COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2097 **Cir. Ct. No. 2005CF6366**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAHIM ABDUL JACKSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Rahim Abdul Jackson, *pro se*, appeals an order denying his WIS. STAT. § 974.06 (2009-10) motion for postconviction relief.[1]

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

Jackson asserts that his postconviction counsel was ineffective: (1) because he failed to raise trial counsel's ineffectiveness in questioning Paul Bates about promises made in exchange for Bates's testimony against Jackson; (2) because he failed to raise trial counsel's ineffectiveness for failing to interview and call Patrick Reed as a defense witness; and (3) because he failed to argue that Jackson was denied due process by the prosecutor's misrepresentations of evidence and of the plea agreement with Bates. In addition, Jackson argues that there is newly discovered evidence, which necessitates a new trial. We disagree and affirm.

BACKGROUND

¶2 A jury found Jackson guilty of five counts of armed robbery with threat of force as a party to a crime. The convictions arose out of two robberies: one that occurred on October 26, 2005, and the other that occurred on October 31, 2005. Four of the counts against Jackson related to the October 26th robbery with the remaining count arising out of the October 31st robbery.

¶3 Jackson's postconviction counsel filed a motion for a new trial arguing that Jackson's trial counsel provided ineffective assistance by failing to call two alibi witnesses. After holding a ***Machner*** hearing,[2] the trial court denied Jackson's motion. Jackson filed a direct appeal, and this court affirmed. ***State v. Jackson***, No. 2008AP651-CR, unpublished slip op. (WI App Feb. 3, 2009). The Wisconsin Supreme Court denied Jackson's petition for review.

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

¶4 Jackson, *pro se*, then filed a motion seeking postconviction relief pursuant to WIS. STAT. § 974.06 and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996) (per curiam). The court denied Jackson's motion without holding a hearing. He now appeals.

STANDARD OF REVIEW

¶5 Whether Jackson's postconviction motion alleges sufficient facts entitling him to a hearing is subject to a mixed standard of review. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We first evaluate the motion on its face to determine whether it alleges sufficient material facts that, if true, would entitle him to relief. *See* ***id.*** We review this question of law *de novo*. ***Id.*** If the motion raises such facts, the postconviction court must grant an evidentiary hearing. ***Id.*** "However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [postconviction] court has the discretion to grant or deny a hearing." ***Id.*** We review the postconviction court's discretionary decisions for an erroneous exercise of discretion. ***Id.***

DISCUSSION

I. Ineffective Assistance of Postconviction Counsel

¶6 It is well-settled that WIS. STAT. § 974.06 requires criminal defendants "to consolidate all their postconviction claims into *one* motion or appeal." *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994). If a defendant's grounds for relief were finally adjudicated, waived, or not raised in a prior postconviction motion or appeal, they may not form the basis for a

new postconviction motion unless the defendant has a sufficient reason for failing to raise the issue previously. *See* ***State v. Fortier***, 2006 WI App 11, ¶16, 289 Wis. 2d 179, 709 N.W.2d 893. The ineffective assistance of postconviction counsel may "in some circumstances" constitute a sufficient reason for not raising an issue. *See* ***Rothering***, 205 Wis. 2d at 682.

¶7 Jackson asserts his current claims of ineffective assistance of trial counsel were not previously raised because postconviction counsel failed to raise them. *See* ***id.*** at 677-78. When an ineffective assistance of postconviction counsel claim is premised on the failure to raise ineffective assistance of trial counsel, the defendant must first establish trial counsel was actually ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. To prevail on a claim of ineffective assistance of trial counsel, Jackson must show that counsel was deficient and that the deficiency prejudiced his defense. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. Because a defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

¶8 To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must demonstrate that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

A. Paul Bates

¶9 Bates was the State's only witness linking Jackson to the crimes. Bates testified that he and Jackson planned the armed robberies that occurred on October 26th and October 31st. In his postconviction motion, Jackson argued that his trial counsel was ineffective for failing to cross-examine Bates about Bates's understanding of the bargain he had reached with the prosecutor in exchange for his testimony. Jackson specifically claims that his trial counsel was ineffective for not making the jury aware of the following benefits Bates received in exchange for his cooperation and testimony: (1) that Bates's bail was reduced, resulting in his release from jail; (2) that two unrelated armed robberies, to which Bates confessed, would be dismissed; (3) that Bates would plead guilty to just one count stemming from the October 26th robbery; and (4) that the prosecutor would make a sentence recommendation at Bates's sentencing.

