COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2818 **Cir. Ct. No. 2000CF6258**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER L. POWELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Roger L. Powell appeals, *pro se*, from an order denying his WIS. STAT. § 974.06 motion for postconviction relief. Powell claimed

that his trial and postconviction lawyers gave him constitutionally deficient representation.[1] *See* ***State ex rel Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996) (constitutionally deficient representation of postconviction lawyer may be a sufficient reason for not having previously raised issues). The circuit court denied the motion. We affirm.

BACKGROUND

¶2 On December 22, 2000, Powell was charged with felony murder as a party to a crime. After the circuit court denied his pretrial motion to suppress evidence, Powell pled guilty to one count of first-degree reckless homicide as a party to a crime. He received a forty-year prison sentence.

¶3 Following his conviction, Powell's postconviction lawyer filed a WIS. RULE 809.30(2)(h) postconviction motion seeking to withdraw his plea based on the alleged constitutionally deficient representation of his trial lawyer. He asserted that Powell's trial lawyer failed to investigate Powell's alibi and failed to provide Powell with a transcript of the testimony of a witness from a trial of a co-defendant. The circuit court denied Powell's motion.

¶4 Powell, with his postconviction lawyer's assistance, subsequently pursued a direct appeal. He challenged the circuit court's decision to deny his

[1] Powell frequently references his "postconviction/appellate" lawyer in his briefing. To the extent Powell is asserting a claim of ineffective assistance on the part of his appellate lawyer, such a claim 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 a postconviction lawyer is raised in the circuit court either by filing a *habeas* petition or by WIS. STAT. § 974.06, *see* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136, 139 (Ct. App. 1996). Because Powell has pursued the latter option, we construe his claim as one of ineffective assistance of his postconviction lawyer.

suppression motion arguing that police violated his constitutional right to counsel by ignoring his repeated requests to speak with his lawyer and by obtaining his incriminating statement through physical intimidation and coercion.[2] We summarily affirmed the judgment of conviction. *See* ***State v. Powell***, No. 2002AP1866-CR, unpublished slip op. and order (WI App July 15, 2003). Powell's petition for review was denied.

¶5 In September of 2010, approximately nine years after he was convicted, Powell, *pro se*, filed a motion to quash the DNA surcharge ordered by the circuit court. The circuit court denied Powell's motion, explaining that the motion was untimely.[3] Powell, *pro se*, sought reconsideration, and the circuit court denied his request. Powell then filed a notice of appeal from the circuit court's order, which he later voluntarily dismissed.

¶6 In October of 2011, Powell, *pro se*, filed a WIS. STAT. § 974.06 motion based on the alleged constitutionally deficient representation of his postconviction lawyer. The circuit court concluded that the motion was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181–182, 517 N.W.2d 157, 162 (1994) (issues not raised on direct appeal cannot be raised in a § 974.06 motion absent a "sufficient reason" for the failure to do so). The circuit court explained that Powell had not presented any reason why he could not have raised his current claims in conjunction with his motion to quash the DNA surcharge filed in

[2] The Honorable Jeffrey A. Wagner presided over the suppression proceedings. The Honorable M. Joseph Donald entered the judgment of conviction.

[3] In his appellate briefs, Powell concedes that the circuit court was correct in this regard and makes clear that he is not challenging the denial of his motion to quash the DNA surcharge.

September of 2010. As an additional basis for denying the motion, the circuit court held that Powell's claims were without merit.

ANALYSIS

¶7 Much of Powell's appellate argument centers on his contention that the circuit court erred when it construed his motion to quash the DNA surcharge as a prior WIS. STAT. § 974.06 motion. We save this procedural issue for another day and instead focus our attention on the alternative basis relied on by the circuit court to deny his motion; namely, that Powell's claims are without merit.[4] *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed); *see also* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

¶8 On appeal, Powell claims his postconviction lawyer was ineffective for failing to address deficiencies in his trial lawyer's performance "prior to, during, and after" the suppression hearing. Namely, Powell asserts that his trial lawyer failed to recognize that the adversarial process had begun on December 15, 2000, when he was "apprehended" by police,[5] read his rights under ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966), and held in custody for a five-day period. In addition, Powell argues that his trial lawyer failed to recognize that police

[4] The Wisconsin Supreme Court recently granted a petition for review of our decision in ***State v. Starks***, No. 2010AP425, unpublished slip op. (WI App June 14, 2011), which addresses this same procedural issue.

[5] Powell's contention that he was "apprehended" is misleading. He was in custody on unrelated charges on December 15, 2000.

unconstitutionally delayed formal commencement of criminal prosecution in order to hold a lineup where Powell did not have the benefit of a lawyer.

