COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP447 **Cir. Ct. No. 2009CF1913**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYRONE T. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Tyrone T. Robinson, pro se, appeals an order denying his WIS. STAT. § 974.06 (2015-16)[1] motion for postconviction relief. Robinson argues that his postconviction counsel was ineffective for failing to challenge the effectiveness of his trial counsel and that the circuit court erroneously denied his motion without conducting an evidentiary hearing. We reject Robinson's arguments and affirm.

BACKGROUND

¶2 In 2010, Robinson pled no contest to second-degree sexual assault of a child and to false imprisonment. As part of Robinson's WIS. STAT. RULE 809.30 direct appeal, appointed counsel filed a postconviction motion requesting plea withdrawal due to a defective plea colloquy, and sentencing relief in light of the state crime lab's DNA analysis report. After considering the testimony of Robinson and his trial attorney, the circuit court denied the motion in full. We affirmed the judgment of conviction and order denying postconviction relief. ***State v. Robinson***, No. 2012AP432-CR, unpublished slip op. (WI App Nov. 27, 2013). The Wisconsin Supreme Court denied Robinson's petition for review.

¶3 In October 2015, Robinson filed a WIS. STAT. § 974.06 postconviction motion for plea withdrawal alleging that trial counsel's ineffective assistance rendered his pleas infirm, and that postconviction counsel should have raised these claims as part of Robinson's direct appeal. The circuit court denied Robinson's motion without an evidentiary hearing, determining that the record conclusively established Robinson was not entitled to relief. Robinson appeals.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

STANDARD OF REVIEW

¶4 To withdraw a guilty or no contest plea after sentencing, a defendant must show by clear and convincing evidence that a refusal to allow plea withdrawal would result in a manifest injustice. ***State v. Dillard***, 2014 WI 123, ¶83, 358 Wis. 2d 543, 859 N.W.2d 44. Where ineffective assistance of trial counsel is the alleged manifest injustice, *see* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996), the defendant must prove that counsel's performance was deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

¶5 Because Robinson had a prior postconviction motion, it is not enough for him to allege that trial counsel's ineffective assistance constituted a manifest injustice entitling him to plea withdrawal. Absent a sufficient reason, a defendant is procedurally barred from raising issues in a WIS. STAT. § 974.06 postconviction motion that could have been raised on direct appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Where as here the ineffective assistance of postconviction counsel is alleged as the sufficient reason, the defendant must set forth with particularity facts showing that postconviction counsel's performance was both deficient and prejudicial. ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334 (citing ***Strickland***, 466 U.S. at 687. In addition, as part of the pleading requirements, the defendant must allege that his newly raised issues are "clearly stronger" than those raised previously. ***State v. Starks***, 2013 WI 69, ¶57, 349 Wis. 2d 274, 833 N.W.2d 146. "[N]o hearing is required if the defendant fails to allege sufficient facts in his or

her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157.

DISCUSSION

¶6 Prior to the entry of Robinson's no contest pleas, the state crime lab released a report containing its analysis of and findings concerning the DNA evidence collected and submitted by law enforcement. The primary claim in Robinson's WIS. STAT. § 974.06 postconviction motion was that trial counsel "provided gross misadvice when he misinformed Robinson that his semen had been found in the alleged victim's underwear."[2] Robinson alleged that but for trial counsel's incorrect information, he would not have pled and would have proceeded to trial. The motion further claimed that trial counsel provided ineffective assistance by failing to procure potentially exculpatory video surveillance recordings or interview additional witnesses.

¶7 The circuit court determined that Robinson was not entitled to an evidentiary hearing, finding that Robinson's new claims essentially rehashed the same issues adjudicated in his prior postconviction proceeding and that to the

[2] According to the report, stains containing Robinson's sperm were located in his van, where the assaults allegedly occurred. The victim's DNA was found under Robinson's fingernails and in the van. A swab of the inner front of Robinson's boxer shorts revealed a DNA mixture with at least one female and one male contributor. The victim was found to be the source of the major female DNA component, and Robinson was included as a possible male contributor: "The probability of randomly selecting an unrelated individual that could have contributed to this mixture profile is approximately" 1 in 59,000. Male DNA matching Robinson's profile was detected inside the victim's underwear. The report concluded that this profile was shared by 73 out of 14,540 males.

extent the claims were different, Robinson failed to set forth a sufficient reason for not raising them earlier. The circuit court also rejected Robinson's claim that he would not have pled but for trial counsel's alleged misinformation concerning the presence of Robinson's semen in the victim's underwear. Here, the court cited to additional DNA evidence as well as Robinson's testimony at the original postconviction hearing that he chose to plead in order to avoid the mandatory minimum penalty.

