COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2167 **Cir. Ct. No. 1993CF931175**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL PAUL LOVE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Michael Paul Love appeals *pro se* from an order denying his motion for postconviction relief. His varied claims include allegations that he received ineffective assistance from his trial and postconviction attorneys, and that the circuit court erroneously exercised its discretion in failing to record

voir dire. He further asks this court to exercise its discretionary power of reversal under WIS. STAT. § 752.35 (2005–06).[1] We reject his contentions and affirm.

Background

¶2 Michael Paul Love was sixteen years old when he shot and killed Duane Lewis. The juvenile court waived its jurisdiction and Love was tried in criminal court. A jury convicted him of first-degree intentional homicide while armed. *See* WIS. STAT. §§ 940.01(1), 939.63 (1993–94).

¶3 Love filed a direct appeal, arguing that the circuit court erred in refusing to redact a portion of his incriminating custodial statement. We disagreed and affirmed the conviction. *See* ***State v. Love***, No. 94-2828-CR, unpublished slip op. (Wis. Ct. App. July 5, 1995). The supreme court denied review.

¶4 In 1999, Love filed a postconviction motion pursuant to WIS. STAT. § 974.06 (1999–2000), claiming that the circuit court had erroneously exercised its sentencing discretion. The court concluded that the motion was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 163–164 (1994) (defendants may not bring successive postconviction motions absent a sufficient reason for doing so). Love did not appeal.

¶5 In 2006, Love initiated the instant litigation by filing a second postconviction motion under WIS. STAT. § 974.06. Love claimed that his trial attorneys[2] were ineffective: (1) by failing to demonstrate that his confession was

[1] All references to the Wisconsin Statutes are to the 2005–06 version unless otherwise noted.

[2] Following the waiver of juvenile jurisdiction, Love was represented in circuit court by two lawyers. His current litigation refers to "trial counsel" and we assume he refers to both.

inadmissible because it was involuntary and obtained without first notifying his mother; and (2) by failing to insist that *voir dire* and opening statements be recorded. He contended that his postconviction attorney was in turn ineffective by failing to assert these claims against his trial lawyers. In addition to claims against his attorneys, Love alleged that the circuit court had erroneously exercised its discretion in permitting *voir dire* not to be recorded. Last, he asked the circuit court to reverse his conviction on the grounds that the real controversy was not fully tried.

¶6 The circuit court denied Love's motion, concluding that the claims were conclusory and unsupported by the record. Love moved for reconsideration. The court denied this motion as well, concluding that Love had failed to show any prejudice to his case from his trial attorneys' alleged errors. This appeal followed.

Discussion

¶7 The State contends that Love's claims are procedurally barred. We agree and affirm on this ground. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985) (circuit court order will be upheld if record supports result irrespective of the circuit court's rationale).

¶8 A defendant is barred from pursuing claims in a subsequent appeal that could have been raised in an earlier postconviction motion or direct appeal unless the defendant provides a "sufficient reason" for not raising them previously. ***Escalona-Naranjo***, 185 Wis. 2d at 181–182, 517 N.W.2d at 162. The ineffective assistance of defendant's postconviction lawyer may provide the requisite "sufficient reason" for permitting an additional motion pursuant to WIS. STAT. § 974.06. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556

N.W.2d 136, 139 (Ct. App. 1996). ***Rothering***, however, does not extend to an unlimited number of successive postconviction motions.

¶9 While ***Rothering*** might have justified raising the instant allegations in Love's first postconviction motion, it cannot be used to justify a second collateral attack. "We need finality in our litigation…. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of [WIS. STAT. § 974.06]." ***Escalona-Naranjo***, 185 Wis. 2d at 185, 517 N.W.2d at 163–164.

¶10 Were we to look behind the procedural bar, the claims would fail on their merits. To establish a postconviction attorney's ineffectiveness based on failure to challenge a trial attorney's effectiveness, the defendant must show that the trial attorney was in fact ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 480, 673 N.W.2d 369, 375. Love has not done so.

