COURT OF APPEALS DECISION DATED AND FILED

October 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

No. 99-3207

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD M. PEASE, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Richard M. Pease, Jr., appeals pro se from an order denying his motion for postconviction relief brought under WIS. STAT. § 974.06

(1997-98).[1] Pease offers multiple arguments and assertions in support of his request for a new trial that are either waived or lack merit. We affirm.

¶2 Pease was convicted in 1990 of being a party to the crimes of first-degree intentional homicide, kidnapping, false imprisonment, endangering safety by use of a weapon, and aiding a felon. The convictions arose out of the shooting death of Michael FitzGibbon on frozen Lake Butte des Morts on December 23, 1989. Pease's conviction was affirmed on appeal. *See* ***State v. Pease, Jr***., No. 92-1409-CR, unpublished slip op. (Wis. Ct. App. Apr. 28, 1993). Pease filed a pro se motion for postconviction relief under WIS. STAT. § 974.06, which the trial court denied.

¶3 We first address Pease's argument that the testimony of prosecution witness Todd Crawford should have been excluded because Crawford allegedly received consideration in exchange for his testimony. Crawford was the only eyewitness to testify at trial. Crawford stated that while FitzGibbon was lying face down on the ice, Pease held a gun close to FitzGibbon's head and pulled the trigger. Pease then demanded that Crawford shoot FitzGibbon, which he claimed he did with his eyes closed. Crawford further testified that Mark Price shot FitzGibbon in the back of the head, and then Pease and the others used a chain saw to cut a hole in the ice where they disposed of FitzGibbon's body. Crawford admitted that he had agreed to testify in exchange for a five-year felony charge.

¶4 In support of his argument that the use of Crawford's testimony was improper, Pease cites ***United States v. Singleton***, 144 F.3d 1343 (10th Cir. 1998), a

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

federal circuit court decision holding that an exchange of prosecutorial leniency for testimony violates federal law. The opinion Pease cites was vacated and, on reconsideration, greatly modified to clarify that the federal statute construed in ***Singleton*** does not preclude the United States, through its attorneys, from offering accomplice leniency in exchange for truthful testimony. *See* ***United States v. Singleton***, 165 F.3d 1297 (10th Cir.), *cert. denied*, 527 U.S. 1024 (1999). In any event, that case is not binding on this court. *See, e.g.,* ***State v. Harris***, 199 Wis. 2d 227, 245 n.10, 544 N.W.2d 545 (1996). The leniency promised Crawford was brought out at trial and was a factor the jury could consider in assessing Crawford's credibility.

¶5 Challenges to the credibility of various witnesses pervade Pease's arguments in support of his request for a new trial. Pease's challenges to the credibility of various witnesses, in essence, ask us to reweigh the evidence and judge the credibility of the witnesses. Those tasks are reserved solely for the trier of fact. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). Inconsistencies and contradictions in the statements of witnesses do not render testimony inherently or patently incredible, but simply create a question of credibility. *See* ***Haskins v. State***, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980).

¶6 In denying Pease's WIS. STAT. § 974.06 motion, the trial court stated:

> Credibility is an issue for the jury to determine. At the time of trial there were many contradictory statements. This is not unusual from events in which the participants had been drinking, and perhaps doing some drugs. It was also, obviously, a time of heightened excitement for the participants. Defendant's counsel had the opportunity, and did, challenge the credibility of the witnesses. Whether or not defendant wished to introduce contradictory evidence is not a matter over which the state had any control. His opportunity to introduce such evidence was not taken

> advantage of when he exercised his constitutional right not to incriminate himself. He cannot now raise these issues.

We affirm the trial court's finding that there was no basis to disturb the jury's credibility determinations.

¶7 We turn to Pease's claim that he is entitled to a new trial because the prosecution failed to disclose exculpatory evidence in violation of ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). The allegedly exculpatory evidence consists of notes taken by the former Winnebago County Coroner, Michael Stelter, in which he observed that the victim was mentally ill and had previously attempted suicide.[2]

¶8 The State has "the affirmative duty to disclose to the defendant or his counsel any material or information within its possession or control which tends to negate the guilt of the defendant or would tend to reduce his punishment therefor." ***Nelson v. State***, 59 Wis. 2d 474, 479, 208 N.W.2d 410 (1973). To establish a ***Brady*** violation, the suppressed evidence must be material; that is, there must be a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***United States v. Bagley***, 473 U.S. 667, 682 (1985).

