COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1584 **Cir. Ct. No. 1999CF525**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LELAND JARVEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Vergeront, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Leland Jarvey, pro se, appeals an order denying his motions for postconviction relief under WIS. STAT. § 974.06 (2009-10)[1] and for the circuit court judge to recuse himself from postconviction proceedings. Jarvey contends that: (1) the circuit court erred in determining the arguments in his postconviction motion are procedurally barred; (2) he is entitled to a new trial based on prosecutorial misconduct, judicial bias, and ineffective assistance of counsel; and (3) the circuit court judge was biased and thus required to recuse himself from the trial and postconviction motion proceedings. We conclude that Jarvey's arguments are procedurally barred. Accordingly, we affirm.

Background

¶2 In April 2000, Jarvey was convicted of first-degree murder for the death of Diane Cartier in April 1971. *See* WIS. STAT. § 940.01(1) (1971). This court affirmed the conviction on direct appeal on November 13, 2001.[2]

¶3 On March 4, 2003, Jarvey filed a motion under WIS. STAT. § 974.07 (2001-02) for postconviction DNA testing. Jarvey requested the circuit court to order the State to conduct additional DNA testing of the evidence in its possession. He also requested the court establish the chain of custody of the evidence the State used at trial, including vaginal slides that the State had introduced to show that Jarvey's sperm was obtained from Cartier's vagina during the autopsy of her body.

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

[2] For a complete statement of facts underlying Jarvey's conviction, *see* ***State v. Jarvey***, No. 2001AP718-CR, unpublished slip op. ¶¶2-14 (WI App Nov. 13, 2001).

He argued that the record indicated that the previous DNA testing was flawed and that the State may have tampered with the evidence.

¶4 On November 26, 2003, Jarvey filed an amendment to his WIS. STAT. § 974.07 (2001-02) motion, contending that the State did not sufficiently establish the chain of custody of the vaginal slides. He asserted that the record established that the pathologist who conducted the autopsy in 1971, Dr. James McIntyre, did not take any vaginal swabs, and thus there could not have been any vaginal slides for use at trial. On December 18, 2003, Jarvey filed another motion to amend his § 974.07 motion, asserting that additional evidence raised questions about the reliability of the vaginal slides. On March 3, 2004, the circuit court denied Jarvey's motion for DNA testing, explaining that Jarvey had not established a basis for further DNA testing under § 974.07. The court also stated that "if the defendant wishes to challenge the chain of custody of certain evidence, the defendant must file a separate specific motion."

¶5 On November 16, 2007, Jarvey filed another motion in the circuit court titled, "Defendant's motion to change judge." In that motion, Jarvey argued that the judge should have recused himself from trial because he had been the Brown County District Attorney in 1971, at the time of Cartier's murder. He cited SCR 60.04(4)(a), which states that a judge shall recuse himself or herself if the judge has personal knowledge of disputed evidentiary facts. Jarvey then asserted there was evidence in dispute, again contending that no vaginal samples were taken in 1971. He asserted that, if his attorney waived an objection to the judge serving on this case, it amounted to ineffective assistance of counsel.

¶6 On January 16, 2008, the circuit court denied the motion for a new judge. The court stated that the judge had disclosed the situation to Jarvey at the

arraignment and had given Jarvey an opportunity to consult his attorney, after which Jarvey consented to continue before the same judge. The court also stated there was no reason to change judges because Jarvey's appeal was complete and there was currently no activity on which a court would rule.

¶7 On January 31, 2008, Jarvey filed a motion for reconsideration on the recusal issue in the circuit court. He stated that he intended to file additional motions, but that he was requesting a change of judge before he filed those motions. He again asserted that his trial counsel was ineffective for failing to move for a new judge, and he requested a hearing on that issue. Jarvey also asserted that his case had not been "fully appealed" because his appellate counsel had failed to raise numerous issues. The circuit court denied the motion, stating that: (1) Jarvey waived his argument that the judge should have recused himself from trial by failing to raise it on his direct appeal; and (2) a motion to the circuit court was not the proper forum to raise a claim of ineffective assistance of appellate counsel because such motions are properly addressed to the court of appeals. *See* ***State v. Knight***, 168 Wis. 2d 509, 518-19, 484 N.W.2d 540 (1992).

