COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2367 **Cir. Ct. No. 2004CF6461**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW CHARLES STECHAUNER,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Matthew Charles Stechauner, *pro se*, appeals from an order that denied his motions for: (1) postconviction relief pursuant to WIS. STAT. § 974.06; (2) sentence modification; (3) postconviction discovery, including

a postconviction competency hearing; and (4) appointment of a lawyer. We affirm.

I.

¶2 In 2004, Stechauner and a co-actor beat Pascual Cruz to death with a baseball bat. Stechauner, with a different co-actor, next robbed a grocery store at gunpoint. Some days later, Stechauner accidently shot himself with a sawed-off shotgun. He went to St. Francis Hospital for treatment, where a police detective spoke with him to determine if he was the victim of a crime. Stechauner answered the detective's questions. After the hospital discharged him, he went with police in a squad car to find the shotgun. In the squad car, and later at the police station, he made additional statements.

¶3 The State charged Stechauner with four crimes, and the state public defender appointed a lawyer to represent him. After Stechauner litigated and lost a motion to suppress his statements, he entered guilty pleas to two charges. Before sentencing, however, the state public defender appointed a new lawyer for him and the circuit court permitted him to withdraw his pleas. Pursuant to a plea bargain, he entered no-contest pleas to second-degree reckless homicide and armed robbery, both as a party to a crime, and the remaining charges were dismissed but read in for sentencing purposes. The circuit court imposed a twenty-five-year sentence for the homicide conviction and a consecutive fifteen-year sentence for the armed robbery.

¶4 Stechauner appealed his convictions with the assistance of a third appointed lawyer. He claimed that: (1) the circuit court erroneously denied his motion to suppress the statements that he made at the hospital and in the squad car that took him from the hospital; and (2) the circuit court erroneously exercised its

sentencing discretion. We affirmed. ***State v. Stechauner***, No. 2006AP1923, unpublished slip op. (WI App. Mar. 27, 2007) (***Stechauner I***).

¶5 Stechauner next filed the postconviction motions underlying this appeal. He argued that ***Stechauner I*** was wrongly decided, that all of his lawyers performed ineffectively in numerous ways, and that a variety of new factors warrant sentence modification. Further, he sought a postconviction competency examination and other postconviction discovery, and he demanded that the circuit court appoint a lawyer to represent him. The circuit court denied the motions without a hearing, and this appeal followed.

II.

¶6 Stechauner's claims filed pursuant to WIS. STAT. § 974.06, are barred. Section 974.06(4) requires criminal defendants to raise all postconviction claims in one motion or appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 177, 517 N.W.2d 157, 160 (1994). A prisoner who has previously pursued an appeal or other postconviction relief cannot raise claims in a new § 974.06 motion absent a "sufficient reason" for failing to raise the issues in the original proceeding. ***Escalona-Naranjo***, 185 Wis. 2d at 181–182, 517 N.W.2d at 162. Additionally, a motion under § 974.06 "'must not be used to raise issues disposed of by a previous appeal.'" ***State v. Lo***, 2003 WI 107, ¶23, 264 Wis. 2d 1, 13, 665 N.W.2d 756, 761 (citation omitted).

a. *Claims previously litigated*

¶7 Stechauner seeks to raise again some of the claims that we rejected in ***Stechauner I***, namely, that the police coerced his inculpatory statements and that the police obtained his statements in violation of his rights under the 5th

Amendment of the U.S. Constitution and ***Miranda v. Arizona***, 384 U.S. 436 (1966). *See* ***Stechauner I***, No. 2006AP1932, ¶¶9–18. He may not do so. *See* ***Lo***, 2003 WI 107, ¶23, 264 Wis. 2d at 13, 665 N.W.2d at 761.

b. *Ineffective assistance of counsel*

¶8 Stechauner's remaining claims under WIS. STAT. § 974.06 turn on allegations that his trial lawyers made errors of omission and commission and that his postconviction lawyer performed ineffectively by failing to raise these issues. Ineffective assistance of a postconviction lawyer may constitute a sufficient reason for a second postconviction proceeding. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996). When a defendant claims that a postconviction lawyer was ineffective by failing to challenge a trial lawyer's alleged ineffectiveness, however, the defendant must establish that the trial lawyer's assistance was, in fact, ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 480, 673 N.W.2d 369, 375.

