COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP1992
2011AP1993

Cir. Ct. Nos. 2005CF6918
2006CF2557

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIELLE MARIE VALOE,

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. Danielle Marie Valoe, *pro se*, appeals an order of the circuit court that denied her WIS. STAT. § 974.06 (2009-10)[1] postconviction motion for relief without a hearing. Valoe claimed that postconviction counsel was ineffective for not challenging, prior to Valoe's direct appeal of her conviction, trial counsel's failure to challenge the charges against her by alleging prosecutorial vindictiveness and selective prosecution. Because there is ultimately no merit to Valoe's claim of prosecutorial vindictiveness, and because Valoe withdrew her selective prosecution claim from the circuit court's consideration, we conclude that the circuit court properly denied her motion and affirm the order.

BACKGROUND

¶2 In December 2005, Valoe was charged with conspiracy to commit theft by fraud against US Bank. The complaint alleged that Valoe would recruit other people to open accounts at the bank. The account balances would then be inflated with deposits of worthless checks or empty envelopes at automatic teller machines, and Valoe would withdraw money from the accounts before the banks determined that the deposit transactions were fraudulent.

¶3 In January 2006, the State presented an offer to Valoe: in exchange for her guilty plea, the State would agree not to issue any additional charges as a result of her involvement in the scheme, and it would make a particular sentencing recommendation. Valoe declined the offer.

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

¶4 In May 2006, following continued investigation, the State charged Valoe in a new case with another count of conspiracy to commit theft by fraud. The scheme was similar but the victim was Wells Fargo Bank. The two circuit court cases were consolidated in July 2006. The State then made another offer that Valoe declined, and a trial began in October 2006. On the second day of trial, Valoe entered guilty pleas. Shortly thereafter, however, she moved to withdraw the pleas, claiming she had entered them under duress. The circuit court ultimately granted the motion and scheduled a new trial.

¶5 Meanwhile, Valoe's probation was being revoked in another case.[2] The prosecutor from these criminal matters appeared at her probation revocation hearings in September 2006 and November 2006, evidently examining four witnesses who would later testify at Valoe's new trial.

¶6 Valoe's second trial in the theft-by-fraud cases began in June 2007. A jury convicted her on both counts. She filed a postconviction motion seeking a new trial, but the motion was denied. Valoe appealed and we affirmed. *See* ***State v. Valoe***, No. 2008AP1960-CR, unpublished slip op. (WI App Oct. 6, 2009).

¶7 In April 2011, Valoe filed the underlying *pro se* postconviction motion, pursuant to WIS. STAT. § 974.06, seeking to have her convictions vacated. She alleged that trial counsel had been ineffective when he failed to file "a motion to dismiss the Information" on the grounds that the prosecutor had been vindictive and selective. Valoe further alleged that her postconviction counsel had been ineffective for failing to challenge trial counsel's performance on these issues

[2] As best we can discern, Valoe was serving a sentence of probation in Milwaukee County Circuit Court case No. 2002CF3966.

prior to the first appeal. The circuit court ordered briefing but ultimately denied Valoe's motion without a hearing, adopting the State's reasoning that the motion lacked merit. Valoe appeals.

DISCUSSION

A. Standard of Review

¶8 To be entitled to a hearing on a postconviction motion, the defendant must allege "sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion does allege sufficient facts, a hearing is required. ***Id.*** If the motion is insufficient, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may exercise its discretion in deciding whether to grant a hearing. ***Id.***

¶9 In addition, a motion brought under WIS. STAT. § 974.06 is typically barred, if filed after a direct appeal, unless the defendant shows a sufficient reason why he or she did not, or could not, raise the issues in a motion preceding the first appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 169, 185, 517 N.W.2d 157 (1994). Claims of ineffective assistance of trial counsel "cannot be reviewed on appeal absent a postconviction motion in the trial court." ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). Thus, ineffective assistance of *postconviction* counsel may sometimes constitute a sufficient reason for not raising an issue on direct appeal. *See* ***id.*** at 382.

¶10 However, an attorney is not ineffective for failing to pursue a meritless issue. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996); ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

Thus, in order to show that postconviction counsel was ineffective for not challenging trial counsel's performance and thus be entitled to relief, Valoe must demonstrate that trial counsel actually was ineffective.[3] *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶11 To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's action or inaction constituted deficient performance and that the deficiency prejudiced the defendant. *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. To prove deficiency, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the results of the proceeding would have been different. ***Id.*** If we conclude that a defendant has failed to demonstrate one of the prongs, we need not address the other. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). The defendant bears the burden to show both elements. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

B. Vindictive Prosecution

¶12 "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. Williams***, 2004 WI App 56, ¶43, 270 Wis. 2d 761, 677 N.W.2d 691 (citation

[3] Valoe spends an inordinate portion of her brief discussing the performance of *appellate* counsel. We decline to discuss appellate counsel's performance, even though appellate and postconviction counsel were the same attorney, because Valoe does not demonstrate that the issue of appellate counsel's performance is properly before this court in this appeal.

omitted). Actual vindictiveness is shown by "'objective evidence that a prosecutor acted in order to punish the defendant for standing on his [or her] legal rights.'" ***Id.*** (citation omitted, brackets in ***Williams***).

