COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP298 **Cir. Ct. No. 1994CF943992**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARLAND H. HAMPTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

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

¶1 PER CURIAM. Garland H. Hampton, *pro se*, appeals the order denying his motion for postconviction relief. Hampton argues that the postconviction court erred when it denied his claims of ineffective assistance of

counsel and newly discovered evidence without holding a hearing. We disagree and affirm.

BACKGROUND

¶2 In June 1995, following a jury trial, Hampton was convicted of first-degree intentional homicide while using a dangerous weapon, as a party to a crime. He was sentenced to life imprisonment with a parole eligibility date in 2015. At the time the offense was committed, Hampton was fifteen years old.

¶3 Hampton took a direct appeal from his judgment of conviction, and this court affirmed. *See* ***State v. Hampton***, 207 Wis. 2d 367, 558 N.W.2d 884 (Ct. App. 1996). The same attorney represented Hampton at trial and on direct appeal.

¶4 In October 2003, Hampton filed a *pro se* postconviction motion pursuant to WIS. STAT. § 974.06 (2001-02).[1] In his motion, he alleged the ineffective assistance of his trial and postconviction counsel for failing to challenge alleged prosecutorial misconduct. After the postconviction court denied Hampton's motion, he moved for reconsideration. The postconviction court denied his motion, and this court affirmed.

¶5 In April 2008, Hampton filed a request for post-trial discovery and inspection. His request was denied, and he filed a notice of appeal. This court dismissed Hampton's appeal after he failed to file his brief within the specified timeframe.

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

¶6 Court records reveal that Hampton filed a petition for a writ of *habeas corpus* in June 2009.[2] This court denied his petition and the motion for reconsideration that followed.

¶7 In January 2010, Hampton filed a *pro se* postconviction motion pursuant to WIS. STAT. § 974.06 and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). He based his motion on alleged ineffective assistance of trial and postconviction counsel and on alleged newly discovered evidence. The alleged newly discovered evidence consisted of a mental health report prepared by Kenneth Smail, Ph.D., which Hampton claimed counsel should have presented at his ***Miranda-Goodchild*** hearing.[3] The postconviction court concluded that all of Hampton's claims, with the exception of his claim of newly discovered evidence, were barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). As for his newly discovered evidence claim, the court reviewed the report and found that there was not a reasonable probability it would have altered the outcome of the ***Miranda-Goodchild*** hearing. As a result, the court held that trial counsel was not ineffective for failing to present the report and postconviction counsel was not ineffective for failing to challenge trial counsel's performance. Hampton now appeals.

[2] Although the filings related to Hampton's petition for a writ of *habeas corpus* are not found in the record, we may take judicial notice of entries found on Wisconsin Supreme Court and Court of Appeals Case Access (WSCCA). *See* WIS. STAT. § 902.01.

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

ANALYSIS

A. Legal standards.

¶8 When a defendant files a WIS. STAT. § 974.06 motion after he has already filed a previous motion or direct appeal, a sufficient reason must be shown for failure to raise the new issues. ***Escalona***, 185 Wis. 2d at 185; § 974.06(4). A possible justification for belatedly raising a new issue is ineffective assistance of the attorney who represented the defendant in those proceedings. ***Rothering***, 205 Wis. 2d at 681-82.

¶9 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. To prevail on a claim of ineffective assistance of trial counsel, Hampton 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.

¶10 A defendant seeking a new trial on the basis of newly discovered evidence must establish, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative to the testimony introduced at trial. ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. If the defendant satisfies all four criteria, the court then examines whether it is reasonably probable that, with the evidence, a different result would be reached at a new trial. *See* ***id.*** We review the postconviction court's decision on whether to grant a new trial based on newly discovered evidence for an erroneous exercise of discretion. *See* ***id.***, ¶31.

B. The postconviction court properly rejected Hampton's claim of ineffective assistance of counsel related to Dr. Smail's report.

¶11 Hampton asserts that his counsel was ineffective for failing to present the report of Dr. Smail's mental health evaluation of him during the ***Miranda-Goodchild*** hearing and on appeal. Hampton claims that Dr. Smail's finding that Hampton had a full-scale IQ of 60 would have shown that he did not have the ability to voluntarily waive his rights under ***Miranda***. Hampton argues that Dr. Smail's report is newly discovered evidence because he only first discovered it in 2009, and therefore, could not have raised his claim of ineffective assistance related to the report at the time he filed his 2003 *pro se* motion for postconviction relief.