¶9 Here, the alleged exculpatory evidence consists of notes indicating that the victim had suicidal tendencies. The trial court observed that the defense was aware of the victim's prior suicide attempt at the time of trial, and that direct evidence at trial established that the victim had been shot. In light of the other evidence of Pease's guilt, and in the absence of any evidence that the victim had

---

[2] FitzGibbon's body was recovered from the lake in March 1990. His body was cremated before an autopsy could be performed.

committed suicide, the trial court concluded that the State's failure to disclose the notes was harmless error. *See* ***State v. Randall***, 197 Wis. 2d 29, 38-39, 539 N.W.2d 708 (Ct. App. 1995) (viewed in toto, State's failure to disclose information was harmless error). We see no evidence that the trial court's factual findings were clearly erroneous. The "exculpatory evidence" was not within the exclusive control of the State, and consequently, there may have been no duty to disclose the evidence to Pease even if the district attorney was aware of it. However, even if the State violated its duty to disclose this evidence, a new trial is not required because disclosure of the notes would not have affected the verdict of the jury. *See* ***Nelson***, 59 Wis. 2d at 486. Absent any evidence that the victim committed suicide, the coroner's notes simply cannot be characterized as information "which tends to negate the guilt of the defendant." *See* ***id.*** at 479. We affirm the trial court's conclusion that Pease failed to establish a ***Brady*** violation sufficient to warrant a new trial.

¶10 Pease further alleges that his due process rights were violated by the prosecutor's reliance on allegedly perjured testimony obtained from coroner Stelter. Pease asserts that Stelter perjured himself with respect to the number of times he examined the victim's body and his comments regarding the nature of the wound in the back of the victim's head.

¶11 "Due process prevents a prosecutor from relying on testimony the district attorney knows to be false, or later learns to be false." ***State v. Nerison***, 136 Wis. 2d 37, 54, 401 N.W.2d 1 (1987). However, a new trial is warranted only if the "prosecutor in fact used false testimony which, in any reasonable likelihood, could have affected the judgment of the jury." ***Id***. Although Pease speculates that the prosecution knew of Stelter's alleged perjury, he provided the trial court with no evidence to support that claim. The trial court found that the defense was

aware of the discrepancies in the coroner's testimony and that both the prosecution and the defense questioned Stelter extensively about those discrepancies at trial. Indeed, it was the State that elicited Stelter's admission that he had not noticed a head wound when he examined the body. We see no reason to disturb the trial court's finding that the State did not knowingly use perjured testimony to obtain Pease's conviction. The record supports the trial court's factual findings, and we affirm the trial court's conclusion that in light of the other evidence presented at trial, Pease was not prejudiced by the coroner's testimony. There is no reasonable likelihood that the coroner's testimony affected the judgment of the jury.[3]

¶12 Several of Pease's arguments are barred because they were not raised in his original postconviction motion filed in 1992 and Pease has not offered a sufficient reason to warrant permitting him to raise them now.[4]

¶13 WISCONSIN STAT. § 974.06 and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 186, 517 N.W.2d 157 (1994), require a criminal defendant to raise all postconviction claims in a single motion or appeal. Issues already adjudicated, waived or not raised in a prior postconviction proceeding cannot be raised in a § 974.06 motion unless there is "sufficient" reason why they were not raised in the

[3] In his reply brief, Pease argues for the first time that the State engaged in prosecutorial misconduct by knowingly presenting false testimony from Stelter, suggesting that his conviction is thus constitutionally defective. *See* ***Naupe v. Illinois***, 360 U.S. 264, 269 (1959) ("[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment."). He asserts that the coroner lied when he testified that he had examined the victim's body and that the State knew he was lying. We will not, as a general rule, consider arguments raised for the first time in a reply brief. *See* ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). We note, however, that the record provides no support for Pease's claim that the State knowingly relied on false testimony.

[4] Because the trial court addressed the issue of the coroner's notes and the allegedly perjured testimony on the merits, it implicitly found a sufficient reason why these claims were not raised in the first postconviction motion.

original postconviction motion. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. Section 974.06 does not "create an unlimited right to file successive motions for relief." ***State ex rel. Dismuke v. Kolb***, 149 Wis. 2d 270, 273, 441 N.W.2d 253 (Ct. App. 1989). "[A] prisoner's failure to assert a particular ground for relief in an initial postconviction motion bars the prisoner's assertion of the ground in a later motion, in the absence of justification for the omission." ***Id.*** at 274.