¶8 We conclude that the circuit court properly denied Robinson's postconviction motion without an evidentiary hearing. *See* ***State v. Sulla***, 2016 WI 46, ¶¶41, 43, 369 Wis. 2d 225, 880 N.W.2d 659 (whether the record conclusively demonstrates that a defendant is not entitled to relief presents a question of law that we review independently). The assertion that trial counsel told Robinson his semen was found inside the victim's underwear and that this impacted Robinson's decision to plead is belied by the record. At sentencing, trial counsel introduced the crime lab report as a defense exhibit to demonstrate the lack of inculpatory DNA findings. As plain as day, trial counsel told the sentencing court that Robinson's semen was not detected in either his boxers or the victim's underwear.

¶9 Attempting to circumvent this fatal fact, Robinson maintains he was too overmedicated to think clearly or to hear trial counsel's sentencing argument correctly characterizing the nature of the DNA evidence. This self-serving claim does not warrant an evidentiary hearing. First, Robinson told the plea-taking court that he understood all of the information in his plea questionnaire, his medication did not affect his ability to understand what he was doing at the plea hearing, he was able to make decisions about what was in his best interest, and he was thinking clearly at the time he entered his pleas.

¶10 Second, prior to the appointment of postconviction counsel, Robinson asked both trial counsel and an appellate attorney from the State Public Defender's Office about the possibility of withdrawing his pleas. Trial counsel testified that after a meeting, Robinson decided not to pursue plea withdrawal. The SPD attorney wrote a letter to Robinson stating that an attempt to withdraw his pleas "because of medication issues" would be made difficult by Robinson's statements at the plea hearing. Thereafter, when Robinson was represented by postconviction counsel and was by his own admission properly medicated and clear headed, he filed a postconviction motion seeking plea withdrawal due to a defective colloquy. Robinson knowingly bypassed the chance to argue in his original postconviction motion that trial counsel's supposed misinformation concerning the presence of semen in the victim's underwear supported plea withdrawal.

¶11 Third and in a similar vein, at his original postconviction hearing, Robinson testified that he did not understand the definition of sexual contact and complained he was misinformed that the victim's DNA was found in the front of his boxer shorts. Though he emphasized his newfound familiarity with and understanding of the crime lab report, Robinson did not claim he was misinformed that his semen was found in the victim's underwear. It was only after the circuit court denied the postconviction motion and Robinson's convictions were affirmed on direct appeal that he alleged a new and different misunderstanding of the DNA report. Robinson's claims of ineffective assistance of trial counsel were properly rejected by the circuit court without a new evidentiary hearing because the record as a whole, including the record made at the earlier evidentiary hearing, conclusively shows that those claims had no merit.

¶12 We further conclude that the circuit court properly denied Robinson's remaining claims without an evidentiary hearing. As to the charge that trial counsel was ineffective for failing to procure potentially exculpatory video surveillance recordings, Robinson was aware that such recordings might exist at the time he entered his no contest pleas. Moreover, he cannot establish that the recordings actually exist, much less their exculpatory value, and, therefore, any prejudice is merely speculative. Likewise, Robinson has not shown any prejudice from trial counsel's failure to interview certain witnesses. Finally, though Robinson asserts the ineffective assistance of postconviction counsel as his sufficient reason for failing to raise these claims earlier, his WIS. STAT. § 974.06 postconviction motion fails to allege with particularity how postconviction counsel's conduct was deficient or prejudicial. ***Balliette***, 336 Wis. 2d 358, ¶18 (whether a postconviction motion is sufficient on its face to require an evidentiary hearing is a question of law we review independently). Robinson was required to demonstrate within the four corners of his motion that as a matter of appellate strategy, his postconviction counsel clearly erred by not challenging trial counsel's failure to obtain videos or interview witnesses. *See* ***id.***, ¶¶65-68. Rather than asserting specific facts relevant to postconviction counsel's representation, Robinson merely alleges that postconviction counsel "presented none of these issues before the trial court, thereby foreclosing Robinson's ability to argue these issues on direct appeal" and "has thus proved ineffective." *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶62, 360 Wis. 2d 522, 849 N.W.2d 668 (the mere fact that postconviction counsel did not pursue certain claims does not demonstrate ineffectiveness, and "[w]e will not assume ineffective assistance from a conclusory assertion"). Given the strong presumption that postconviction counsel rendered effective assistance, *see* ***Balliette***, 336 Wis. 2d 358, ¶¶26, 28, Robinson's

motion fails to establish a reason sufficient to overcome ***Escalona's*** procedural bar.

By the Court.—Order affirmed.

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