COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP419 **Cir. Ct. No. 2002CF2601**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. CANADY,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Robert L. Canady, *pro se*, appeals from orders denying his postconviction motions, filed under WIS. STAT. § 974.06 (2007-08)[1] and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996) (per curiam). Canady argues that his postconviction counsel was ineffective because he did not argue that Canady's trial counsel was ineffective for failing to file a motion to suppress. In addition, Canady argues that his postconviction counsel was ineffective for failing to challenge the sentence he received as violative of ***Apprendi v. New Jersey***, 530 U.S. 466 (2000). The postconviction court denied the first claim after a ***Machner*** hearing and denied the ***Apprendi*** claim on its face.[2] We affirm.

BACKGROUND

¶2 In February 2003, following a jury trial, Canady was convicted of first-degree intentional homicide as a party to a crime, with use of a dangerous weapon. He was sentenced to life in prison with eligibility to petition for release to extended supervision on May 10, 2042.

¶3 Canady subsequently took a direct appeal claiming that his confession was either part of a polygraph examination and was inadmissible or was involuntary and should have been suppressed. We affirmed his conviction. *See* ***State v. Canady***, No. 2006AP1000-CR, unpublished slip op. (WI App Mar. 13, 2007).

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

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

¶4 In June 2008, Canady, *pro se*, filed a WIS. STAT. § 974.06 motion alleging that pursuant to ***Rothering***, postconviction counsel's ineffectiveness constituted a sufficient reason for his failure to previously raise the issues addressed in the motion. Canady's claims were based on postconviction counsel's failure to challenge trial counsel's decision not to file a motion to suppress on the basis of an illegal search and seizure and postconviction counsel's failure to argue that his sentence violated ***Apprendi***. The postconviction court denied Canady's second claim on its face after concluding that the ***Apprendi*** holding "is not applicable to a sentence which is not governed by mandatory sentencing guidelines, such as Wisconsin's system of advisory guidelines." The postconviction court ordered briefing on the suppression issue.

¶5 Canady sought reconsideration on the ***Apprendi*** claim, which was denied. Meanwhile, the postconviction court granted Canady a ***Machner*** hearing regarding the suppression issue. Canady requested that counsel be appointed to represent him for purposes of the hearing. The postconviction court never addressed Canady's motion for the appointment of counsel, and he proceeded *pro se*.

¶6 At the ***Machner*** hearing, Canady's postconviction counsel, Attorney Provis, and his trial counsel, Attorney Backes, testified. Based on the testimony presented, the postconviction court denied Canady's remaining postconviction claim. Canady now appeals from both the order denying his claim regarding the suppression issue and the order denying his claim based on ***Apprendi***.

ANALYSIS

I. Ineffectiveness of postconviction counsel for failing to challenge trial counsel's decision not to pursue a suppression motion.

¶7 A claim of ineffective counsel is a constitutional issue, which is cognizable under WIS. STAT. § 974.06. *See* ***State v. Ludwig***, 124 Wis. 2d 600, 606, 369 N.W.2d 722 (1985) (Constitutional right to counsel is right to effective assistance of counsel.); ***State v. Johnson***, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981) (WISCONSIN STAT. § 974.06 permits collateral review of a defendant's conviction based on errors of jurisdictional or constitutional dimension.). However, § 974.06 "was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Thus, a prisoner who has had a direct appeal or other postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a "sufficient reason" for failing to raise it earlier. ***Id.***

¶8 Claims of ineffective assistance of trial counsel must be raised in the trial court in a postconviction motion prior to a direct appeal. *See* WIS. STAT. RULE 809.30(2)(h). Therefore, postconviction counsel's failure to raise ineffective assistance of trial counsel may present a "sufficient reason" to overcome the ***Escalona*** procedural bar. *See* ***Rothering***, 205 Wis. 2d at 681-82. When an ineffective assistance of postconviction counsel claim is premised on the failure to raise ineffective assistance of trial counsel, the defendant must first establish trial counsel actually was ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶9 To prevail on a claim of ineffective assistance of trial counsel, Canady must show that counsel was deficient and that the deficiency prejudiced his defense. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. A defendant must successfully show both deficiency and prejudice; if one prong is unfulfilled, we need not address the other. *See* ***State v. Manuel***, 2005 WI 75, ¶72, 281 Wis. 2d 554, 697 N.W.2d 811.