¶8 On February 18, 2010, Jarvey filed the WIS. STAT. § 974.06 postconviction motion underlying this appeal. He asserted that he is entitled to a new trial due to prosecutorial misconduct, judicial bias, and ineffective assistance of counsel. Jarvey also filed a motion requesting that a new judge decide this motion.[3]

[3] Jarvey also moved for appointment of postconviction counsel, but has not pursued that issue on appeal.

¶9 The circuit court denied Jarvey's WIS. STAT. § 974.06 motion, as well as his request for a new judge. The court determined that Jarvey's arguments for a new trial were procedurally barred because he failed to raise them in his prior motions, and that the court had already denied Jarvey's request for a new judge. Jarvey appeals.

Discussion

¶10 Jarvey recognizes that he did not raise prosecutorial misconduct, judicial bias, or ineffective assistance of counsel on his direct appeal, and that these arguments are therefore subject to procedural bar. *See* ***State v. Lo***, 2003 WI 107, ¶32, 264 Wis. 2d 1, 665 N.W.2d 756 (all grounds for relief must be raised in first postconviction motion or direct appeal, or are barred under WIS. STAT. § 974.06(4)); *see also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) ("[C]laims which could have been raised on direct appeal or in a [§] 974.02 motion cannot later be the basis for a [§] 974.06 motion."). Jarvey argues, however, that he has asserted a sufficient reason for failing to raise these claims on direct appeal because he asserts ineffective assistance of postconviction counsel for failing to raise the ineffective assistance of trial counsel in a postconviction motion.[4] *See* ***Escalona***, 185 Wis. 2d at 185 (If a defendant does

[4] Jarvey also contends that his arguments are not barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because, contrary to the circuit court's statements, this is his first WIS. STAT. § 974.06 motion. He asserts his prior motions in the circuit court were for DNA testing and for a new judge, not for postconviction relief. The State concedes that Jarvey's motion under § 974.07 does not bar Jarvey's current motion under § 974.06, but contends that Jarvey's 2007 motion for a new judge was really a § 974.06 motion. In his reply brief, Jarvey disputes this characterization. He acknowledges he asserted issues beyond the request for a change of judge in his 2007 motion, but notes that the only issue the court actually addressed was the change of judge request. Because we affirm the circuit court on different grounds, we need not resolve this dispute. *See* ***State v. Earl***, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755.

not raise a claim in an original direct appeal or postconviction motion, the defendant may not raise that claim in a subsequent § 974.06 postconviction motion unless the defendant is able to establish a sufficient reason for failing to raise the argument earlier.); ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996) ("It may be in some circumstances that ineffective postconviction counsel constitutes a sufficient reason as to why an issue which could have been raised on direct appeal was not.").

¶11 To establish ineffective assistance of postconviction counsel for failing to raise ineffective assistance of trial counsel in a postconviction motion, a defendant must establish that trial counsel was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. "[A] defendant claiming ineffective assistance must establish both deficient performance and prejudice." ***Id.***, ¶14.

¶12 Jarvey asserts that his trial counsel was ineffective for failing to object to prosecutorial misconduct at trial. Jarvey cites to the prosecutor's questioning of a trial witness, a pathologist who had reviewed Dr. McIntyre's autopsy report, indicating that McIntyre was deceased at the time of trial. Jarvey contends that, in fact, McIntyre died only after Jarvey's trial. Jarvey argues that the State's motivation was to conceal McIntyre's testimony that he did not take vaginal samples from Cartier's body, and instead introduce the testimony of a different pathologist that it appeared the samples had been taken. Jarvey contends that the origin of the vaginal slides is actually unknown and that the prosecutorial misconduct in asserting that McIntyre had died denied him due process. *See* ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996) ("Prosecutorial misconduct can rise to such a level that the defendant is denied his or her due

process right to a fair trial. If the misconduct poisons the entire atmosphere of the trial, it violates due process." (Citations omitted.)).