¶9 The two-pronged test for claims of ineffective assistance of counsel requires a defendant to prove both that the lawyer's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, "[t]he 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." ***Id.*** at 694. If a defendant fails to satisfy one prong of the analysis, the court need not address the other. ***Id.*** at 697.

¶10 Stechauner packs multiple complaints into almost every one of his handwritten paragraphs, and many of his sparsely punctuated paragraphs extend over several pages. He repeats allegations to support different claims, and some of those claims are simply statements of things that one or another of his lawyers allegedly did or failed to do that Stechauner believes demonstrate that lawyer's ineffectiveness. We are not bound by the manner in which a party states the issues. *See* ***Travelers Indem. Co. of Ill. v. Staff Right, Inc.***, 2006 WI App 59, ¶8, 291 Wis. 2d 249, 254, 714 N.W.2d 219, 221. Accordingly, we address Stechauner's contentions within a framework somewhat different from the one that he proposed.

i. *Stechauner's competency to proceed*

¶11 Stechauner complains that his lawyers performed ineffectively by failing to challenge his competency. He argues that he is "mildly mentally retarded" and that he was also mentally ill throughout the proceedings. Further, he asserts that he was "highly medicated" with Thorazine, which "had effects" on him during the plea colloquy and "caused him to plea[d] out."

¶12 Competency to proceed is "a judicial inquiry, not a medical determination." ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 215, 614 N.W.2d 477, 486. A person is competent to proceed if the person possesses both "sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and ... a rational as well as factual understanding of a proceeding against him or her." ***State v. Garfoot***, 207 Wis. 2d 214, 222, 558 N.W.2d 626, 630 (1997). A history of mental illness does not necessarily render the person incompetent to proceed. ***Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d at 216, 614 N.W.2d at 486. Similarly, "mental retardation in and of itself is generally

insufficient to give rise to a finding of incompetence to stand trial." ***Garfoot***, 207 Wis. 2d at 226, 558 N.W.2d at 632. Further, a defendant is not incompetent to proceed solely by virtue of taking medication to maintain competency. *See* WIS. STAT. § 971.13(2).

¶13 To support his motion, Stechauner submitted several mental health assessments. These confirm his low intelligence and reflect diagnoses of behavioral and learning disorders. Stechauner does not, however, identify a medical report that contains a conclusive diagnosis of mental retardation.[1] By contrast, a psychologist's report from 2000 reflects that he is of "low intelligence but not mentally challenged." This report also reflects that he is not psychotic but has "some mild neurological impairment." Although he may at some point have received a diagnosis of borderline mental retardation, the Record neither confirms such a diagnosis nor demonstrates that he was congenitally incapable of understanding the proceedings or consulting with his attorney.[2]

¶14 Moreover, the Record reflects that Stechauner testified coherently at a suppression hearing, responded appropriately to the circuit court's inquiries during the plea colloquy, and did not exhibit behavior during the proceedings

[1] The medical reports in the Record reflect that mental health professionals reached varying conclusions over the years when evaluating Stechauner. Diagnoses include polysubstance dependency, attention deficit hyperactivity disorder, conduct disorder, and post-traumatic stress disorder. The reports also reflect more general diagnoses of "emotional disturbance" and "learning disabilities." One report states that Stechauner has "a possible learning disorder or mental retardation," another states that he displays "possible borderline intellectual functioning," and a third notes that a previous assessor had "considered [Stechauner] for borderline mental retardation."