¶10 Jackson points out that during *voir dire*, the prosecutor asked the jurors whether they had any concerns about a co-defendant testifying for the State. One juror responded: "It depends what kind of deal that person got in exchange for their testimony." The juror indicated that it would sway his opinion a bit if the co-defendant "got cut a real good deal in exchange for their testimony." Had the jury been aware of Bates's stake in testifying, Jackson submits that it could have reached a significantly different impression of Bates's credibility. We address each of Jackson's claims in turn.

i. Bail Reduction

¶11 As the State points out, Jackson's motion provided no factual support for his assertion that Bates was released on bail as a result of cooperating with police. Accordingly, we reject Jackson's claim that his trial counsel rendered

ineffective assistance in this regard. *See* ***Allen***, 274 Wis. 2d 568, ¶15 ("postconviction motion for relief requires more than conclusory allegations").

ii. Dismissal of Two Unrelated Robberies

¶12 The jury was told that in exchange for Bates's truthful testimony at Jackson's trial, Bates would plead guilty to three of the five armed robbery counts that he faced. The State acknowledges that the jury was not expressly told that two of the armed robberies counts were going to be dismissed but argues that this was the only conclusion that could be drawn. We agree.

¶13 Jackson also takes issue with the fact that the jury was falsely led to believe that Bates was facing four counts of armed robbery stemming from the October 26th and October 31st robberies, with a fifth count that occurred later. In actuality, two of the counts against Bates stemmed from robberies that occurred on October 3rd and October 15th.

¶14 Jackson was also originally charged with robberies committed on October 3rd and October 15th but these counts were dismissed on the first day of trial. As a result, the prosecutor warned trial counsel that any mention of offenses other than those for which Jackson was being tried could result in the introduction of other-acts evidence. In addition, the prosecutor mentioned that Bates was told to focus his testimony only on the October 26th and October 31st robberies. We cannot conclude that Jackson's trial counsel performed deficiently in avoiding the introduction of other-acts evidence by not highlighting for the jury that two of the counts against Bates stemmed from unrelated robberies.

iii. Charges Related to October 26th Robbery

¶15 In a related argument, Jackson faults trial counsel for not making the jury aware that Bates was being charged with just one count stemming from the October 26th robbery while Jackson was being tried for four counts.[3] Jackson asserts that the jury never learned that Bates "was escaping another three counts of armed robbery" for the October 26th robbery.

¶16 In making this argument, Jackson seems to overlook that Bates was never charged with more than one count stemming from the October 26th robbery. Thus, it would have been inaccurate for trial counsel to argue that Bates "escaped" three additional counts of armed robbery related to the October 26th robbery based on Bates's testimony. Consequently, Jackson has not established that his trial counsel was ineffective in this regard.

iv. That Prosecutor Would Make a Sentence Recommendation

¶17 Lastly, Jackson claims his trial counsel was ineffective for not making the jury aware that the prosecutor would make a sentence recommendation at Bates's sentencing. Bates testified that in exchange for his testimony, he was told only that the prosecutor would mention that he testified truthfully, if that was the case, at Bates's sentencing hearing. The prosecutor reiterated this during his closing. Jackson, however, asserts that the prosecutor promised to do more than merely mention at Bates's sentencing that Bates had testified truthfully: the

[3] Jackson faced one count for each of the four victims of the October 26th robbery.

prosecutor promised to make a sentence recommendation that was contingent on Bates's trial testimony.[4]

¶18 To support this allegation, Jackson submitted a statement from a Milwaukee detective who was present during Bates's plea negotiations with the prosecutor. According to the detective's statement, as part of the plea negotiations, the prosecutor informed Bates that he would take Bates's cooperation during Jackson's trial into account in making a sentencing recommendation. Jackson also submitted an affidavit from Patrick Reed stating that Bates told Reed that the prosecutor promised to give a sentence recommendation at Bates's sentencing in exchange for Bates's testimony. Had the jury known that the prosecutor would make a sentence recommendation, Jackson argues that it "could have surmised that Bates would have believed that the better his testimony for the prosecutor, the better the sentence recommendation for him."

¶19 It is not clear when the detective's statement was written or when Jackson acquired it.[5] Jackson claims to have received Reed's sworn affidavit in May 2010, nearly a year after the Wisconsin Supreme Court denied Jackson's petition for review of his direct appeal. Missing from Jackson's motion is any factual support to indicate that either his trial counsel or his post-conviction counsel should have known that the prosecutor offered to consider Bates's testimony against Jackson in making a sentencing recommendation. Without facts

[4] Though there is nothing in the record to confirm this, the State, in its brief, concedes that the prosecutor made a sentencing recommendation at Bates's sentencing hearing, which the sentencing court adopted.

[5] In his motion, Jackson writes that he obtained the detective's statement "[s]ometime after trial."

supporting that trial counsel and postconviction counsel had such knowledge, we cannot conclude that Jackson received ineffective assistance.[6] *See* ***Allen***, 274 Wis. 2d 568, ¶15.

B. Patrick Reed

¶20 Jackson argues that his trial counsel rendered ineffective assistance when he failed to interview and call Reed as a defense witness. He asserts that Reed's testimony would have supported the defense's theory that Bates lied when he implicated Jackson in the robberies.

¶21 In support of his motion Jackson submitted Reed's sworn affidavit, which Jackson received more than three-and-one-half years after his jury trial. In the affidavit, Reed, a co-defendant of Jackson's, explained that both he and Bates falsely implicated Jackson in the robberies. Reed averred that if he had been interviewed by someone on Jackson's behalf, he would have admitted to falsely implicating Jackson in the October 3rd and October 15th robberies and would have advised that Bates had also lied. Reed further claimed that while he and Bates were incarcerated at the same correctional facilities, Bates told Reed he had lied when he testified during Jackson's trial. According to Reed, Bates lied because he believed Jackson had caused him to be arrested and because Bates was offered a plea bargain.

