# COURT OF APPEALS DECISION DATED AND FILED

## March 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2010AP420** | **Cir. Ct. No. 1998CF6565**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RONNEL FITZGERALD,**

**DEFENDANT-APPELLANT.**

---

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

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

¶1 PER CURIAM. Ronnel Fitzgerald, *pro se*, appeals from circuit court orders denying his WIS. STAT. § 974.06 (2009-10)[1] motion and a motion for

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

reconsideration. Fitzgerald's basic claim is that postconviction counsel should have challenged his trial attorneys' failure to properly investigate a coercion defense and his second trial attorney's failure to adequately examine discovery materials. The court rejected the first argument as previously raised and rejected the second argument because Fitzgerald failed to show prejudice. We conclude that denial of the motions was proper, and we affirm the orders.

## BACKGROUND

¶2 In December 1998, Fitzgerald and others committed an armed robbery in which the victim was shot and killed. Fitzgerald was charged with felony murder. He pled guilty while represented by Attorney Ann T. Bowe. Prior to sentencing, he moved for and received new counsel, Attorney Richard Poulson.

¶3 Poulson moved to withdraw Fitzgerald's plea. Fitzgerald claimed his plea was not knowing or intelligent because Bowe failed to properly investigate available defenses, so he was not adequately advised of possible defenses that he was or might be waiving. Specifically, he contended Bowe had not adequately investigated a coercion defense that Fitzgerald had raised with her.[2]

¶4 The court[3] held a multi-day hearing at which both Bowe and Fitzgerald testified, and ultimately denied the motion, concluding that counsel had given good advice when she explained that a coercion defense would not be

---

[2] Fitzgerald also asserted that Bowe failed to investigate a defense premised on challenging the merits of the predicate felony offense, but that issue is not revisited on appeal.

[3] The Honorable Elsa C. Lamelas accepted Fitzgerald's plea, presided over the motion hearings, and rejected the withdrawal motion and subsequent reconsideration motion. She also imposed sentence.

viable. Fitzgerald then moved for reconsideration, presenting a letter from co-defendant Zachary Hayes, which Fitzgerald asserted supported his coercion defense. The court held another hearing at which Hayes testified, but denied reconsideration, concluding Hayes's testimony effectively ratified Bowe's conclusion on the viability of a coercion defense. Fitzgerald was subsequently sentenced to sixty years' imprisonment.

¶5 Attorney John Grau was appointed to represent Fitzgerald for postconviction proceedings, and filed an appeal on Fitzgerald's behalf. The sole issue on appeal was whether the circuit court erred in denying the plea withdrawal motion. In February 2002, we summarily affirmed the judgment and orders.

¶6 In December 2009, Fitzgerald filed the underlying WIS. STAT. § 974.06 motion. He alleged that Grau was ineffective for not arguing that "trial counsel Ann T. Bowe, and post-conviction counsel Richard Poulson" were ineffective. Specifically, Fitzgerald complains that Bowe and Poulson failed to investigate the coercion defense, and Poulson failed to adequately gather evidence from discovery materials that would support the coercion claim and enhance the reconsideration motion hearing.

¶7 The circuit court rejected the motion.[4] Regarding the coercion investigation claim, the court noted that Fitzgerald was simply revisiting an issue previously addressed by the plea withdrawal motion and, therefore, the court would not consider that issue. The court also concluded that evidence Fitzgerald thought should have been uncovered in the discovery materials was based on

[4] This is the motion that was considered by the Honorable Rebecca F. Dallet.

hearsay and would not have led to a different result on the plea withdrawal motion. Accordingly, the court ruled there had been no prejudice and denied the motion. Fitzgerald appeals.

## DISCUSSION

### I. The Roles of the Attorneys.

¶8 Before we proceed with the analysis of Fitzgerald's appeal, it is important to define the roles of each attorney and the scope of their representation. Notably, Attorney Poulson was not postconviction counsel and he did not file a postconviction motion on Fitzgerald's behalf. Poulson replaced Bowe prior to sentencing. This means that although Fitzgerald had been adjudicated guilty based on his plea, no judgment of conviction had yet been entered. Thus, Poulson was a second trial attorney. *See generally* WIS. STAT. RULE 809.30(2) (postconviction proceedings initiated with a notice of intent to pursue postconviction relief, filed after sentence or final adjudication). In addition, because no judgment of conviction had been entered, the plea withdrawal motion was not a postconviction motion.[5] Attorney Grau was postconviction and appellate counsel.

### II. Investigation of Coercion by Bowe and Poulson.

¶9 WISCONSIN STAT. § 974.06 permits collateral review of a defendant's conviction based on errors of jurisdictional or constitutional dimension. ***State v. Johnson***, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App.

