any record citations for his assertions. However, even if such evidence had been presented to the jury, it was up to the jury, which has the exclusive right to judge credibility, to consider any inconsistencies and contradictions with the victim's testimony in reaching that credibility determination. ***Kohlhoff v. State,*** 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978).

¶36 Here the jury heard a recorded statement by the victim and testimony from her indicating that she had sexual intercourse with Ali. In light of this, it cannot be said that the evidence is so insufficient in probative value that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***Poellinger***, 153 Wis. 2d at 501. Accordingly, we conclude that appellate counsel was not deficient in failing to raise a claim of insufficiency of the evidence.

CONCLUSION

¶37 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.