¶9 To establish constitutionally ineffective representation, Powell must show: (1) deficient representation; and (2) resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, he must point to specific acts or omissions by his lawyer that are "outside the wide range of professionally competent assistance," *see* ***id.***, 466 U.S. at 690, and to prove resulting prejudice, he must show that his lawyer's errors were so serious that he was deprived of a fair trial and reliable outcome, *see* ***id.***, 466 U.S. at 687. We do not need to address both ***Strickland*** aspects if a defendant does not make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶10 The circuit court must hold an evidentiary hearing on a claim of constitutionally deficient representation only if the defendant "'alleges sufficient material facts that, if true, would entitle the defendant to relief.'" ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 123, 700 N.W.2d 62, 68 (citation omitted). If the postconviction motion does not assert sufficient facts, or presents only conclusory allegations, or if the Record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may deny the claim without a hearing. ***Ibid.*** Whether the Record "'conclusively demonstrates that the defendant is not entitled to relief'" is a legal question that we review *de novo*. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996) (citation omitted).

¶11 Following the suppression hearing in this matter, the circuit court's findings of fact included the following:

- Powell was arrested for unrelated offenses on June 28, 2000. *See* Milwaukee Co. Case No. 00CF3261. During the interview that followed his arrest in Case No. 00CF3261, Powell asked to speak to a detective to provide information regarding the death of Henry Matthews. A detective subsequently interviewed Powell as a witness.

- Powell gave police information that did not implicate himself.

- A lawyer was subsequently appointed to represent Powell in Milwaukee Co. Case No. 00CF3261.

- Others who were arrested gave police information that implicated Powell in the Matthews homicide.

- Based on the information implicating Powell, detectives interviewed Powell five times over the course of five days. The interviews were conducted on December 15, 2000 (two interviews), December 17, 2000, and December 20, 2000 (two interviews).

- Two line-ups were held in regard to the Matthews homicide on December 16, 2000. Powell stood in one of the line-ups.

The circuit court went on to conclude, in relevant part:

> The defendant did not have a 6th Amendment right to counsel on an uncharged homicide offense. Under the rule of ***McNeil v. Wisconsin***, 501 U.S. 171, 111 S. Ct. 2204[] (1991), the 6th Amendment right to counsel is specific to the charged case. The fact that the defendant had counsel on the … charge in [Milwaukee Co. Case No.] 00CF003261 did not preclude officers from speaking to him about the Henry Matthews homicide.

¶12 More than ten years later, in its order denying Powell's WIS. STAT. § 974.06 motion, the circuit court reiterated this point:[6]

> Moreover, the claims set forth by the defendant are without merit. Caselaw holds that there is no right to counsel at a line[]up if the defendant is only the subject of an investigation and has not yet been charged. The adversarial process had not yet commenced at the time of the defendant's line[]up, and thus, there was no constitutional right to counsel.

We agree.

¶13 The Sixth Amendment provides the right to counsel at all crucial stages of a criminal prosecution. ***McNeil***, 501 U.S. at 175. This right to counsel is, however, "offense specific." ***Ibid.*** The Sixth Amendment right to counsel in Wisconsin does not attach until after "the filing of a criminal complaint or the issuance of an arrest warrant." ***State v. Dagnall***, 2000 WI 82, ¶30, 236 Wis. 2d 339, 357, 612 N.W.2d 680, 688, *overruled on other grounds by* ***Montejo v. Louisiana***, 556 U.S. 778 (2009).

¶14 As previously stated, Powell was charged in this case on December 22, 2000. Consequently, there is no merit to Powell's claim that the adversarial process began on December 15, 2000. At the time of the interviews and the lineup, he had no Sixth Amendment right to counsel in connection with the case that is the subject of this appeal.[7] As such, Powell's trial lawyer did not give him constitutionally deficient representation by not raising this issue. *See* ***State v.***

[6] This reasoning belies Powell's contention that the circuit court failed to adequately explain its basis for denying his claims.

[7] Powell acknowledges that in resolving his direct appeal, we previously concluded there was no violation of his Fifth Amendment right to counsel.

Wheat, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 282, 647 N.W.2d 441, 447 (counsel not ineffective for failing to raise meritless claim).

¶15 As a final matter, Powell's argument that his trial lawyer failed to recognize that police unconstitutionally delayed formal commencement of criminal prosecution in order to hold a lineup where Powell did not have the benefit of a lawyer fails because Powell did not raise this issue in his postconviction motion. Accordingly, he has forfeited his right to raise it on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140, 145 (1980), *superseded by statute on other grounds* ("It is the often repeated rule in this State that issues not raised or considered in the [circuit] court will not be considered for the first time on appeal."); ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 670, 761 N.W.2d 612, 620 (failure to make the timely assertion of a right is a forfeiture).

¶16 Because Powell has failed to establish that his trial lawyer's representation was constitutionally deficient, it follows that his postconviction lawyer's representation was not constitutionally deficient. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 480, 673 N.W.2d 369, 375 ("[T]o establish that postconviction or appellate counsel was ineffective, a defendant bears the burden of proving that trial counsel's performance was deficient and prejudicial.").

By the Court.—Order affirmed.

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