¶13 We conclude that Jarvey's claim that his trial counsel was ineffective for failing to object on prosecutorial misconduct grounds lacks merit. Jarvey's prosecutorial misconduct claim is premised on his assertion that Dr. McIntyre's testimony at his initial appearance in 1999 indicates McIntyre would have testified at trial that he did not take vaginal swabs from Cartier's body in 1971. However, the record does not support Jarvey's claim. The transcript of the initial appearance reveals the following exchange between the State and McIntyre:

> Q: Did you happen to take a smear, a vaginal smear from the body?
>
> A: I did not.
>
> Q: You said that you did not?
>
> A: I didn't, that I remember.
>
> ….
>
> Q: Doctor, on [the second page of the autopsy report] … it says, "Female external genital examination shows normal adult development with free and adequate entry area through the hymenal region into the vagina for the obtaining of swab samples of vaginal contents." Is that—does that indicate that you would routinely take a swab?
>
> A: I do not remember taking that. I might have.
>
> ….
>
> Q: Did you conduct an examination of the genital area of Ms. Cartier?
>
> A: Yes, I did.
>
> Q: Is it possible that you, in fact, did take a swab sample at that time?
>
> A: Yes, it's possible. I mean, I really don't recall.

> ….
>
> Q: Doctor, if assuming a vaginal smear was taken do you know where that would have been kept?
>
> A: If I took it, which I don't think I did, I don't remember doing it, it would have, could easily have been taken by one [of] the police officers even before I got the body or at the time, and I think if you speak to any of those men they might remember, to answer your question.

¶14 Thus, Dr. McIntyre's trial testimony would have been that he did not remember taking a vaginal swab of Cartier's body, but it was possible that he did. We conclude that it was not deficient performance for trial counsel not to pursue the issue whether McIntyre was actually deceased at the time of trial, when McIntyre had testified that he did not remember whether the samples had been obtained when he performed the autopsy in 1971. Because Jarvey's claim of ineffective assistance of trial counsel fails, his claim of ineffective assistance of postconviction counsel also fails. Thus, Jarvey has not shown a sufficient reason for failing to raise this argument earlier.

¶15 Next, Jarvey contends that his trial counsel was ineffective for failing to pursue a claim of judicial bias to obtain a different judge for trial. Jarvey reiterates that the trial judge was the district attorney at the time the crime was committed, and thus was required to recuse himself. Because Jarvey has litigated this issue in a prior motion, he may not raise it here.

¶16 The record reveals that at Jarvey's arraignment the circuit court judge personally addressed Jarvey, disclosing that he had been the district attorney when Cartier was killed in 1971, and asked Jarvey whether he wanted the judge to recuse himself. Jarvey stated he did not want the judge to recuse himself. The court then asked defense counsel whether he had an adequate opportunity to discuss with Jarvey his rights regarding the recusal request, and Jarvey and his

counsel had a discussion off the record. Counsel stated they had an adequate opportunity to discuss the matter, and he concurred in Jarvey's decision not to request recusal.

¶17 The issue of recusal arose at a later hearing, regarding a statement of a trial witness that was inconsistent with a statement the witness had made in 1971, which had been observed by the judge in his role as the district attorney. The parties stipulated that the judge would not be a necessary witness and Jarvey again agreed on the record to have the judge continue on the case.

¶18 Jarvey contends that, in front of the judge, he felt coerced to agree to allow the judge to continue on the case; that the judge should have recused himself without posing the question to Jarvey; and that, if the issue is waived, his attorney was ineffective for allowing the waiver. The issue of judicial bias, however, was raised in Jarvey's motion for a new judge and his motion for reconsideration, and was addressed by the court in its response to both motions. Jarvey did not appeal the court's orders and may not obtain review of those decisions here through a WIS. STAT. § 974.06 motion. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A motion under [§] 974.06 … is not a substitute for a direct appeal. A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." (Citation omitted.)). Accordingly, we affirm.

By the Court.—Order affirmed.

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