¶11 We review ineffective-assistance-of-counsel allegations under the two-prong standard of ***Strickland v. Washington***, 466 U.S. 668 (1984). To prevail, defendants must prove both deficient performance and prejudice from that deficiency. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 587, 682 N.W.2d 433, 442. "[B]oth the performance and prejudice components … are mixed questions of law and fact." ***State v. Pitsch***, 124 Wis. 2d 628, 633–634, 369 N.W.2d 711, 714 (1985) (citation omitted). We will not overturn the circuit court's findings of fact unless they are clearly erroneous. ***Id.***, 124 Wis. 2d at 634, 369 N.W.2d at 714. However, determinations of whether an attorney's performance was deficient and whether the deficiency prejudiced the defense are questions of law that we review *de novo*. ***Id.***, 124 Wis. 2d at 634, 369 N.W.2d at 715.

¶12 To prove deficiency, Love must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Pote***, 2003 WI App 31, ¶15, 260 Wis. 2d 426, 440, 659 N.W.2d 82, 89. To prove prejudice, Love must show that the errors "had an actual, adverse effect." ***Id.***, 2003 WI App 31, ¶16, 260 Wis. 2d at 440, 659 N.W.2d at 89. Love must satisfy both prongs of the test to be afforded relief. ***Allen***, 2004 WI 106, ¶26, 274 Wis. 2d at 587, 682 N.W.2d at 443. If his showing is inadequate on one component, we need not address the other. *See* ***Pote***, 2003 WI App 31, ¶14, 260 Wis. 2d at 439–440, 659 N.W.2d at 89. We may choose to address either component first. ***Id.***, 2003 WI App 31, ¶14, 260 Wis. 2d at 439, 659 N.W.2d at 88–89.

¶13 Love shows no prejudice from his trial attorneys' failure to request that opening statements and *voir dire* be recorded. Opening statements were recorded; thus Love suffered no prejudice from his attorneys' failure to make the request. As to *voir dire*, Love asserts the loss of "materials facts" of "substantial value," but he has neither identified those facts nor posited how their loss has prejudiced him. "[A] postconviction motion for relief requires more than conclusory allegations." ***Allen***, 2004 WI 106, ¶15, 274 Wis. 2d at 580, 682 N.W.2d at 439. Love's claim must therefore fail.

¶14 Love next faults his trial attorneys for failing to suppress an incriminating custodial statement on the dual grounds that he requested his mother's presence during the interrogation and that his statement was not voluntarily made. The claims cannot succeed because Love shows no deficiency in his trial attorneys' performance.

¶15 Love makes only a conclusory and self-serving allegation in asserting that he requested his mother during the course of his interrogation. Love directs us to nothing that supports his allegation in the transcripts or other record documents. We will not comb the record for facts to support his claim. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 411, 620 N.W.2d 463, 465–466 (court of appeals will not sift the record for facts to support a party's argument).

¶16 Moreover, Love does not assert that he ever told his trial attorneys of a request for his mother during questioning nor does he suggest any reason that his attorneys should have known of such a request. The attorneys' alleged failure to act on information within Love's knowledge is not ineffective assistance if Love did not disclose the existence of the underlying facts. *Cf*. ***State v. Hubanks***, 173 Wis. 2d 1, 26–27, 496 N.W.2d 96, 105–106 (Ct. App. 1992) (failure to investigate witnesses not ineffective where defendant has not revealed the existence of the witnesses).

¶17 Love has similarly failed to identify a deficiency in any other aspects of the defense effort to suppress incriminating statements. Contrary to Love's contention, there is no Wisconsin rule mandating parental notification before a juvenile's statement is admissible. ***Theriault v. State***, 66 Wis. 2d 33, 46, 50, 223 N.W.2d 850, 856, 858 (1974). Nor is there a *per se* rule excluding in-custody statements from juveniles who were not first given the opportunity to consult with a parent. ***State v. Jerrell C.J.***, 2005 WI 105, ¶¶37, 43, 283 Wis. 2d 145, 164, 166, 699 N.W.2d 110, 119, 120. While these considerations are significant, "[t]he voluntariness of a confession is evaluated on the basis of the totality of the circumstances surrounding that confession." ***Id.***, 2005 WI 105, ¶20, 283 Wis. 2d at 157, 699 N.W.2d at 115.

