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DISTRICT IV

September 17, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2017AP654 State of Wisconsin v. Robert John Hicks (L.C. # 2003CF2284)
2017AP655 State of Wisconsin v. Robert John Hicks (L.C. # 2004CF1866)

Before Blanchard, Graham, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. Rule 809.23(3).

Robert John Hicks appeals an order denying his motion for postconviction relief filed under WIS. STAT. § 974.06.[1] Based upon our review of the briefs and record, we conclude at

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

conference that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

In 2005, Hicks pled guilty to third-degree sexual assault and three counts of felony bail jumping. After sentencing, he filed a postconviction motion in 2007 for resentencing under WIS. STAT. RULE 809.30. The circuit court denied that motion, and we affirmed on appeal.

In his current postconviction motion, Hicks seeks to modify his sentence or to withdraw his pleas. The circuit court denied the motion.

Because Hicks already had a postconviction motion under WIS. STAT. RULE 809.30, issues in his current motion are barred unless he has a sufficient reason for not raising them in the earlier motion, as provided in WIS. STAT. § 974.06(4). *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). To show a sufficient reason, Hicks asserts that his postconviction counsel was ineffective by not raising these issues. The State responds that such a claim of ineffective assistance requires a showing that the issues not raised by postconviction counsel were "clearly stronger" than the issues that counsel did raise. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶4, 360 Wis. 2d 522, 849 N.W.2d 668.

In his current postconviction motion, Hicks alleges that at the time of his pleas his trial counsel told him that the joint sentencing recommendation would be for the new sentences to run concurrently with his already existing sentence. However, Hicks alleges that at sentencing the State then asked for the sentences to be consecutive. Hicks asserts that this recommendation was a breach of the plea agreement by the State, and that his trial counsel failed to object to the breach.

The State correctly points out that on appeal Hicks does not develop an argument explaining how this issue was clearly stronger than the issue raised in his first postconviction motion. That said, we have reviewed the existing record, and we conclude that Hicks's claim appears to be weak.

To obtain resentencing on the ground that the State breached the plea agreement with its sentence recommendation, Hicks would be required to first prove that the plea agreement was for the State to recommend concurrent sentences rather than consecutive ones. The record does not currently support that claim. At the plea hearing, Hicks's attorney and the prosecutor described the agreement as including joint recommendations for consecutive sentences. When the court asked Hicks if the recitation of the agreement was also his understanding of the agreement, Hicks said that it was.

After accepting Hicks's pleas, the court went directly to sentencing. The State began its argument by clearly stating its request for a sentence "consecutive to the sentence this court gave him on the child pornography case," which was Hicks's already existing sentence. There was no sign of an objection from Hicks and, when he was offered allocution, he declined to speak. This lack of objection suggests that the plea agreement was correctly stated by the attorneys.

It is possible that a movant in Hicks's position could provide persuasive testimony or documentary evidence showing that the State actually agreed to a concurrent sentence recommendation. However, Hicks's motion does not contain or describe any such evidence. Accordingly, his claim for resentencing is weak because there is no basis to believe he would be able to prove that the State agreed to a concurrent recommendation.

Hicks's claim might also be liberally construed as one for plea withdrawal on the ground that he did not properly understand the plea agreement's sentence recommendation. However, this argument would also be weak, for the reasons described above. It is possible that Hicks would testify that he believed there was an agreement for a concurrent recommendation, but, in light of the existing record, it is unlikely that a factfinder would choose to believe that testimony over the existing record. Therefore, we conclude that Hicks has not shown that either potential claim based on the distinction between a concurrent and consecutive recommendation would be clearly stronger than the claim for resentencing that he made in his first postconviction motion.

In his brief on appeal, Hicks also raises two other issues. However, we conclude that neither of these was sufficiently raised in his current postconviction motion, and therefore we do not further address them.

More specifically, Hicks asserts that the plea agreement included a promise from the State to take a potential petition under WIS. STAT. ch. 980 "off the table," but that Hicks was subsequently evaluated for such a petition. The only reference to such an issue in his postconviction motion is a statement that he was told that, if he accepted the plea offer, "[t]hey would be willing to drop the 1st degree sexual assault to 3rd degree and take the Chapter 980 off the table." The motion does not contain any other factual assertions or argument that would be necessary to develop that statement into a possible claim. Therefore, we do not regard this issue as having been raised in the postconviction motion, and we do not discuss it further.

Hicks's brief on appeal also asserts that his trial counsel did not inform him of the effect of read-in charges. The postconviction motion does not contain any reference to this subject, and we do not discuss it further.

IT IS ORDERED that the order appealed is summarily affirmed under WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals