**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 4, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP417** **Cir. Ct. No. 1993CF934260**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ROY LEE ROGERS,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Sherman, JJ.

¶1 PER CURIAM. Roy Rogers appeals an order denying his postconviction motion filed under WIS. STAT. § 974.06 (2009-10).[1] He also appeals the order denying his motion for reconsideration. We affirm.

¶2 In 1994, Rogers pled guilty to, and was convicted of, one count of first-degree intentional homicide. Rogers' right of direct appeal under WIS. STAT. RULE 809.30 was restored in 2003 on federal habeas review. Rogers, by counsel, then filed a postconviction motion under that rule that was denied, and we affirmed on appeal. In 2009, Rogers filed a postconviction motion under WIS. STAT. § 974.06 that was also denied, and this appeal is from that order.

¶3 Because Rogers has already had review under WIS. STAT. RULE 809.30, he is normally barred from filing a motion under WIS. STAT. § 974.06 unless he shows, in the words of the statute, a "sufficient reason" for not having raised the motion's claims in the earlier postconviction motion or appeal. *See* § 974.06(4); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¶4 Rogers attempts to evade that bar by arguing that his postconviction counsel was ineffective. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Rogers' postconviction counsel filed a postconviction motion and appeal addressing some issues. Because appellate counsel has discretion to select from among several issues to maximize the likelihood of success on appeal, the

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

test for deficient performance in this situation is whether the ignored issues were stronger than those actually presented. *See* ***Smith v. Robbins***, 528 U.S. 259, 288 (2000).

¶5 Rogers' postconviction motion was denied without an evidentiary hearing. To receive an evidentiary hearing, the defendant must allege facts which, if true, would entitle him to relief; but if he fails to raise an issue of fact or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the motion can be denied without a hearing. ***State v. Howell***, 2007 WI 75, ¶75, 301 Wis. 2d 350, 734 N.W.2d 48.

¶6 Rogers first argues that he should be allowed to withdraw his guilty plea because the plea colloquy was defective—because it did not inform him of the elements of the crime—and he did not understand the elements. Rogers is barred from raising this issue unless his postconviction counsel was ineffective by not raising the issue.

¶7 Rogers' postconviction motion does not sufficiently allege facts which, if true, would show that postconviction counsel was ineffective. That is because, even if Rogers is correct that the plea colloquy was defective, to obtain a hearing on his plea withdrawal motion his postconviction attorney would also have to allege that Rogers did not know the elements that should have been provided. *See* ***id.***, ¶27. Rogers does not allege any facts related to that point. For example, Rogers did not allege that he told his postconviction attorney he was unaware of the elements, or that trial counsel told postconviction counsel that Rogers did not appear to understand, or that postconviction counsel did not interview him at all on this subject. Without any such allegations, we are being asked to simply assume that postconviction counsel somehow knew there was a

basis to allege that Rogers did not understand the elements. Therefore, we conclude that Rogers has not alleged facts that, if true, would entitle him to relief.

¶8 Rogers next argues that trial counsel should have moved to suppress Rogers' statement on the ground that he was illegally arrested without probable cause. According to Rogers, the arrest lacked probable cause because it was only during interviews after his arrest that police were told of his role in the crime. The circuit court rejected this claim on the ground that a "police show-up report" states that police were told soon after their arrival at the crime scene, and before Rogers' arrest, that Rogers and another person tied up the victim and that "the def." (meaning Rogers) shot the victim in the head.

¶9 Rogers argues on appeal that the circuit court's reliance on that report was improper because the report was written after his arrest, and other police reports do not support the report's assertion that police had that information when they arrested him. Rogers concludes, from the lack of other supporting reports, that the report relied on by the circuit court was fabricated.

¶10 We again view this issue through the lens of ineffective assistance of postconviction counsel. Rogers' arguments about the differences among the police reports are not sufficient to support a conclusion that this issue was stronger than the other issues Rogers' postconviction counsel raised on appeal. Indeed, the lack of support in other reports does not, on its face, support the allegation that police lacked probable cause when they arrested Rogers. Therefore, Rogers has again failed to allege sufficient facts that, if true, entitle him to relief.

¶11 Rogers next argues that his statement should have been suppressed because, after his arrest, he did not receive a hearing within forty-eight hours for a judicial determination of whether there was probable cause. The circuit court

rejected this argument on the ground that the court had previously determined in 1997 that a juvenile detention hearing was held in the required time. Rogers argues that no record exists to show such a hearing. The State does not respond to this issue. The record does not appear to include a transcript or docket entry showing the existence of a detention hearing. The circuit court's order in September 1997 relied on the juvenile file, but it does not appear that this file is before us in this case. We decline to simply assume that the 1997 circuit court was correct in its reading of the file.

¶12 However, we conclude that Rogers' argument fails because he has not established that suppression of a statement is a proper remedy for failure to hold a hearing within forty-eight hours. He cites no legal authority showing that this is a proper remedy. Without such authority, and again viewing the case in the context of ineffective assistance of postconviction counsel, Rogers' argument does not show that this issue was stronger than the ones that were actually presented.

¶13 Rogers next argues that his postconviction counsel was ineffective because, when arguing that Rogers' statement was involuntary, counsel did not sufficiently rely on a statute that requires notification to parents that their children are in custody. *See* WIS. STAT. § 938.19(2) (formerly WIS. STAT. § 48.19(2)). Rogers concedes that case law did not provide for suppression on that ground until after postconviction counsel's work was over. While Rogers is correct that counsel could have based his argument more directly on the statute, we cannot conclude that there was a reasonable probability of a different outcome if postconviction counsel had relied more on the statute.

*By the Court.*—Orders affirmed.

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