¶10 To prove deficiency, a defendant must demonstrate that counsel's conduct falls below an objective standard of reasonableness. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, the 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶11 Ineffective assistance claims present us with mixed questions of fact and law. *See* ***Mayo***, 301 Wis. 2d 642, ¶32. The trial court's findings of historical fact will be upheld unless clearly erroneous; whether those facts constitute a deficiency or amount to prejudice are determinations we review *de novo*. *See* ***id.***

¶12 Canady claims his trial counsel, Attorney Backes, was ineffective for failing to file a motion to suppress the murder weapon based on an alleged violation of Canady's Fourth Amendment rights. Because it is dispositive, we turn directly to the prejudice prong of the ineffective assistance analysis. Even if we accept Canady's proposition that Attorney Backes's performance was deficient, we conclude that he was not prejudiced by counsel's conduct. We agree with Canady's postconviction counsel's, Attorney Provis's, assessment, offered during the ***Machner*** hearing, that even if the gun seized during the search had been

suppressed, it is unlikely that a jury would have acquitted Canady in light of the overwhelming evidence against him, which included the victim's identification of "Bill" (the name Canady goes by) as the shooter and Canady's confession. Consequently, Canady's ineffective assistance of trial counsel argument lacks merit. Because trial counsel was not ineffective, postconviction counsel was not ineffective for failing to raise trial counsel's performance as an issue. Canady therefore cannot use ***Rothering*** to circumvent the dictates of WIS. STAT. § 974.06 and ***Escalona***, and the postconviction court properly denied Canady's present § 974.06 motion.

¶13 We briefly address Canady's argument that because the trial court failed to issue a ruling on his motion seeking the assistance of counsel for the ***Machner*** hearing, he was denied the opportunity to conduct a meaningful and adequate evidentiary hearing. While the State correctly points out that Canady had no constitutional right to counsel in a postconviction proceeding under WIS. STAT. § 974.06, *see* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 649, 579 N.W.2d 698 (1998), the State otherwise fails to respond to Canady's claim that the postconviction court erred when it "fail[ed] to even acknowledge, let alone address" his motion, *see* ***State v. Lehman***, 137 Wis. 2d 65, 76, 403 N.W.2d 438 (1987) ("The trial court has the authority to appoint counsel whenever in the exercise of its discretion it deems such action necessary."). Canady, however, did not bring the issue of his motion for the appointment of counsel to the postconviction court's attention at any point prior to or during the ***Machner*** hearing. Instead, he acquiesced to proceeding *pro se*, and consequently, we deem this issue forfeited. *See generally* ***State v. Schmaling***, 198 Wis. 2d 756, 762, 543 N.W.2d 555 (Ct. App. 1995) (concluding defense acquiescence acts as waiver); *see generally* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d

612 (distinguishing forfeiture from waiver, noting that the former is the failure to make the timely assertion of a right, while the latter is the intentional relinquishment or abandonment of a known right).

II. Ineffectiveness of postconviction counsel for failing to argue that Canady's sentence was violative of ***Apprendi****.*

¶14 Canady next asserts that postconviction counsel gave him ineffective assistance by failing to argue that his sentence violated the ***Apprendi*** doctrine and that the postconviction court erred when it denied his claim without holding a hearing. Under ***Apprendi***, other than the fact of a prior conviction, the trial court may not find "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." ***Id.***, 530 U.S. at 490. Rather, it must be submitted to a jury and proved beyond a reasonable doubt. ***Id.***

¶15 Canady was sentenced to life in prison, with eligibility for release to extended supervision on May 10, 2042, which was double the statutory minimum. *See* WIS. STAT. § 973.014(1g)(a)1., 2. In his postconviction motion, Canady challenges the following statement made by the sentencing court: "She was slick-talking you, and she called you a bitch-ass nigger, and then you killed her. That's what it comes down to." Canady argues that this amounted to fact finding and that the jury should have had an opportunity to assess the provocation that the victim's words could invoke in a person. To further support his argument, Canady quotes the sentencing court's statement:

> The public has to understand that human life is worth more than most people on the street believe it [i]s. It's one of those situations that shows us that things in our community, things in this world have gotten so far out of hand where human life is just put on the bottom of the run[g] of important things. She called you a bitch-ass nigger, so she has to die.