[2] The Record reflects that Stechauner had prior criminal convictions and prior juvenile adjudications before this case arose. At the time of his no-contest pleas, he disclosed that he was twenty-one years old, he had completed the ninth grade, and he was studying to obtain his high school equivalency degree.

suggesting that he was disoriented or confused. The circuit court correctly determined that Stechauner failed to allege facts showing that his lawyers performed deficiently by failing to challenge his competency.

ii. *Alleged errors in pursuing motion to suppress statements*

¶15 Stechauner argued on direct appeal that his statements should have been suppressed because the police seized him at the hospital in violation of the 4th Amendment. ***Stechauner I***, 2006AP1923-CR, ¶15 n.3. We held that, because the circuit court never addressed this argument, the claim was not sufficiently preserved to permit review. ***Ibid.*** Stechauner asserts now that his lawyers performed ineffectively by failing to preserve the claim during pretrial and postconviction proceedings. He shows no prejudice from the alleged deficiency, so the claim must fail.

¶16 The circuit court conducted a suppression hearing to resolve Stechauner's contentions that the police questioned him in violation of his 5th Amendment rights. Milwaukee Police Detective David Kolatski testified at the hearing that he spoke to Stechauner at St. Francis Hospital, that police did not restrain Stechauner during the conversation, and that he was free to leave. Stechauner, by contrast, testified that the police handcuffed him to a hospital bed. No other witness corroborated Stechauner's testimony.

¶17 The circuit court found that Kolatski was credible and Stechauner was not. The circuit court therefore rejected the claim that Stechauner was in custody at the hospital for 5th Amendment purposes. Credibility determinations rest with the finder of fact. ***State v. Mercer***, 2010 WI App 47, ¶42, 324 Wis. 2d 506, 533, 782 N.W.2d 125, 139. In light of the circuit court's credibility assessments, Stechauner does not show that the outcome of the proceedings would

probably have been different if his lawyers had more aggressively pursued a 4th Amendment claim supported by only his testimony. *See* ***Strickland***, 466 U.S. at 694.

¶18 Stechauner also complains that his first trial lawyer did not call his mother, Starella Frye, to testify at the suppression hearing that he was seized and in police custody while hospitalized. Stechauner included Frye's affidavit to support his claim. The affidavit does not aid Stechauner, however, because Frye averred that she did not see or have contact with him in the hospital.

¶19 "To determine whether a person is in custody for Fifth [A]mendment purposes[, t]he test is 'whether a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances.'" ***State v. Gruen***, 218 Wis. 2d 581, 593, 582 N.W.2d 728, 732 (Ct. App. 1998) (citations and one set of quotation marks omitted). Similarly:

> a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled[.]

State v. Williams, 2002 WI 94, ¶21, 255 Wis. 2d 1, 12, 646 N.W.2d 834, 839 (citations and one set of quotation marks omitted). Stechauner fails to show how Frye's testimony could have assisted the circuit court to determine his custodial

status in the hospital, given that Frye had no contact with him while he was hospitalized.[3] Thus, Stechauner did not satisfy his burden of showing how Frye's testimony "'would have altered the outcome of the proceeding.'" *See* ***State v. Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 850, 681 N.W.2d 272, 278 (citation omitted).

¶20 Stechauner names seven people in addition to his mother who he claims should have testified at the suppression hearing, and he faults his first trial lawyer for failing to call them as witnesses. He offers no support for his conclusory assertions that the people he names would have provided any relevant information about his custodial status. Therefore, the circuit court properly rejected the allegations. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 473 (defendant seeking postconviction relief may not rely on conclusory assertions).

iii. *Coerced plea*

¶21 Stechauner asserts that his second trial lawyer "forced him to plead guilty" and to sign documents that he had not read. He also states that he did not receive "a copy of the plea concessions." These claims are completely conclusory. Stechauner resolved this case with no-contest pleas, not guilty pleas. The circuit court conducted a thorough and appropriate colloquy before accepting the pleas. The State disclosed the terms of the plea bargain on the Record, and Stechauner acknowledged that he understood. During the colloquy, he admitted that he had

[3] Frye averred in her affidavit that she saw Stechauner as he was getting into the squad car after leaving the hospital. The circuit court agreed with Stechauner that he was in custody in the squad car, so he was not prejudiced by the loss of Frye's testimony to support that contention.

