COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2132 **Cir. Ct. No. 1990CF903187**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONY EPPENGER,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Tony Eppenger, *pro se*, appeals from a trial court order denying his WIS. STAT. § 974.06 (2009-10)[1] motion for postconviction relief and from an order denying his motion for reconsideration. He argues that he is entitled to an evidentiary hearing on his postconviction motion, which alleged ineffective assistance of trial counsel and postconviction counsel related to jury selection issues. We conclude that Eppenger's motion is procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because Eppenger has not demonstrated that his postconviction counsel provided ineffective assistance or that he is entitled to an evidentiary hearing on that issue. Therefore, we affirm.

BACKGROUND

¶2 In 1991, a jury found Eppenger guilty of first-degree intentional homicide, contrary to WIS. STAT. § 940.01(1) (1989-90). Represented by new counsel (hereafter, "postconviction counsel"), Eppenger filed a postconviction motion and an amended postconviction motion seeking a new trial, based on alleged trial counsel ineffectiveness and plain error. Eppenger argued that trial counsel provided constitutionally deficient representation when she elicited testimony from Eppenger that he had been questioned by police about other homicides and when she failed to introduce testimony that Eppenger was so intoxicated that his inculpatory statements to police should not have been admitted. Eppenger also asserted that the trial court committed plain error when it admitted the testimony concerning other homicide investigations. A ***Machner***[2]

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

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

hearing was conducted. The trial court denied Eppenger's motion and he appealed.

¶3 Eppenger raised the same issues on appeal. We rejected his arguments and affirmed his conviction. *See* ***State v. Eppenger***, No. 1993AP2531-CR, unpublished slip. op. (WI App Dec. 13, 1994).

¶4 In June 2010, Eppenger filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal.[3] He moved the trial court to vacate the judgment of conviction or order a new trial. He argued that his trial counsel and postconviction counsel had both provided ineffective assistance for a variety of reasons, all of which related to jury selection. Specifically, he asserted that trial counsel and postconviction counsel should have argued: (1) the *voir dire* should have been transcribed; (2) three African-American jurors were struck improperly under ***Batson v. Kentucky***, 476 U.S. 79 (1986); (3) two partial jurors should not have been allowed to remain on the panel; and (4) the trial court should not have admonished Eppenger in front of the jurors when Eppenger expressed concern about the jury selection.[4]

¶5 The postconviction motion included four affidavits, which were all signed in early 2009 and were nearly identical, from individuals who claimed they were in the courtroom when the African-American jurors were struck, the partial

[3] Eppenger initially filed a petition for a writ of habeas corpus in the circuit court's civil division, in October 2009. The case was transferred to the criminal division and Eppenger filed his postconviction motion.

[4] Eppenger presented additional sub-arguments. Because we decide this case based on ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), we do not discuss all of the issues presented in Eppenger's seventeen-page postconviction motion.

jurors were allowed to remain on the jury and Eppenger complained about the jury's composition.[5] Eppenger also provided a slightly longer affidavit of his own with the same information. Eppenger's affidavit did not mention postconviction counsel or any discussions Eppenger might have had with him. The postconviction motion contained a single statement asserting that Eppenger "beg[ged] post-conviction counsel to raise the issues now presented in this motion [but] he refuse[d] to do so." Eppenger provided no additional details concerning any communications he might have had with postconviction counsel.

¶6 The trial court denied Eppenger's postconviction motion without a hearing. In its written order, the trial court recognized that ineffective assistance of postconviction counsel may be sufficient cause to avoid the procedural bar of ***Escalona-Naranjo***, but it concluded that Eppenger had failed to demonstrate that postconviction counsel performed deficiently. The trial court explained:

> The practice in the court system at the time of the defendant's trial was not to record voir dire proceedings unless it was specifically requested. Recording of voir dire did not become mandatory until January 1, 1998 under Supreme Court Rule 71.01(2). Because there was no rule in effect which required the court to record the voir dire proceedings at the time of the defendant's trial, a claim of trial court error would not have been successful. Further, because there is no information available about the make-up of the jury, there is no way for this court to intelligently evaluate a Batson claim. This issue should have been brought to the attention of postconviction counsel by the defendant long ago. The defendant was there. He is the only one who would have known the race of the jurors who were struck. Postconviction counsel would not have known this information because he was not present during the trial, so postconviction counsel cannot be deemed to have been ineffective for failing to raise an issue he didn't

[5] As discussed below, the record contains no evidence that any of these things occurred, other than assertions made in Eppenger's postconviction motion and accompanying affidavits.

> know about on appeal. The defendant is the only one who could have apprised postconviction counsel of his concerns under Batson. If postconviction counsel was not alerted to the potential Batson issue, there was no reason for him to pursue an ineffective assistance of counsel claim or a claim of trial court error.

¶7 Eppenger filed a motion for reconsideration, asserting that he had in fact asked postconviction counsel to raise the jury selection issues and that postconviction counsel had refused. Eppenger asked for a hearing "to consider letters or correspondences between post-conviction counsel" and Eppenger, but he did not provide copies of any correspondence. The trial court denied the motion without a hearing, stating that the "motion raises nothing which would alter the court's decision." This appeal follows.

STANDARD OF REVIEW

¶8 The Wisconsin Supreme Court recently reaffirmed the legal standards to be applied when examining the denial of a WIS. STAT. § 974.06 postconviction motion, including the application of ***Escalona-Naranjo***'s procedural bar.[6] *See* ***State v. Balliette***, 2011 WI 79, ___ Wis. 2d ___, ___ N.W.2d ___. The court recognized that whether a WIS. STAT. § 974.06 motion is sufficient on its face to entitle a defendant to an evidentiary hearing on his or her ineffective assistance of postconviction counsel claim is a question of law that appellate courts review *de novo*. ***Id.***, ¶18. ***Balliette*** explained:

> If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the circuit court must

[6] ***Escalona-Naranjo*** held that a defendant is required to raise all grounds for relief in his or her original, supplemental or amended motion for postconviction relief, unless sufficient reason is shown for failing to raise the issues earlier. *See* ***id.***, 185 Wis. 2d at 181. When no sufficient reason is provided, a subsequent motion is procedurally barred. *See* ***id.*** at 181-82.

> hold an evidentiary hearing. However, if the motion does not raise such facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the grant or denial of the motion is a matter of discretion entrusted to the circuit court.
>
> Whether counsel was ineffective is a mixed question of fact and law. The circuit court's findings of fact will not be disturbed unless shown to be clearly erroneous. The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law.

Id., ¶¶18-19 (citations omitted).

DISCUSSION

I. Additional legal standards.

¶9 As in ***Balliette***, evaluation of Eppenger's motion for postconviction relief under WIS. STAT. § 974.06 requires this court to apply several different tests. *See* ***Balliette***, 2011 WI 79, ¶20 ("To evaluate the sufficiency of the allegations in [the defendant's] motion, we must consider his ineffective assistance of counsel claims in relation to the established pleading requirements for a § 974.06 motion."). The test for ineffective assistance of counsel, as articulated in ***Strickland v. Washington***, 466 U.S. 668 (1984), provides "that a convicted defendant must show two elements to establish that his counsel's assistance was constitutionally ineffective: First, that counsel's performance was deficient; second, that the deficient performance resulted in prejudice to the defense." ***Balliette***, 2011 WI 79, ¶21. "[T]here is a presumption that counsel is effective unless shown otherwise by the defendant" and the presumption applies to trial counsel, postconviction counsel and appellate counsel. ***Id.***, ¶¶27-28.