[6] Finally, on the issue of the jury's assessment of Bates's testimony, we note that shortly after he was arrested and before consideration was offered or discussed, Bates implicated Jackson in the crimes Jackson was ultimately convicted of committing. As the State points out, "the fact that Bates was later rewarded for testifying against Jackson would not explain why he inculpated Jackson early on." This further undercuts Jackson's argument that the jury would have reached a significantly different impression of Bates's credibility had it been aware of the consideration he received.

¶22 Jackson argues that his trial counsel was ineffective for not bringing this information to light during Jackson's trial where the outcome rested heavily on the jury's assessment of Bates's credibility. Reed, however, was originally named as a witness for the State; consequently, Jackson's trial counsel had no reason to think that Reed was going to say anything favorable for Jackson. On the first day of trial, the prosecutor advised that he did not intend to call Reed and further stated that he would not seek to introduce other-acts evidence unless Reed was called as a defense witness.[7] Because calling Reed as a defense witness would have opened the door to other-acts evidence, Jackson has not convinced us that his trial counsel performed deficiently by not doing so.

II. Due Process

¶23 Next, Jackson asserts that the prosecutor violated his right to due process when he misrepresented the evidence and the plea agreement between the State and Bates. Jackson filed a direct appeal and did not bring this issue forward. Because this argument is not premised on the ineffective assistance of postconviction counsel[8] and because Jackson has not set forth a sufficient reason for failing to raise the issue previously, it is procedurally barred. *See* ***Fortier***, 289 Wis. 2d 179, ¶16.

[7] Reed and Jackson were involved in a 1998 armed robbery, which the prosecutor described as "a similar offense" to the crimes for which Jackson was on trial. Reed also implicated Jackson in a September 15, 2005 robbery. In addition, Reed's affidavit referenced robberies that occurred on October 3rd and 15th, so the jury would have been alerted to Jackson's suspected involvement in those crimes as well.

[8] To the extent that Jackson made an argument hinging on the ineffective assistance of postconviction counsel—i.e., that postconviction counsel was ineffective for not arguing that his trial counsel was ineffective for not making the jury aware that the prosecutor would make a sentence recommendation at Bates's sentencing—that argument is addressed separately. *See supra* A. iv.

III. Newly Discovered Evidence

¶24 Lastly, Jackson asserts that Reed's affidavit, which Jackson received in May 2010, constitutes newly discovered evidence warranting a new trial. A motion for a new trial based on newly discovered evidence is submitted to the trial court's sound discretion. ***State v. Terrance J.W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). "We will affirm the trial court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and the facts of the record." ***Id.*** To obtain a new trial based on newly discovered evidence, a party must establish the following:

> (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial.

Id.; *see also* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

¶25 In addition, when the newly discovered evidence is a recantation of trial testimony, other newly discovered evidence must sufficiently corroborate the recantation before the defendant is entitled to a new trial. ***Terrance J.W.***, 202 Wis. 2d at 500-01. Corroboration is required because recantation evidence is "inherently unreliable." *See* ***McCallum***, 208 Wis. 2d at 476, 479. The defendant meets the burden of corroborating the recantation by other newly discovered evidence by showing a feasible motive for the initial false accusation and circumstantial guarantees of the trustworthiness of the recantation. ***Id.*** at 477-78.

¶26 Even if we were to assume, without deciding, that Jackson has met his burden of showing a feasible motive for the initial false accusation, we conclude that the recantation lacks circumstantial guarantees of trustworthiness.

Such guarantees may be found where the statement is internally consistent and where it is given under oath. *See* ***Id.*** at 478.

¶27 Jackson argues that because Reed's affidavit was freely and voluntarily given with an understanding of the penalties of perjury and because Reed laid out details that he could not have known without talking to Bates, there are sufficient circumstantial guarantees of trustworthiness. We are not convinced. As noted by the trial court: "Reed's affidavit essentially sets forth a hearsay recantation by a principal witness (Bates)." However, it is Bates's alleged recantation of his trial testimony, and not Reed's recount of it, that is at issue. Unlike Reed's affidavit, Bates's statements to Reed were not given under oath.

¶28 We do not see any alternative indicia of trustworthiness. Absent satisfaction of the corroboration requirement, the alleged recantation does not entitle Jackson to a new trial. *See* ***Terrance J.W.***, 202 Wis. 2d at 500. Accordingly, we affirm.[9]

By the Court.—Order affirmed.

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

[9] The postconviction court made a number of factual errors in its decision and order denying Jackson's motion for postconviction relief, which the State acknowledges. As stated, our standard of review required us to review *de novo* whether Jackson's motion on its face alleged sufficient material facts that, if true, would entitle him to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Thus, setting aside the errors that were made, we have independently determined that Jackson's motion failed in this regard.