¶12 First, we are not convinced that Hampton has satisfied the newly discovered evidence test and established by clear and convincing evidence (1) that Dr. Smail's report was, in fact, discovered after his conviction; and (2) that he was not negligent in seeking to discover it. *See* ***Plude***, 310 Wis. 2d 28, ¶32. Dr. Smail's written report dated August 29, 1994, was addressed to Hampton's trial counsel. The report reveals that Dr. Smail examined Hampton at the request of Hampton's counsel and that he met with Hampton on four separate occasions in August 1994. Thus, Hampton would have known about Dr. Smail's testing of him at the time of his ***Miranda-Goodchild*** hearing and when he filed his *pro se* motion for postconviction relief in 2003, and he has failed to establish that he was not negligent in seeking to obtain a copy of Dr. Smail's written report. Consequently, we conclude that Hampton's ineffective assistance claim relating to counsel's failure to present Dr. Smail's report is barred by ***Escalona***. *See generally* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App.

1995) (We may affirm on grounds different than those relied on by the trial court.).

¶13 Moreover, even if we were to accept on its face Hampton's representation that he first learned of Dr. Smail's report in 2009, we agree with the postconviction court's resolution of this issue and adopt its reasoning found in its decision denying Hampton relief:

> With regard to the defendant's newly discovered evidence claim, the court has reviewed Dr. Smail's report and finds there is *not* a reasonable probability it would have altered the outcome of the ***Miranda-Goodchild*** hearing. Although Dr. Smail found that the results for defendant's intellectual functioning "suggest at face value" that it falls into the range for mild mental retardation, he nevertheless concluded, "These test results seem remarkably low given his reported academic accomplishments and [his] general presentation during the interviews." Dr. Smail concluded, "[Hampton]'s general adaptability seems significantly greater than these scores might predict and, therefore, a diagnosis of Mild Mental Retardation, which is a direct inference from the test scores, is not made at this time."
>
> Based on these conclusions, this court cannot find that Dr. Smail's report would have caused [the trial court] to find any differently at the conclusion of the suppression hearing. Consequently, the court cannot find that trial counsel was ineffective for failing to present the report. Hence, postconviction counsel cannot be deemed ineffective for failing to raise an ineffective assistance of counsel claim with regard to trial counsel's performance.

(Citations to Dr. Smail's report omitted.) *See* WIS. CT. APP. IOP VI.(5)(a) (Oct. 22, 2010) ("When the trial court's decision was based upon a written opinion … of its grounds for decision that adequately express the panel's view of the law, the panel may incorporate the trial court's opinion … or make reference thereto, and affirm on the basis of that opinion."). Because the results of the suppression hearing would have been the same, it follows then that the result of Hampton's trial also would have been the same.

*C. The postconviction court properly concluded that Hampton's remaining claims were subject to **Escalona**'s procedural bar.*

¶14 Hampton also argues that his trial counsel was ineffective: (1) for withdrawing his motion to suppress his confession without his permission; (2) for failing to allow him to testify and for failing to introduce his statements made to police at his ***Miranda-Goodchild*** hearing; (3) for failing to have him examined so that further findings (in addition to those made by Dr. Smail) could have been made as to his competence or intelligence; and (4) for failing to argue that the trial court erroneously exercised its discretion by not considering WIS. STAT. § 938.19(2) at his ***Miranda-Goodchild*** hearing. In addition, Hampton claims that the trial court erroneously exercised its discretion in ruling at his ***Miranda-Goodchild*** hearing.

¶15 We agree with the postconviction court's assessment that these claims are procedurally barred pursuant to ***Escalona*** because they could have been brought in Hampton's 2003 *pro se* motion for postconviction relief. In an effort to circumvent ***Escalona***, Hampton argues that the same attorney represented him at trial and during postconviction proceedings and "therefore, counsel was not likely to raise [her] own ineffectiveness on appeal or in a post[]conviction motion which does constitute a 'sufficient reason.'" Hampton's argument fails as he offers no reason, much less offer a sufficient one, for *his* failure to raise the instant claims in his 2003 *pro se* motion for postconviction relief.

¶16 In light of the foregoing, Hampton was not entitled to a hearing on his postconviction motion. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (A circuit court may deny a postconviction motion without a hearing: (1) if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; (2) if one or more of the key factual allegations are

conclusory; or (3) if the record conclusively demonstrates that the movant is not entitled to relief.).

By the Court.—Order affirmed.

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