¶10 A defendant can raise a claim of ineffective assistance of trial counsel on direct appeal. "After the time for appeal or postconviction remedy

provided in WIS. STAT. § 974.02 has expired, a prisoner in custody under sentence of a court may bring a motion to vacate, set aside, or correct a sentence, utilizing the procedure set out in WIS. STAT. § 974.06" if the prisoner is claiming that "his sentence was imposed in violation of the constitution." ***Balliette***, 2011 WI 79, ¶34. "A claim that trial counsel provided ineffective assistance is a claim that the defendant's sentence was imposed in violation of the constitution." ***Id.***

¶11 While a defendant may move for relief pursuant to WIS. STAT. § 974.06 at any time, *see* § 974.06(2), the defendant must meet certain requirements that are set out in § 974.06(4).[7] ***Balliette***, 2011 WI 79, ¶35. "[C]laims that could have been raised in the defendant's direct appeal … are barred from being raised in a subsequent § 974.06 motion absent a showing of a sufficient reason why the claims were not raised on direct appeal or in a previous § 974.06 motion." ***Balliette***, 2011 WI 79, ¶36. In some circumstances, ineffectiveness of postconviction counsel may constitute a sufficient reason. *See* ***id.***, ¶37.

¶12 When a defendant attempts to circumvent the procedural bar outlined in ***Escalona-Naranjo*** and ***Balliette*** by asserting that postconviction

[7] WISCONSIN STAT. § 974.06(4) provides:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

counsel was ineffective for not raising additional challenges to the effectiveness of his trial counsel, the court must determine whether the postconviction motion was sufficient to entitle the defendant to an evidentiary hearing. ***Balliette*** explained what a sufficient motion must contain:

> As a general rule, a motion must "[s]tate with particularity the grounds for the motion and the order or relief sought." WIS. STAT. § 971.30. When the relief sought is a new trial based upon the alleged ineffective assistance of postconviction counsel, this statute appears to require some particularity of how the defendant intends to show that postconviction counsel's performance was objectively deficient and how that performance resulted in prejudice to the defense.

Balliette, 2011 WI 79, ¶40 (bracketing in original). A court must apply "the five 'w's' and one 'h' test, 'that is, who, what, where, when, why, and how.'" ***Id.***, ¶59 (citation omitted). "A motion that alleges, within the four corners of the document itself, the kind of material factual objectivity we describe ... will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim.'" ***Id.*** (citation and emphasis omitted; ellipses in original).

II. Application.

¶13 Eppenger's WIS. STAT. § 974.06 motion came after his WIS. STAT. § 974.02 motion and direct appeal. Because the claims Eppenger raised in his § 974.06 motion could have been raised in his initial motion and direct appeal, Eppenger "was required to provide 'a sufficient reason as to why an issue which could have been raised on direct appeal was not.'" *See* ***Balliette***, 2011 WI 79, ¶62 (citation omitted). The reason Eppenger alleged is the ineffectiveness of postconviction counsel.

¶14 To be entitled to an evidentiary hearing, Eppenger "was required to do more than assert that his postconviction counsel was ineffective for failing to challenge on direct appeal several acts and omissions of trial counsel that he alleges constituted ineffective assistance." *See* ***id.***, ¶63. He was required to allege that postconviction counsel's "'performance was deficient' and 'that the deficient performance prejudiced the defense.'" *See* ***id.*** (quoting ***Strickland***, 466 U.S. at 687). We conclude that Eppenger has failed to show that he is entitled to an evidentiary hearing or relief on his claim that postconviction counsel was ineffective.

¶15 We begin with Eppenger's allegation that his postconviction counsel performed deficiently. Eppenger argued that postconviction counsel should have inquired about "the missing transcript" before appealing or should have filed a motion alleging that the record was defective. However, the record conclusively demonstrates that there was no "missing transcript." As was the practice at the time of trial, the *voir dire* was not transcribed. *See* ***State v. Taylor***, 2004 WI App 81, ¶11 n.4, 272 Wis. 2d 642, 679 N.W.2d 893 (noting that SCR 71.01(2) did not require that *voir dire* be reported until January 1, 1998).

¶16 We observe that postconviction counsel could have attempted to raise issues related to the jury selection even without a transcript, such as by seeking to reconstruct the record. However, there is nothing in the trial record that would have alerted postconviction counsel that there was a potential problem with the jury selection. There were no objections in the record from either trial counsel or Eppenger personally concerning the jury selection. Indeed, at the State's request, the trial court made a brief record after the jury selection. Trial counsel told the trial court that she had stipulated to a specific procedure used to screen potential jurors and then the trial court asked Eppenger, "Do you have any

objections, Mr. Eppenger, [to] the way we handled it?" Eppenger replied, "No." Neither Eppenger nor his trial counsel subsequently raised any concerns about the jury selection process that were documented in the transcripts that postconviction counsel reviewed before filing the postconviction motion.

¶17 Because the record did not contain any objections or references to concerns about the jury selection process, the information was not available to postconviction counsel unless Eppenger shared it with him. The filings and transcript of the postconviction motion hearing do not suggest that Eppenger raised the issue with postconviction counsel. For instance, Eppenger sent the trial court several letters before the postconviction motion hearing that expressed concern about postconviction counsel's representation. At the postconviction hearing, the trial court asked Eppenger about his concerns. Eppenger personally indicated that he wanted to proceed with postconviction counsel as his attorney. He never mentioned anything about his concerns with the jury selection.

¶18 Also at the postconviction hearing, after postconviction counsel had presented testimony and argument concerning the two issues he raised in the postconviction and amended postconviction motions, he told the trial court that Eppenger "has asked me to raise an additional issue" that was not previously raised. The issue, postconviction counsel said, was that Eppenger believed that when he was arraigned, the State should have personally handed him, rather than his trial counsel, a copy of the Information. Postconviction counsel did not indicate that there were any other issues that Eppenger had asked him to raise at the postconviction motion hearing.

¶19 The first time the record mentions anything about Eppenger discussing jury selection issues with postconviction counsel is Eppenger's 2010

postconviction motion and motion for reconsideration. As noted earlier, the postconviction motion contained a single sentence that asserted: "Tony Eppenger beg[ged] post-conviction counsel to raise the issues now presented in this motion [but] he refuse[d] to do so." This assertion was not mentioned in Eppenger's affidavit.[8] The motion for reconsideration contained three sentences concerning postconviction counsel. It repeated the statement from the postconviction motion and suggested that the trial court should not have denied Eppenger's postconviction motion without first holding a hearing to consider unspecified "letters or correspondences" between Eppenger and postconviction counsel.

¶20 We are unconvinced that Eppenger's bald assertions that he told his postconviction counsel about the jury selection issues are sufficient to warrant an evidentiary hearing to determine whether postconviction counsel actually knew about any alleged jury selection errors. Eppenger's postconviction motion and motion for reconsideration did not explain when, where or how he communicated his concerns to his postconviction counsel, or specifically what concerns he allegedly shared with postconviction counsel. The motions also did not explain how Eppenger "intended to establish deficient performance if he was given the chance at an evidentiary hearing." *See* ***Balliette***, 2011 WI 79, ¶68. As ***Balliette*** noted, "The evidentiary hearing is not a fishing expedition to discover ineffective assistance; it is a forum to prove ineffective assistance. Both the court and the State are entitled to know what is expected to happen at the hearing, and what the defendant intends to prove." ***Id.*** (emphasis omitted).

[8] On appeal, Eppenger asserts that his "own sworn affidavit" alleged that he "alert[ed] post-conviction counsel to this claim and provided him the facts." Eppenger is mistaken; his affidavit does not even mention postconviction counsel, much less any alleged communications with postconviction counsel concerning the jury selection.

¶21 We conclude that Eppenger's postconviction motion and motion for reconsideration failed to sufficiently demonstrate that postconviction counsel performed deficiently or that Eppenger is entitled to a hearing on that allegation. Given that conclusion, we need not consider whether Eppenger sufficiently alleged that he was prejudiced by postconviction counsel's performance. *See* ***Strickland***, 466 U.S. at 697 (court need not address both deficient performance and prejudice if the defendant does not make a sufficient showing on either one). Because Eppenger has not demonstrated the ineffective assistance of postconviction counsel, that cannot be a basis to overcome ***Escalona-Naranjo***'s procedural bar. We affirm the denial of Eppenger's motions.

By the Court.—Orders affirmed.

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