¶18 In the instant litigation, the court conducted a ***Miranda-Goodchild*** hearing[3] to determine the admissibility of Love's custodial statement. The question of whether Love gave his statement voluntarily was thus squarely before the court. The circuit court evaluated the voluntariness of Love's confession using the appropriate "totality of the circumstances" standard. The evidence presented included uncontroverted testimony that Love was arrested at home and that his mother was informed of the arrest and the charge.

¶19 Love does not demonstrate that his trial attorneys acted improperly, or failed to do any necessary act, or failed to object to any erroneous circuit court procedure in litigating the suppression motion. The motion to suppress was unsuccessful but the focus of an ineffective assistance analysis is not on the outcome but on the reliability of the proceedings. ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 588, 665 N.W.2d 305, 314.

¶20 Love failed to show ineffective assistance from his trial attorneys. He therefore cannot establish that his postconviction attorney was ineffective in failing to make such a claim. *See* ***Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d at 480, 673 N.W.2d at 375.

¶21 In addition to alleging ineffective assistance of counsel, Love contends that he is entitled to relief because the circuit court erroneously exercised its discretion in permitting *voir dire* not to be recorded. Love cannot use WIS. STAT. § 974.06 to press this claim. The statute is a vehicle for only constitutional

[3] A trial court holds a ***Miranda-Goodchild*** hearing to determine whether a suspect's rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), were honored, and whether any statement the suspect made to police was voluntary. *See* ***State v. Hockings***, 86 Wis. 2d 709, 715–716, 273 N.W.2d 339, 341–342 (1979).

and jurisdictional challenges. ***State v. Evans***, 2004 WI 84, ¶33, 273 N.W.2d 192, 215, 682 N.W.2d 784, 795 (criticized on other grounds by ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 368–369, 714 N.W.2d 900, 908).

¶22 Moreover, we cannot fault the court's exercise of discretion in declining to record *voir dire*. The court provided that if problems arose during jury selection, the issues would be reconstructed and put on the record. No party requested recording the selection and no party objected to the court's mechanism for addressing any potential disputes. Love points to no legal barrier to the procedure used by the court; at the time of Love's trial, SCR 71.01 (1993-94) did not require that *voir dire* be recorded. We conclude that the court's exercise of discretion was appropriate.

¶23 Love claims that the circuit court had authority to reverse his conviction pursuant to WIS. STAT. § 805.15(1). The court could not do so. Motions pursuant to § 805.15(1) must be filed and served within twenty days of the verdict unless the court sets a longer time by order. WIS. STAT. § 805.16. Love was convicted in 1993. His 2006 motion was filed outside of the statutory time limits.[4]

¶24 Finally, Love asserts that this court can reverse his conviction pursuant to WIS. STAT. § 752.35. We cannot. An appeal of an unsuccessful collateral attack under WIS. STAT. § 974.06 does not allow discretionary reversal

[4] The circuit court did not address this aspect of Love's motion. We consider it denied by virtue of the court's finding that Love raised "no other issue of merit …." *See also* WIS. STAT. § 805.16(3) (motions considered denied if not decided within ninety days after verdict).

under § 752.35. *See* ***State v. Allen***, 159 Wis. 2d 53, 55–56, 464 N.W.2d 426, 427 (Ct. App. 1990). The supreme court has commented on the ***Allen*** holding, but it has not overruled our decision. *See* ***State v. Armstrong***, 2005 WI 119, ¶113, 283 Wis. 2d 639, 682–683, 700 N.W.2d 98, 119–120. We must therefore adhere to ***Allen***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189–190, 560 N.W.2d 246, 256 (1997).

By the Court.—Order affirmed.

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