reviewed documents with his lawyer in preparation for his pleas and that he had not been threatened or coerced. The plea colloquy fully complied with the requirements of WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 267–272, 389 N.W.2d 12, 23–25 (1986). Stechauner's bald assertions of coercion do not warrant further postconviction litigation. *See* ***Allen***, 2004 WI 106, ¶9, 274 Wis. 2d at 576, 682 N.W.2d at 437.

iv. *Failure to demand DNA evidence*

¶22 Stechauner asserts that one or both of his trial lawyers failed to argue that his DNA does not match DNA samples taken from the crime scenes. In support of the contention, he directs this court to "see DNA documents." He has not, however, submitted any documents, showing us that DNA evidence exonerates him. Moreover, he points to no rule requiring inculpatory DNA evidence in a prosecution for either homicide or robbery, and we know of none. Thus, he fails to show how the outcome of the proceedings would have been different if his lawyers had argued that the State lacked incriminating DNA evidence. *See* ***Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d at 850, 681 N.W.2d at 278.

v. *Testimony at the preliminary examination.*

¶23 A surveillance camera attached to the exterior of a building near where Cruz was murdered recorded some of the events surrounding his death. According to Stechauner, his lawyers should have pursued a claim that the district attorney who prosecuted the case "said [Stechauner's] face was on murder tape," and thus "gave false testimony" at the preliminary examination. The Record

shows that the prosecutor did not testify at the preliminary examination.[4] Therefore, Stechauner's lawyers did not perform deficiently by not pursuing this issue. *See* ***Allen***, 2004 WI 106, ¶9, 274 Wis. 2d at 576, 682 N.W.2d at 437.

vi. *Errors in supreme court proceeding*

¶24 Stechauner asserts that his appellate lawyer performed ineffectively by failing to challenge his sentence in the supreme court. This claim cannot be pursued in a motion under WIS. STAT. § 974.06, but must be raised and pursued by writ of *habeas corpus* in the supreme court. *See* ***State ex rel. Fuentes v. Wisconsin Court of Appeals***, 225 Wis. 2d 446, 453, 593 N.W.2d 48, 51(1999).

vii. *Miscellaneous allegations*

¶25 Stechauner makes a variety of additional allegations that his attorneys lacked both skill and civility. To the extent that we have not addressed some of his many complaints, we have determined that those complaints are so lacking in merit or so inadequately developed that they do not warrant individual discussion.[5] *See* ***State v. Waste Mgmt of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal."). We are satisfied that the

[4] Police Detective James Hensley testified at the preliminary examination that he "could make out Mr. Stechauner carrying a bat in the alley on videotape." Arguably, Stechauner's complaint could be understood as a claim that his lawyers did not challenge Hensley's credibility. Credibility, however, is not an issue at the preliminary examination. State v. Stuart, 2005 WI 47, ¶30, 279 Wis. 2d 659, 673, 695 N.W.2d 259, 265–266.

[5] Among the complaints that Stechauner advanced and that we do not address are allegations that one or another of his lawyers made insulting comments to him and to his sister, failed to offer the hospital records of his treatment for a self-inflicted gunshot wound as evidence at the suppression hearing, forced him to tell the circuit court that he did not want a presentence investigation, and failed to give him a copy of the discovery in this case.

circuit court properly denied his claims under WIS. STAT. § 974.06 without a hearing.

III.

¶26 Stechauner contends that the circuit court erroneously denied his claim that new factors warrant sentence modification. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because … it was unknowingly overlooked by all of the parties." ***State v. Kluck***, 210 Wis. 2d 1, 7, 563 N.W.2d 468, 470 (1997).

