COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP826 **Cir. Ct. No. 2007CF5894**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK W. STERLING,
DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: REBECCA F. DALLET and CHARLES F. KAHN, JR, Judges. *Affirmed*.

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

¶1 PER CURIAM. Mark W. Sterling, *pro se*, appeals the orders denying his WIS. STAT. § 974.06 (2011-12) motion for postconviction relief.[1] Sterling argues that his postconviction counsel performed deficiently by not alleging trial counsel ineffectiveness on numerous bases. We reject his arguments and affirm the orders.

BACKGROUND

¶2 In 2008, a jury found Sterling guilty of attempted first-degree intentional homicide and false imprisonment, both as a party to a crime and while using a dangerous weapon. Sterling and his co-actors kidnapped a man at gun-point and then shot him several times after he tried to escape by jumping from the SUV Sterling was driving.

¶3 Following his conviction, Sterling filed two postconviction motions.

> The first argued that: (1) "the [trial] judge improperly involved himself in suggesting that the charge against Mr. Sterling be increased"; and (2) trial counsel was ineffective for failing to object to the trial court's interference. The second motion argued for resentencing because the trial court failed to state on the record why it did not order a [presentence investigation report]. Without holding a hearing, the postconviction court denied both motions.

State v. Sterling, No. 2009AP815-CR, unpublished slip op. ¶10 (WI App May 4, 2010). Sterling filed a direct appeal, and we affirmed. *See* ***id.***, ¶1.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The Honorable Rebecca F. Dallet entered the June 13, 2011 order disposing of all but one of Sterling's postconviction claims. The Honorable Charles F. Kahn, Jr., presided over Sterling's evidentiary hearing and entered the order that denied his remaining postconviction claim.

¶4 In 2011, Sterling, *pro se*, filed the postconviction motion that forms the basis for this appeal. He argued that his postconviction counsel provided ineffective assistance by not alleging his trial counsel was ineffective in the following ways: (1) for failing to challenge the validity of the victim's identification testimony; (2) for failing to call a detective as a witness, which Sterling claims deprived him of the opportunity to prove that the victim's state of mind at the hospital was unreliable; (3) for failing to call an expert witness to provide a scientific explanation regarding the effects that drugs (both legal and illegal), alcohol, fear, shock and pain can have on a person's ability to recall events; (4) for failing to discredit the victim's testimony about being shot while he was laying down; (5) for failing to seek a lesser-included offense; (6) for failing to object to improper remarks by the prosecutor; and (7) for misleading him about the State's ability to amend the charge of first-degree reckless injury to first-degree intentional homicide.[2]

¶5 With regard to the last claim, Sterling alleged that when he asked postconviction counsel why she was not raising the issue of trial counsel's ineffectiveness for misleading him about the State's ability to amend the charge against him, she told him he would have had to have raised the issue during the prior circuit court proceedings. Sterling argued that this reasoning was without merit. Sterling did not specifically discuss postconviction counsel's ineffectiveness in the context of his other claims. He stated only that postconviction counsel arbitrarily waived the issues he raised in his motion by failing to pursue them.

[2] We have regrouped and reorganized Sterling's claims for purposes of this decision.

¶6 In a decision and order date June 13, 2011, the circuit court denied all of Sterling's claims but one—his claim that trial counsel misled him to believe that the State could not amend the charges against him if he went to trial. The circuit court held an evidentiary hearing on this claim, during which Sterling and one of his trial attorneys testified. After listening to the testimony, the circuit court denied Sterling's remaining postconviction claim, and this appeal follows.

