COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2009AP2581
2009AP2582

Cir. Ct. Nos. 2000CF2119
2000CF2339

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. BAHR,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. James A. Bahr, *pro se*, appeals from orders denying his WIS. STAT. § 974.06 (2007-08)[1] motion without a hearing. The circuit

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

court ruled that the allegations in the motion were procedurally barred, conclusory, or meritless. We agree with the circuit court's denial and we affirm the orders.

¶2 In consolidated cases, a jury convicted Bahr of two counts of first-degree sexual assault of a child and one count of intimidation of a victim. Bahr was sentenced to thirty-nine years' imprisonment on each assault and nine months for the intimidation, all three sentences to be served consecutively. A direct appeal was filed; this court summarily affirmed. A no-merit petition for review was filed but denied by the supreme court.[2] Five years later, Bahr filed the underlying postconviction motion. The motion alleged ineffective assistance of trial counsel, ineffective assistance of appellate counsel, police misconduct, and prosecutorial misconduct.

¶3 The circuit court denied the motion without a hearing. It noted that police and prosecutorial misconduct issues were procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because they were not, but could have been, raised in the direct appeal. The court then construed the ineffective-assistance claims as alleging ineffective assistance of postconviction counsel, consistent with ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), but rejected those claims as either conclusory or lacking merit. Bahr appeals.

¶4 The decision whether to deny a postconviction motion without a hearing is committed to the circuit court's discretion. *See* ***State v. Bentley***, 201

[2] Contrary to Bahr's representation in his reply brief, a no-merit report was not filed in his direct appeal in this court.

Wis. 2d 303, 318, 548 N.W.2d 50 (1996). We will not reverse that decision unless the court erroneously exercised its discretion.

¶5 "A thread runs through our entire jurisprudence that not only is an appeal guaranteed, but it should be a meaningful one." ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 342, 576 N.W.2d 84 (Ct. App. 1998). That same jurisprudence, however, does not require a defendant to be permitted to file multiple, successive motions and appeals from the same action. *See* ***id.*** at 343. Thus, our system compels a prisoner to raise all grounds for postconviction relief in the original, supplemental, or amended postconviction motion or appeal, unless the prisoner can show a sufficient reason for not raising a ground earlier. ***Id.***; *see also* WIS. STAT. § 974.06(4) and ***Escalona***, 185 Wis. 2d at 185.

¶6 In his motion, Bahr complained that police and prosecutorial misconduct infected his trial. We conclude that the circuit court properly ruled these issues barred by ***Escalona***: either issue could have been raised in the direct appeal or in a postconviction motion prior to direct appeal. ***Id.*** at 173, 185.

¶7 Similarly, Bahr's claims of ineffective assistance of trial counsel would also be barred by ***Escalona*** because of the opportunity to raise them previously in a postconviction motion.[3] In fact, a postconviction motion is necessary to preserve ineffective-assistance claims against trial counsel for direct appeal. *See* ***State v. Machner***, 92 Wis. 2d 797, 803, 285 N.W.2d 905 (Ct. App.

[3] To the extent that Bahr claimed ineffective assistance of *appellate* counsel, those claims were not properly before the circuit court. *See* ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992). Accordingly, to the extent any of those issues remain on appeal, like a complaint about the no-merit petition for review, those issues are not properly before this court at this time.

1979). Thus, it could be ineffective assistance of *postconviction* counsel to fail to raise and preserve the ineffective-assistance-of-trial-counsel claims. However, if there is no merit to the claims that postconviction counsel failed to raise and preserve—that is, if the movant fails to show that trial counsel's performance was deficient and prejudicial—then postconviction counsel was not ineffective for failing to pursue those issues.

¶8 Because postconviction counsel's ineffective assistance may constitute a sufficient reason for not previously raising a claim, *see* ***Rothering***, 205 Wis. 2d at 681-82, the circuit court here treated Bahr's ineffective-assistance claims as claims against postconviction counsel, thereby avoiding the immediate bar of ***Escalona***. Bahr's motion is ultimately unsuccessful because it fails to sufficiently allege any ineffective assistance of trial counsel that postconviction counsel should have pursued.

¶9 To demonstrate entitlement to relief, a postconviction motion must provide sufficient facts to allow a reviewing court to meaningfully assess the claim asserted. *See* ***Bentley***, 201 Wis. 2d at 314-15. If a motion does not raise sufficient facts to entitle the movant to relief, or if the motion contains only conclusory allegations, the circuit court may in its discretion deny the motion without a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Here, the court ultimately rejected Bahr's ineffective-assistance claims as either conclusory or meritless. We agree with the circuit court.

¶10 Bahr had alleged, for instance, that "because he didn't have enough money, his trial attorney … did not argue multiplicity[.]" However, given that Bahr was charged with two counts of sexual assault because he had two different victims, the circuit court deemed this claim underdeveloped and conclusory.

¶11 Bahr claimed that counsel should have raised a challenge under ***Batson v. Kentucky***, 476 U.S. 79 (1986), to the State's use of peremptory challenges to strike all the potential male jurors from the panel. The court explained there was no merit to this claim because trial counsel had made exactly that challenge, albeit unsuccessfully.[4] Thus, postconviction counsel had no basis on which to challenge trial counsel's performance in that regard.

¶12 In another example, Bahr claimed that "[i]neffective assistance of [trial] counsel is shown, by withdrawing his motion." The court noted that Bahr did not elaborate on that claim, but that it had nevertheless independently reviewed the transcript portions Bahr cited as support for his argument. The court stated "it is at a loss as to how this constituted ineffective assistance of any kind" and that for counsel to *not* have withdrawn the motion would have resulted in counsel pursuing a frivolous claim.

¶13 Bahr's appellate brief is a near-identical reproduction of his postconviction motion. Save for a few introductory edits and a slight change to the conclusion to comply with the WIS. STAT. RULE 809.19 rules for appellate briefs, the substance is the same.[5]

¶14 In other words, Bahr does not substantively challenge the circuit court's ruling but, rather, simply reiterates the arguments made to the circuit court. He does not advance any theory on how the trial court erred, except to insist by

[4] The State offered a gender-neutral explanation for its strikes. *See* ***State v. Lamon***, 2003 WI 78, ¶29, 292 Wis. 2d 747, 664 N.W.2d 607 (citing ***Batson v. Kentucky***, 476 U.S. 79, 97-98 (1986)).

[5] In fact, it appears that several of the pages are simply photocopies of the original motion.

repetition that counsel must have been ineffective. He does not elaborate on any claims the court considered conclusory, and he neither refutes nor concedes points the court found to be lacking in merit. We do not consider underdeveloped arguments, *see* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988), nor do we abandon our neutrality to develop a party's arguments, *see* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

¶15 Therefore, to the extent Bahr's claims of error are not procedurally barred, we agree with the circuit court that his postconviction motion does not allege sufficient facts to entitle him to relief. The court properly denied his motion without a hearing.

By the Court.—Orders affirmed.

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