¶14 Pease now contends that a ***Brady*** violation occurred when the prosecution failed to disclose certain statements taken from Doug Seefeld and Susan Duerr that he claims support his allegation of perjury. He asserts that the testimony of prosecution witness Sam Griffin, a fellow prisoner to whom he made self-incriminating statements, was introduced in violation of Pease's Sixth Amendment right to counsel. He further argues that conflicting statements contained in his search and arrest warrants violate his Fourth Amendment right to be free from unreasonable search and seizure. He also contends that the trial court erred by admitting a police report later determined to have been falsified and by admitting physical evidence from the victim because the "chain of custody" was allegedly broken. In addition, despite the fact that Pease's direct appeal raised several claims of ineffective assistance of trial counsel, he now presents a host of new complaints regarding his trial counsel.[5]

[5] In his direct appeal, Pease argued that his trial counsel was ineffective for failing to preserve the testimony of his brother, Joseph Pease, who refused to testify on the eve of trial. *See* ***State v. Pease, Jr***., No. 92-1409-CR, unpublished slip op. (Wis. Ct. App. Apr. 28, 1993).

(continued)

¶15 Pease offers no adequate reason why these issues were not raised in his first postconviction motion brought in 1992. Where a defendant's claim for relief could have been, but was not, raised in a prior postconviction motion or on direct appeal, the claim is procedurally barred absent a sufficient reason for failing to previously raise it. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. Accordingly, Pease is prohibited from raising these issues here.

¶16 In addition, we have examined the trial court's alternate reasons for denying Pease's new claims and we adopt them as well. For example, the trial court rejected Pease's claim that but for the effect of his antidepressant medication, he would have testified at trial. The trial court found that Pease had offered no evidence that he was not competent to stand trial and that trial counsel knew of Pease's medical condition and concluded that it did not affect Pease's competency. The trial court further noted that if Pease had testified truthfully, his testimony would have been similar to his testimony in the trial of codefendant Price, wherein Pease testified that he shot the victim. We also note that many of Pease's arguments and claims on appeal differ from those presented to the trial court in his WIS. STAT. § 974.06 motion. We will not address claims that were not presented to the trial court. *See* ***State v. Rogers***, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995).

Now Pease contends that his trial counsel: (1) failed to introduce evidence of Pease's medical condition, including the fact that he suffers from Bells-Palsy syndrome and was taking antidepressant medication at the time of trial; (2) failed to make an adequate opening statement; (3) failed to argue that another man committed the crimes; (4) failed to argue that the victim committed suicide; (5) failed to adequately pursue inconsistencies in the coroner's testimony; (6) failed to challenge the underlying search warrant; (7) failed to explicitly request an instruction that no adverse inference be taken from the fact that Pease did not testify; and (8) failed to pursue a "chain of custody" argument with respect to the inadvertent release of the victim's body for cremation before an autopsy was conducted. Pease also lists other examples in his effort to demonstrate that his trial counsel rendered ineffective assistance.

¶17 We turn to Pease's claim that he received ineffective assistance from his appellate counsel. A claim of ineffective assistance of appellate counsel is properly raised by a petition for a writ of habeas corpus in the appellate court that heard the defendant's direct appeal. *See* ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992). Generally, we will not act in the absence of a proper petition. *See* ***State v. Speese***, 191 Wis. 2d 205, 227, 528 N.W.2d 63 (Ct. App. 1995), *reversed on other grounds*, 199 Wis. 2d 597, 545 N.W.2d 510 (1996). However, even if we were to consider the issue, it appears that Pease's arguments do not support a conclusion that appellate counsel rendered ineffective assistance in this case.

¶18 To establish a claim of ineffective assistance of appellate counsel, the defendant must show that counsel's performance was both deficient and prejudicial. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 620, 516 N.W.2d 362 (1994). We need not consider whether appellate counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990). A reasonable probability would be one sufficient to undermine confidence in the outcome of Pease's prior appeal. *See* ***id.***

¶19 Pease argues that his appellate counsel rendered ineffective assistance by failing to argue that trial counsel was ineffective for the myriad of reasons that Pease set forth in his briefs. He also asserts that his appellate counsel was ineffective for failing to argue that the trial court erred by admitting a letter reflecting animosity between Pease and the victim, and by failing to argue that

Pease was unknowingly under the influence of LSD when the crime was committed such that he lacked the capacity to commit the crimes. We have reviewed the arguments raised by Pease. Pease has not established that he was prejudiced by his appellate counsel's performance. Accordingly, there is no basis to conclude that Pease received ineffective assistance of appellate counsel.

¶20 Within the main arguments addressed herein, Pease also touches upon various other issues that are without merit. We do not separately address those issues. *See* ***Libertarian Party v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (appellate court need not address issues that "lack sufficient merit to warrant individual attention"); ***State v. Waste Management, Inc***., 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal."). The order of the trial court is affirmed.

By the Court.—Order affirmed.

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