1. Presumed Vindictiveness

¶13 Valoe appears to believe that the timing of her second charge demonstrates a "realistic likelihood," and thus a presumption, of vindictiveness. Her motion alleges that "[t]here is no doubt about when the prosecutor began his retaliation" against her: it was "enhanced" when she rejected the first plea offer and again when her probation hold was lifted. On appeal, we are limited to reviewing the four corners of Valoe's postconviction motion. *See* ***Allen***, 274 Wis. 2d 568, ¶27. We conclude that her allegations are too conclusory to warrant applying a presumption of vindictiveness. *See* ***id.***, ¶¶9, 23.

¶14 "[A]n inflexible presumption of vindictiveness must be viewed with particular caution in the pretrial setting." ***State v. Johnson***, 2000 WI 12, ¶29, 232 Wis. 2d 679, 605 N.W.2d 846. "[B]efore trial, the prosecutor must remain free to exercise his or her broad discretion to determine which charges properly reflect society's interests," so long as probable cause supports any charged offenses. ***Id.***, ¶¶26, 29. Concerns about prosecutorial vindictiveness are tempered when new charges stem from a separate incident or when new charges involve a different victim. *See* ***Williams***, 270 Wis. 2d 761, ¶45.

¶15 "'[T]he mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified." ***Johnson***, 232 Wis. 2d 679, ¶30 (citation omitted); *cf.* ***Bordenkircher v. Hayes***, 434 U.S. 357, 358-59, 365 (1977) (prosecutor, who carried out explicit threat to file more serious

charges if defendant rejected plea to lesser offense, did not violate due process). "[B]y tolerating and encouraging the negotiation of pleas, [the Supreme] Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego [her] right to plead not guilty." ***Bordenkircher***, 434 U.S. at 364.

¶16 Accordingly, the fact that the State charged Valoe with another count of the same offense involving a different victim following further investigation appears to reflect an exercise of prosecutorial discretion, not a "realistic likelihood" of prosecutorial vindictiveness. *See* ***Williams***, 270 Wis. 2d 761, ¶45. That the new charge came months after Valoe rejected a plea offer does not change this conclusion. *See* ***Johnson***, 232 Wis. 2d 679, ¶30. Valoe thus has not alleged sufficient facts to support a presumption of vindictiveness, so she has not shown that trial counsel was ineffective for failing to pursue a claim of presumed prosecutorial vindictiveness.

2. Actual Vindictiveness

¶17 Valoe's postconviction motion also alleged that "it was fundamentally unfair for the prosecutor to represent the DOC against her at the probation revocation proceeding, then represent the State against her at a criminal trial, because the prosecutor used the revocation proceedings to gather evidence and prep his witnesses." We thus construe her motion to be alleging that the prosecutor's participation in the revocation proceedings demonstrates his actual vindictiveness. We also reject this argument as conclusory.

¶18 First, we must stress that to the extent that Valoe attempts to challenge the prosecutor's participation in the revocation proceedings as an independent matter, she cannot. Those hearings and her 2002 case are *not* before

us on appeal. We are reviewing only the postconviction motion filed in Valoe's 2005 and 2006 cases.

¶19 Second, Valoe tries to establish some sort of reversible error by pointing to two cases where, in the course of discussing other issues, we described revocation proceedings and indicated that the Department of Corrections is ordinarily represented in revocation proceedings by a non-attorney agent. *See* ***State v. Terry***, 2000 WI App 250, ¶14, 235 Wis. 2d 519, 620 N.W.2d 217; ***State ex rel. Mentek v. Schwarz***, 2000 WI App 96, ¶13, 235 Wis. 2d 143, 612 N.W.2d 746; *overruled on other grounds by* 2001 WI 32, 242 Wis. 2d 94, 624 N.W.2d 150. However, Valoe never disputes the fact that the Department actually was represented by a non-attorney agent.

¶20 Further, our prior descriptions of probation revocation proceedings notwithstanding, Valoe identifies no rules that specifically preclude the district attorney from assisting the non-attorney agent. *Cf., e.g.*, ***State ex rel. Cresci v. Schmidt***, 62 Wis. 2d 400, 414, 215 N.W.2d 361 (1974) (reviewing whether hearing examiner properly exercised discretion "in determining that neither petitioner nor the bureau of probation and parole would be entitled to have assistance of counsel at the hearing").