¶16 Whether Canady's postconviction motion alleges sufficient facts entitling him to a hearing is subject to a mixed standard of review. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We first evaluate whether the motion on its face alleges sufficient material facts that, if true, would entitle him to relief. *See* ***id.*** We review this question of law *de novo*. ***Id.*** If the motion raises such facts, the postconviction court must grant an evidentiary hearing. ***Id.*** However, the postconviction court in its discretion "may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief." ***Id.***, ¶12. We review the postconviction court's discretionary decisions for an erroneous exercise of discretion. ***Id.***, ¶9.

¶17 At the time of his conviction, Canady faced a statutory maximum sentence of life imprisonment. *See* WIS. STAT. §§ 939.50(3)(a), 940.01(1) (2001-02). The court sentenced him to the statutory maximum; it did not exceed it. Consequently, nothing in ***Apprendi*** renders Canady's sentence improper in any way. *Cf.* ***State v. Montroy***, 2005 WI App 230, ¶¶23-24, 287 Wis. 2d 430, 706 N.W.2d 145.[3]

¶18 Further, the facts that Canady relies on to show that the sentencing court committed an ***Apprendi*** violation were made during the court's consideration of his character and the need to protect the public—two of the

[3] In ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1, our supreme court withdrew language from ***State v. Montroy***, 2005 WI App 230, 287 Wis. 2d 430, 706 N.W.2d 145, regarding the test to be applied in a motion for resentencing based on a court's alleged reliance on inaccurate information. Because ***Montroy*** was not overruled, it retains precedential value for our purposes. *See* ***State v. Harris***, 2010 WI 79, ¶34 n.12, __Wis. 2d __, 786 N.W.2d 409 ("Only when a case is overruled does it lose all of its precedential value.").

primary sentencing factors courts are to consider. *See* ***State v. Gallion***, 2004 WI 42, ¶¶23, 59-61, 270 Wis. 2d 535, 678 N.W.2d 197 (identifying three primary sentencing factors: (1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public). Canady has not pointed to anything in the sentencing analysis that amounts to new fact finding in violation of ***Apprendi***; instead, the court simply characterized the facts presented at trial in the context of its analysis of the sentencing factors to arrive at a sentencing decision.

¶19 Finally, the federal cases on which Canady relies, including ***Cunningham v. California***, 549 U.S. 270 (2007), are distinguishable given the advisory nature of Wisconsin's sentencing guidelines. *See* ***id.*** at 292 ("California's [determinate sentencing law] does not resemble the advisory system the [***United States v. Booker***, 543 U.S. 220 (2005)] Court had in view. Under California's system, judges are *not* free to exercise their 'discretion to select a specific sentence within a defined range.'") (citation omitted; emphasis added). In this regard, the court in ***Booker*** explained:

> "If the [federal] Guidelines as currently written could be read as merely provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."

Montroy, 287 Wis. 2d 430, ¶24 (quoting ***Booker***, 543 U.S. at 233; brackets in ***Montroy***). Given the advisory nature of Wisconsin's sentencing guidelines, the postconviction court properly denied Canady a postconviction hearing on the

Apprendi issue because even if all the facts alleged in the motion are true, Canady is not entitled to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶9.[4]

By the Court.—Orders affirmed.

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

[4] Canady faults the State for writing in its brief that Canady brought prior postconviction motions in this matter. According to Canady, the underlying WIS. STAT. § 974.06 collateral postconviction motion is the only postconviction litigation in this matter. The record belies Canady's assertion. In a postconviction motion filed on August 6, 2004, Canady, through his appointed counsel, moved the court for an order granting a new trial on the ground of ineffective assistance of trial counsel based on an alleged failure to investigate potential defense witnesses. In the alternative, Canady moved for a new trial in the interest of justice. The postconviction court denied this motion on October 20, 2004.