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DISTRICT I

February 23, 2021

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

2018AP1690 State of Wisconsin v. Antonio McAfee (L.C. # 1996CF964525)

Before Brash, P.J., Dugan and Donald, 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).

Antonio McAfee appeals the order denying his WIS. STAT. § 974.06 (2017-18)[1] motion. Based upon our review of the briefs and record, we conclude at conference that this case is

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

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We further conclude McAfee's claims fail because they are either barred or because he has not demonstrated that he was prejudiced by postconviction counsel's alleged deficiencies. Therefore, we summarily affirm.

This court has previously summarized the facts of McAfee's case. *See* ***State v. McAfee*** (***McAfee I***), No. 1999AP594-CR, unpublished slip op. ¶¶2-4 (WI App Sept. 28, 2000); ***State v. McAfee*** (***McAfee II***), No. 2004AP995-CR, unpublished slip op. ¶¶4-8 (WI App May 24, 2005).[2] For purposes of this appeal, it suffices to state that McAfee fired a handgun while fleeing Milwaukee police officers Wendolyn Tanner and Brian Ketterhagen. Officer Tanner was killed. McAfee went to trial on the charge of first-degree intentional homicide.

As we previously summarized:

> The defense theory was that McAfee did not intend to kill Tanner, but merely fired backwards through the bushes without aiming as he ran, in order to slow down the pursuit. The defense also argued that the fatal shot could actually have been fired by Ketterhagen, based on angles calculated using the positions of Tanner's body, the recovered shell casings and damage caused to a nearby fence during the shootout. Ketterhagen, however, testified that he saw McAfee stop running, hide around a corner and ambush Tanner face-to-face as he came through the opening in the fence. Ketterhagen also said that Tanner was already down before Ketterhagen got out of his vehicle and began firing at McAfee. The parties stipulated to the submission of first-degree reckless homicide, but the jury rejected the lesser included offense and found McAfee guilty of first-degree intentional homicide.

McAfee I, No. 1999AP594-CR, ¶4.

[2] McAfee also sought relief in the federal courts. The Seventh Circuit affirmed the denial of McAfee's petition for habeas corpus, which rested on his claim that his trial counsel was ineffective. *See* ***McAfee v. Thurmer***, 589 F.3d 353 (7th Cir. 2009).

McAfee sought postconviction relief and argued that his "best defense" to the crime charged was that he was guilty of first-degree reckless homicide and that trial counsel should have presented evidence that would have led the jury to find him guilty of the lesser-included crime. The circuit court held a ***Machner*** hearing before concluding that trial counsel was not ineffective.[3] The circuit court noted that McAfee's posconviction arguments exhibited "buyer's remorse" as to the agreed-upon theory of defense. McAfee appealed, and this court affirmed. *See* ***McAfee II***, No. 2004AP995-CR.

In so doing, we broke McAfee's ineffective-assistance-of-counsel claims into "two categories of claimed error":

> (1) trial counsel's singular reliance on a "friendly fire, cover-up" defense was deficient because it was irrationally based on … facts and law which precluded acquittal[4]; and (2) trial counsel was deficient in her failure to properly investigate, develop evidence, and cross-examine witnesses so as to … more effectively argue for the lesser-included offense of first-degree reckless homicide.

Id., ¶14. This court concluded that trial counsel's representation of McAfee was not deficient. *See* ***id.***, ¶3. Moreover, we specifically rejected McAfee's claim that "trial counsel irrationally failed during final argument to argue for the lesser-included offense of first-degree reckless homicide and failed to analyze the physical evidence from a view consistent with the lesser-included charge." ***Id.***, ¶35. The Wisconsin Supreme Court denied McAfee's petition for review.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[4] The friendly fire, cover up theory was that Ketterhagen fired the fatal bullet and the police falsified testimony to cover up the truth.

Thirteen years later, McAfee filed the underlying WIS. STAT. § 974.06 motion, arguing that postconviction counsel was ineffective for failing to argue that trial counsel was ineffective for not conceding that McAfee was guilty of reckless conduct when he fired his gun during his flight from the police officers and for not requesting a second lesser-included jury instruction for second-degree reckless homicide. The circuit court denied the motion without a hearing, and this appeal follows.

Absent a sufficient reason, a defendant is procedurally barred from raising claims in a WIS. STAT. § 974.06 postconviction motion that could have been raised in a prior postconviction motion or appeal. *See* § 974.06(4); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 184-86, 517 N.W.2d 157 (1994). Whether a § 974.06 motion alleges the requisite sufficient reason for failing to bring available claims earlier is a question of law that this court independently reviews. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668.

"In some instances, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal." ***Id.***, ¶36. To make such a showing, a WIS. STAT. § 974.06 motion must do more than assert a failure to challenge aspects of trial counsel's representation; the motion must allege that postconviction counsel was deficient and that the deficient performance prejudiced the defendant. ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. As part of showing deficient performance, "a defendant who alleges in a § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought." ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶4, 45-46.

In this instance, we need not analyze whether McAfee's present claims are clearly stronger than the ones previously raised. As set forth below, McAfee's claims fail because they are either barred by ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991), or because he has not demonstrated that he was prejudiced by postconviction counsel's alleged deficiencies.

On direct appeal, McAfee argued, in part, that trial counsel was ineffective for not more effectively arguing for the lesser-included offense of first-degree reckless homicide. In what amounts to a variation of that same theme, McAfee again argues—this time under the umbrella of postconviction counsel's ineffectiveness—that trial counsel should have focused on recklessness, *albeit* second-degree reckless homicide, and should have conceded that McAfee's behavior qualified. Because it amounts to a "re-theorized" version of his earlier claim that trial counsel deficiently shifted the focus away from McAfee's recklessness, McAfee's claim in this regard is barred. *See* ***id.*** ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

McAfee's assertion that postconviction counsel was deficient for not arguing that trial counsel should have requested an instruction on second-degree reckless homicide also fails. As summed up by the circuit court in its decision denying McAfee's postconviction motion:

> The defendant was charged with first-degree *intentional* homicide—not reckless homicide—and the jury found him guilty of that charge beyond a reasonable doubt. Even if trial counsel had conceded that the defendant's actions were reckless and had been successful in requesting a lesser-included instruction on second-degree reckless homicide, the jury still would have been instructed to consider the charge of first-degree intentional homicide before considering the lesser-included offenses.

(Emphasis in original.) "We presume that the jury follows the instructions given to it." *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

Here, after following the instructions given to it, the jury found McAfee guilty of first-degree intentional homicide. "If any doubt existed as to the level of scienter, e.g., intent …, the jury would have rejected the greater offense." ***Id.*** at 363. The jury did not do so when presented with instructions on both first-degree intentional homicide and first-degree reckless homicide. To the extent that McAfee believes an instruction on second-degree reckless homicide could have changed the jury's view, that belief hinges on speculation. Speculation is not enough to establish prejudice. *See* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (explaining that "more than rank speculation" is required to satisfy the prejudice prong of an ineffective assistance of counsel claim). Accordingly, we affirm the posconviction court's order denying McAfee's WIS. STAT. § 974.06 motion without a hearing.

IT IS ORDERED that the order is summarily affirmed. *See* 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