[5] We note this distinction primarily because the State appears to argue that Fitzgerald's current postconviction motion is procedurally barred by the plea withdrawal motion as a prior postconviction motion. However, there is no prior postconviction motion in this case.

1981). However, a § 974.06 motion may not be used to raise issues disposed of by prior appeal. *See* ***State v. Lo***, 2003 WI 107, ¶23, 264 Wis. 2d 1, 665 N.W.2d 756.

¶10 Fitzgerald's first claim is that Bowe and Poulson were ineffective because they failed to adequately examine a coercion defense. The circuit court ruled this was a rehash of issues already addressed in the prior plea withdrawal motion. Fitzgerald asserts the court is in error, because he has never before raised ineffective assistance of trial counsel.

¶11 However, Fitzgerald admits in his appellant's brief that his previous plea withdrawal and reconsideration motions "claimed his trial counsel, Ann T. Bowe failed to investigate his defenses"—exactly what he claims now. Our 2002 opinion affirmed the circuit court's denial of those prior motions. An issue once litigated may not be relitigated, no matter how artfully rephrased.[6] *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

**III. Search of Discovery Materials by Poulson.**

¶12 Fitzgerald also claims that Poulson was ineffective because he did not adequately search the discovery materials. If he had, Fitzgerald believes he would have uncovered a statement from Fitzgerald's stepmother, Kathy Delmore, which allegedly corroborated Fitzgerald's and co-defendant Hayes's versions of

---

[6] Although Attorney Grau did not file a separate motion alleging ineffective assistance of trial counsel prior to the appeal, he did use the appeal to raise a question of whether the court properly denied the motion to withdraw the plea, which necessarily included a challenge to the determination that Bowe properly investigated the coercion defenses.

In addition, we conclude this preclusion likewise applies to the claim that Poulson's research was inadequate, as Fitzgerald merely applied the same arguments to him as he did to Bowe.

the coercion defenses, and which would have been helpful at the reconsideration hearing.

¶13 Our jurisprudence contemplates finality in litigation. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Accordingly, "any claim that could have been raised on direct appeal or in a previous WIS. STAT. § 974.06 … postconviction motion is barred from being raised in a subsequent § 974.06 postconviction motion" unless a sufficient reason is identified for not raising the claim earlier." ***Lo***, 264 Wis. 2d 1, ¶2; ***Escalona***, 185 Wis. 2d at 185.

¶14 Fitzgerald's claim that Poulson was ineffective for failing to better search discovery could have been raised by Grau in a postconviction motion. *See* ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244 (ineffective assistance of trial counsel claim must be preserved by postconviction motion prior to appeal). To avoid the ***Escalona*** procedural bar, Fitzgerald needs a sufficient reason to explain the failure to raise that argument. Ineffective assistance of postconviction counsel may constitute a sufficient reason. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). However, to demonstrate that Grau was ineffective for failing to challenge Poulson's performance, Fitzgerald must show that Poulson was actually ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. On this requirement, Fitzgerald fails.

¶15 Delmore's statement to police—which she gave when identifying Fitzgerald as a likely suspect in this case—is that someone named "Mighty" told her that Fitzgerald might be in trouble with people called "the Twins" for some

issue involving a pit bull puppy. This trouble is ostensibly what "coerced" Fitzgerald into an armed robbery.

¶16 The circuit court noted that Delmore's statement was based entirely on inadmissible hearsay, and possibly on double hearsay depending on how Mighty came by his information. The court further noted that Delmore was not actually present when Fitzgerald was allegedly coerced into committing the armed robbery, and nothing in her or Mighty's statements was necessarily indicative of coercion. Accordingly, the court concluded that even if Poulson had attempted to present this information, the motion to withdraw the plea would have still been denied—meaning Fitzgerald suffered no prejudice.

¶17 Fitzgerald contends that if Poulson had investigated further, he might have found something useful, like the real identities of Mighty and the Twins. However, to succeed in postconviction posture, Fitzgerald must do more than make conclusory allegations. *See* ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433. He does nothing to show that Delmore's statement would ever be admissible, and he offers no evidence to demonstrate that additional investigation would have been fruitful.

¶18 Because the circuit court deemed Delmore's statement unusable, it concluded there was no prejudice from the failure to find, pursue, or utilize it. Accordingly, Poulson was not ineffective. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984) (defendant must show deficient performance *and* prejudice to prevail on ineffective assistance claims). If Poulson was not ineffective, Grau had no reason to challenge his performance in a postconviction motion. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987) (counsel not ineffective for failing to pursue meritless challenge).

¶19 Fitzgerald's current postconviction challenges fail, one because it was previously litigated and one because it is procedurally barred. The circuit court properly denied the WIS. STAT. § 974.06 and reconsideration motions.

*By the Court.*—Orders affirmed.

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