¶21 Third, Valoe complains that the prosecutor used the probation proceedings to prepare his witnesses for trial. However, the record does not reveal and Valoe does not identify which witnesses the prosecutor examined at the probation proceedings nor what evidence he was able to gather from them that he had not already obtained simply by interviewing them. *See* ***Love***, 284 Wis. 2d 111, ¶27 (A "postconviction motion must contain an historical basis setting forth material facts that allows the reviewing court to meaningfully assess the

defendant's claims."). Valoe also apparently fails to appreciate that a prosecutor may have multiple pretrial opportunities to examine witnesses, such as through a preliminary hearing or a deposition, and she does not attempt to distinguish those situations from her own.

¶22 Fourth, we note that the limited portions of the probation proceedings that Valoe did reproduce for her filings indicate that the prosecutor first appeared in the probation hearing in September 2006, *after* both fraud cases had been filed against Valoe.[4] Thus, whatever happened in the probation revocation proceedings could not be said to have led to a vindictive charging decision.

¶23 Ultimately, despite Valoe's complaints of error relating to the prosecutor's examination of witnesses at her probation revocation hearings, Valoe makes no attempt to explain how those errors reveal actual vindictiveness of the prosecutor. Her mere belief that they do will not suffice, and we will not develop her argument for her. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995). Absent any showing of objective evidence that the prosecutor acted so as to punish Valoe for standing on her rights, *see* ***Williams***, 270 Wis. 2d 761, ¶43, there was no basis for trial counsel to make such a claim.

C. Selective Prosecution

¶24 Finally, Valoe alleged that she was selectively prosecuted, singled out for maintaining her innocence, despite having many accomplices who opened

[4] Valoe claims in her postconviction motion that "the record regarding the prosecutor's involvement goes back as far as March 20, 2006." However, Valoe provided no evidence or record citation in the motion to support this assertion.

accounts and participated in her scheme. To establish selective prosecution, a defendant must first present a *prima facie* showing of a discriminatory prosecution. *See* ***State v. Kramer***, 2001 WI 132, ¶15, 248 Wis. 2d 1009, 637 N.W.2d 35. To make this *prima facie* showing, the defendant must show the prosecution had a discriminatory effect and that it was motivated by a discriminatory purpose. ***Id.***, ¶18.

¶25 In its response to Valoe's postconviction motion, the State had argued that Valoe "fails to even minimally suggest a constitutionally protected discriminatory motive" and thus "fails to even make a *prima facie* case of selective prosecution." In her reply brief to the circuit court, Valoe conceded that she had failed to make a *prima facie* showing, and she withdrew her selective prosecution claim. The circuit court, when it rejected Valoe's motion, wrote that it found "no merit to the defendant's motion for the reasons set forth in the State's brief."

¶26 It is not clear to us whether, in adopting the State's reasoning, the circuit court meant to rule on the merits of the withdrawn selective prosecution claim, or whether it had simply intended to rule on the remaining claims. In either case, however, Valoe cannot revive the selective prosecution claim. If the circuit court was merely ruling on the remaining, unwithdrawn claims, then clearly Valoe cannot revisit the selective prosecution matter she removed from the circuit court's consideration. *See* ***State v. Caban***, 210 Wis. 2d 597, 604-05, 563 N.W.2d 501 (1997). If the circuit court was ruling on the merits of the selective prosecution claim, then Valoe is judicially estopped from raising it on appeal. *See* ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996) (Judicial estoppel "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position."). When she withdrew her selective prosecution

claim, she conceded that she had not made the required *prima facie* showing, and the circuit court adopted this position. Valoe may not now claim error in that ruling.

D. Summary

¶27 There is no merit to a claim of vindictive prosecution based on the record, either because of the addition of a new charge after Valoe rejected a plea offer or because the prosecutor played some undefined role in a probation revocation proceeding that is not before us on review. Because there is no merit to a claim of vindictiveness, whether presumed or actual, trial counsel was not ineffective for failing to pursue it, and postconviction counsel had no reason to pursue a claim against trial counsel's performance.[5] Further, Valoe withdrew her postconviction claim of selective prosecution. Accordingly, the circuit court properly denied the motion after briefing without a hearing.

By the Court.—Order affirmed.

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

[5] To the extent that postconviction counsel actually made a strategic decision not to pursue ineffective assistance of trial counsel, counsel's strategic decisions "are virtually invulnerable to second-guessing." *See* ***State v. Westmoreland***, 2008 WI App 15, ¶20, 307 Wis. 2d 429, 744 N.W.2d 419. Contrary to Valoe's beliefs, appointed counsel is *not* required to "present all nonfrivolous arguments requested" by the client. *See* ***Jones v. Barnes***, 463 U.S. 745, 751 (1983). Rather, counsel must exercise professional judgment in the manner in which he or she represents the defendant. *See* ***id.***