COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2219 **Cir. Ct. No. 1996CF975**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY L. WATSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Jeffrey Watson, pro se, appeals an order denying his WIS. STAT. § 974.06[1] motion for postconviction relief. Watson argues he is entitled to postconviction relief on grounds he was denied the effective assistance of postconviction counsel. Watson also contends the circuit court erred by denying his motion without an evidentiary hearing. We reject Watson's arguments and affirm the order.

BACKGROUND

¶2 In 1996, Watson pled no contest to one count of attempted armed robbery. In exchange for his no contest plea, the State agreed, among other things, to recommend that the sentence in the present case run concurrent with a sentence Watson was serving in another case. Watson was ultimately sentenced to twenty years in prison, to run consecutive to the forty-year prison sentence Watson was already serving. Watson unsuccessfully sought postconviction relief, claiming that the State breached the plea agreement. On direct appeal, this court affirmed Watson's conviction and the order denying his postconviction motion. ***State v. Watson***, No. 1998AP1639-CR, unpublished slip op. (Wis. Ct. App. Nov. 3, 1998).

¶3 In July 2009, Watson, pro se, filed the underlying WIS. STAT. § 974.06 motion for postconviction relief, seeking a "correction of sentence from consecutive to concurrent" or, alternatively, plea withdrawal based on the ineffective assistance of postconviction counsel. The circuit court denied the motion without holding an evidentiary hearing, and this appeal follows.

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

DISCUSSION

¶4 In his motion, Watson argued his postconviction counsel was ineffective for failing to raise three arguments. As an initial matter, we question whether Watson's claims are procedurally barred. *See* ***State v. Escalona–Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) (if defendant fails to raise claim in direct appeal or postconviction motion, defendant may not raise that claim in subsequent WIS. STAT. § 974.06 postconviction motion unless defendant is able to establish sufficient reason for failing to raise argument earlier). In some circumstances, ineffective postconviction counsel may constitute a sufficient reason as to why an issue that could have been raised on direct appeal was not. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996). Even assuming Watson provided a sufficient reason to circumvent the procedural bar, his arguments fail on their merits.

¶5 First, Watson argues his postconviction counsel should have argued that the circuit court breached the plea agreement when it imposed a consecutive sentence. Plea bargains, however, are made between the defendant and the State—the circuit court is not a party to them. ***State v. Hampton***, 2004 WI 107, ¶27, 274 Wis. 2d 379, 683 N.W.2d 14. Moreover, during the plea colloquy, the circuit court confirmed Watson's understanding that the court was not bound by any agreement Watson made with the State; the court could impose the maximum sentence; and it could make that sentence consecutive to other sentences.

¶6 Citing ***State v. Comstock***, 168 Wis. 2d 915, 485 N.W.2d 354 (1992), and ***State v. Terrill***, 2001 WI App 70, 242 Wis. 2d 415, 625 N.W.2d 353, Watson nevertheless claims that when a circuit court accepts a plea agreement, it is bound to follow its terms. Watson's reliance on these cases is misplaced, however, as

they are distinguishable from the present matter. In ***Comstock***, our supreme court held that when a circuit court accepts a plea agreement with charging concessions, it cannot later undo that agreement and allow the State to pursue the original charges absent a finding of fraud upon the court. ***Comstock***, 168 Wis. 2d at 950-53. In turn, ***Terrill*** holds that a circuit court is bound to honor a plea agreement that includes a deferred acceptance of guilty plea provision. ***Terrill***, 242 Wis. 2d 415, ¶¶22-26. Neither case holds that a court can be bound to a specific sentencing agreement between a defendant and the State. Because the circuit court did not violate the plea agreement by imposing a consecutive sentence, postconviction counsel was not deficient for failing to raise this argument. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel not deficient for failing to pursue meritless argument).

¶7 Second, Watson claims postconviction counsel should have challenged trial counsel's failure to object to the imposition of the consecutive sentence. In order to establish that postconviction counsel was deficient for failing to challenge the effectiveness of trial counsel, Watson must first show that trial counsel was actually 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. Because the circuit court was not obligated to impose a concurrent sentence, trial counsel was not deficient for failing to make a meritless objection. *See* ***Wheat***, 256 Wis. 2d 270, ¶14.

¶8 Third, Watson claims postconviction counsel was ineffective for failing to challenge the validity of his plea. Specifically, Watson claims he did not enter a knowing plea because trial counsel erroneously led him to believe the court "was required to honor [his] written condition for a specific sentence" if it

accepted the plea. As noted above, however, the plea colloquy belies Watson's claim, as he acknowledged his understanding that the court was not bound by the plea agreement and, therefore, under no obligation to impose a concurrent sentence.

¶9 Citing ***State v. Basley***, 2006 WI App 253, 298 Wis. 2d 232, 726 N.W.2d 671, Watson nevertheless contends that regardless whether the court complied with its obligations at the plea hearing, the validity of his plea was compromised by matters extrinsic to the hearing—specifically, his counsel's advice. The ***Basley*** court concluded that a proper plea colloquy cannot be used to deny a defendant a hearing on a plea withdrawal motion when the defendant adequately alleges something outside the colloquy caused the plea to be invalid. ***Id.***, ¶18. In ***Basley***, the defendant adequately alleged his plea was invalid when he asserted counsel had coerced him into pleading guilty by threatening to withdraw unless he pled. ***Id.*** ¶10.

¶10 Unlike the defendant in ***Basley***, however, Watson is not claiming that trial counsel coerced him into entering a no contest plea. Rather, he asserts that based on counsel's pre-plea advice, he mistakenly believed the court was bound to give him a concurrent sentence. If Watson in fact held this erroneous belief, the circuit court corrected it at the plea hearing when it informed him it could impose a consecutive sentence regardless of the plea agreement. Postconviction counsel, therefore, was not deficient for failing to raise this challenge to the validity of Watson's plea.

¶11 Finally, Watson claims the circuit court erred by denying his WIS. STAT. § 974.06 motion without an evidentiary hearing. If a postconviction motion does not raise facts sufficient to entitle the defendant to relief, or presents only

conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has discretion to deny the motion without a hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). As discussed above, the record demonstrates that Watson is not entitled to relief. Therefore, we conclude the circuit court properly exercised its discretion when it denied the motion without an evidentiary hearing.

By the Court.—Order affirmed.

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