¶27 Stechauner asserts that he did not have the benefit of a presentence investigation report, his face is not visible on the videotape made at the murder scene, and the circuit court was not sufficiently advised about his mental health.[6] These claims do not warrant relief. First, the circuit court remarked when scheduling Stechauner's sentencing that a presentence investigation report was not completed, and Stechauner expressly assured the circuit court that he wanted to proceed without such a report. Second, the State's sentencing remarks included a lengthy description of the quality and contents of the videotape. Third, Stechauner disclosed his treatment for mental illness when he entered his no-contest pleas,

[6] Some of the "new factors" alleged in Stechauner's appellate brief were not presented as possible "new factors" in Stechauner's postconviction motion. Accordingly, we do not address here his claim that he is entitled to a sentence modification because the State lacked DNA evidence against him, or because his lawyers did not show him all of the evidence in the case. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 492, 611 N.W.2d 727, 730 (we do not consider issues raised for the first time on appeal). We also do not address the alleged new factors that Stechauner raised in his motion but chose not to discuss in his appellate brief. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344, 516 N.W.2d 463, 470 (Ct. App. 1994) (issues not briefed are deemed abandoned).

and his second lawyer extensively discussed his history of mental health treatment during the sentencing proceeding. The circuit court acknowledged in its sentencing remarks that Stechauner had "spent a lot of time in supervision and in placement both in residential treatment and corrections and in mental health facilities." None of these factors are "new."

¶28 Stechauner also proposes that "new law Act 28" entitles him to a sentence reduction. 2009 Wis. Act 28 is a 692-page document with 9457 sections. Stechauner's assertion that the act entitles him to relief is insufficiently specific to merit consideration.[7] *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (arguments that are not developed will not be addressed).

IV.

¶29 We turn to Stechauner's procedural motions filed in aid of his requests for substantive relief. We conclude that the circuit court properly denied those motions.

¶30 Stechauner's motions for postconviction discovery included demands for a competency examination and for numerous documents, including his own medical records. A person seeking postconviction discovery must demonstrate that the evidence is relevant and would probably have changed the

[7] To the extent that we can infer from Stechauner's submission that he seeks relief pursuant to sentencing reforms that allow inmates to earn positive adjustment time leading to early release from confinement, we note that Stechauner has not followed the correct procedure for obtaining the benefits of the reforms. Stechauner is serving consecutive sentences for second-degree reckless homicide, a Class D felony, and for armed robbery with use of force, a Class C felony. *See* WIS. STAT. §§ 940.06(1), 943.32(2). Pursuant to WIS. STAT. § 304.06(1)(bg)2., an inmate serving sentences for these classes of felony may petition the earned release review commission for release when the inmate has served the initial confinement terms imposed less positive adjustment time that the inmate has earned.

outcome of the proceeding. ***Ziebart***, 2003 WI App 258, ¶32, 268 Wis. 2d at 488, 673 N.W.2d at 379. Stechauner did not make that showing. He established no basis for concluding that he was incompetent at any point in the litigation, so the postconviction competency examination he seeks would not lead to relevant information. Further, his appellate brief fails to advance any reason that the documents he wants would have affected the outcome of the criminal proceedings. He therefore shows no error in the circuit court's decision denying his document requests. *See* ***ibid.*** Moreover, as the circuit court observed, Stechauner may seek his own medical records without involving the courts by making requests from his treatment providers. *See* WIS. STAT. § 146.83.

¶31 We last address Stechauner's motion for a court-appointed lawyer to represent him in these proceedings. "'[T]he right to appointed counsel extends to the first appeal of right, and no further.'" ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 648, 579 N.W.2d 698, 713 (1998) (citation omitted). The circuit court has discretion, however, to appoint a lawyer "when the necessities of the case and demands of justice require the appointment." ***State v. Dean***, 163 Wis. 2d 503, 516, 471 N.W.2d 310, 316 (Ct. App. 1991). Here, Stechauner alleged ineffective assistance of counsel and claimed that new factors warrant sentence modification. These are claims that circuit courts often hear, and the claims are not so complex that Stechauner's *pro se* status prevented the circuit court from understanding and resolving them. The circuit court therefore did not err in refusing to appoint a lawyer for him.

By the Court.—Order affirmed.

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