DISCUSSION

¶7 A WIS. STAT. § 974.06 motion filed after a direct appeal may be procedurally barred absent a showing of a sufficient reason why the claims were not raised in a previous motion or on direct appeal. *See* ***State v. Lo***, 2003 WI 107, ¶44 n.11, 264 Wis. 2d 1, 665 N.W.2d 756; ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). The ineffective assistance of postconviction counsel may constitute a sufficient reason for failing to raise a claim on direct appeal. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

¶8 Here, the circuit court denied all but one of Sterling's claims set forth in his WIS. STAT. § 974.06 motion without a hearing. Whether a § 974.06 motion is sufficient on its face to entitle a defendant to an evidentiary hearing on his or her ineffective assistance of postconviction counsel claim is a question of law that appellate courts review *de novo*. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. ***Balliette*** explained:

> If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the circuit court must hold an evidentiary hearing. However, if the motion does not raise such facts, "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. (citations omitted).

¶9 To obtain an evidentiary hearing where the reason set forth in a WIS. STAT. § 974.06 motion is the alleged ineffectiveness of postconviction counsel, Sterling "was required to do more than assert that his postconviction counsel was ineffective for failing to challenge … several acts and omissions of trial counsel that he alleges constituted ineffective assistance." *See* ***Balliette***, 336 Wis. 2d 358, ¶63. He was required to allege that postconviction counsel's "'performance was deficient' and 'that the deficient performance prejudiced the defense.'" *See* ***id.*** (citation omitted).

¶10 Against this backdrop, we agree with the State that Sterling's general assertion in his motion—that postconviction counsel was ineffective for failing to raise the issues he presented—falls short. "[T]his is, at best, only part of what is required in a [WIS. STAT.] § 974.06 motion." *See* ***Balliette***, 336 Wis. 2d 358, ¶65. Sterling "was [also] required to assert *why* it was deficient performance for postconviction counsel not to raise these issues." *See* ***id.*** He failed to do so.

¶11 In its June 13, 2011 order, the circuit court rejected all but one of Sterling's arguments after reviewing the merits of his underlying claims of *trial counsel* ineffectiveness. Our approach differs: We conclude that Sterling's insufficient allegations of *postconviction counsel* ineffectiveness fail to overcome the procedural bar. We therefore affirm the June 13, 2011 order, albeit on different grounds. *See* ***International Flavors & Fragrances, Inc. v. Valley Forge***

Ins. Co., 2007 WI App 187, ¶23, 304 Wis. 2d 732, 738 N.W.2d 159 (we may affirm for reasons different from those of the circuit court).[3]

¶12 All that remains then is Sterling's claim that postconviction counsel improperly decided not to raise the issue of trial counsel's ineffectiveness for misleading him about the State's ability to amend the charge against him. Sterling alleged that postconviction counsel's reason for that decision—i.e., her belief that Sterling would have had to "speak up" during the circuit court proceedings when the possibility of amended charges was mentioned—was "without merit because there is no law that allows for a defendant, himself, to disrupt court proceedings to voice a legal argument when that [defendant] is represented by counsel."

¶13 During the evidentiary hearing on this claim, Sterling's trial counsel testified that he advised Sterling on more than one occasion that the charges against Sterling could be amended if he did not accept the plea bargain that was offered. Sterling also testified that he was present in court when the prosecutor stated that she would be considering whether to amend the charges against him. Based on the testimony presented, the circuit court found that Sterling was aware that the State could amend the charges against him and specifically found that Sterling's trial counsel had advised him of the possibility that the charge against him could be increased. Consequently, the circuit court denied his remaining postconviction claim.

[3] Sterling argues that the State waived its procedural bar argument by not raising it in the circuit court. He is incorrect. This court can consider new arguments raised by respondents who seek to uphold the results reached below. *See* ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶27 n.4, 326 Wis. 2d 729, 786 N.W.2d 78.

¶14 The record supports the circuit court's findings. *See* ***Balliette***, 336 Wis. 2d 358, ¶19 ("The circuit court's findings of facts [with respect to ineffective assistance of counsel] will not be disturbed unless shown to be clearly erroneous."). As such, if postconviction counsel had raised the issue of trial counsel's alleged ineffectiveness for misleading Sterling about the State's ability to amend the charge, it would have been meritless. Postconviction counsel was not ineffective for foregoing such a claim. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit.").

By the Court.—Orders affirmed.

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