

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2007

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2005AP2059

Cir. Ct. No. 2005CV6679

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. CHARLES E. HENNINGS,

PETITIONER-APPELLANT,

v.

GREG GRAMS, WARDEN, COLUMBIA CORRECTIONAL INSTITUTION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Charles E. Hennings appeals from an order denying his petition for a writ of habeas corpus alleging the ineffective assistance of postconviction counsel. The issue is whether the trial court should have decided the merits of his ineffective assistance claims. We conclude that because

Hennings has no constitutional or statutory right to postconviction counsel to pursue relief pursuant to WIS. STAT. § 974.06 (2005-06), he has no constitutional or statutory entitlement to the effective assistance of counsel on those claims.¹ Therefore, we affirm.

¶2 A jury found Hennings guilty of felony murder.² After judgment was entered, Hennings moved for a new trial, which the trial court denied. This court affirmed the judgment of conviction and the postconviction order. *See State v. Hennings*, No. 2000AP3432-CR, unpublished slip op., ¶43 (WI App Nov. 13, 2001) (“*Hennings I*”). Hennings then moved *pro se* for postconviction relief pursuant to WIS. STAT. § 974.06 (2003-04), challenging the effectiveness of his postconviction counsel who represented him on his previous motion for a new trial. Following a *Machner* hearing, the trial court denied the motion.³ This court affirmed that postconviction order, holding, in reference to one claim, that Hennings failed to prove prejudice as required to maintain an ineffective-assistance claim pursuant to *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and that, in reference to the other two claims, counsel’s conduct was within the realm of reasonable representation. *See State v. Felton*, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983); *see State v. Hennings*, No. 2004AP1132, unpublished slip op., ¶¶12, 21, 27 (WI App Sept. 20, 2005) (“*Hennings II*”).

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² Hennings was previously tried by a jury. The trial court declared a mistrial because the jury was unable to reach a verdict. Hennings was again tried; that jury convicted him of felony murder, a lesser-included offense of those originally charged: first-degree intentional homicide and armed robbery.

³ An evidentiary hearing to determine trial counsel’s effectiveness is known as a *Machner* hearing. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶3 While *Hennings II* was pending, Hennings filed a petition for a writ of habeas corpus, alleging the ineffective assistance of postconviction counsel. This court dismissed that petition, explaining that it would be more properly filed in the trial court because it challenged postconviction counsel's conduct in that court before he filed his notice of appeal. Hennings did so and the trial court denied the petition, ruling that Hennings had not "completely exhausted all of his legal remedies regarding the allegations he presents, nor has he complied with the requirements of Wis. Stats. sec. 782.04." It is from this order that Hennings appeals.

¶4 On appeal, Hennings alleges the ineffective assistance of postconviction counsel, whom he retained to pursue relief pursuant to WIS. STAT. § 974.06, for failing to pursue two instances of trial counsel's alleged ineffectiveness. Hennings misunderstands that while he is entitled to (the effective assistance of) counsel to pursue postconviction claims pursuant to WIS. STAT. RULE 809.30(2)(h) (1999-2000), he is not entitled to representation to pursue postconviction claims pursuant to § 974.06. See *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991); *State v. Evans*, 2004 WI 84, ¶32, 273 Wis. 2d 192, 682 N.W.2d 784, *overruled on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900.

¶5 The United States Supreme Court has addressed this issue in *Coleman*, 501 U.S. at 752-53:

There is no constitutional right to an attorney in state post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); *Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. See *Wainwright v. Torna*, 455 U.S. 586, 102 S. Ct. 1300, 71 L. Ed. 2d 475

(1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). Coleman contends that it was his attorney's error that led to the This error cannot be constitutionally ineffective; therefore Coleman must []bear the risk of attorney error that results in a procedural default.[]

Id. Similarly, the Wisconsin Supreme Court has held that “[t]here is no constitutional right to counsel on a § 974.06 motion.” *Evans*, 273 Wis. 2d 192, ¶32. There also is no statutory right to counsel on a postconviction motion for relief pursuant to WIS. STAT. § 974.06. *See* WIS. STAT. § 977.05(4) and (6).

¶6 There is no constitutional or statutory right to counsel in postconviction proceedings pursuant to WIS. STAT. § 974.06. *See Coleman*, 501 U.S. at 752-53; *Evans*, 273 Wis. 2d 192, ¶32. Consequently, Hennings may not maintain an ineffective-assistance claim against counsel for a proceeding for which he was not entitled to representation. *See Coleman*, 501 U.S. at 752-53.

By the Court.—Order affirmed.

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

