COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP566 **Cir. Ct. No. 1995CF951175**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KWESI B. AMONOO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

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

¶1 KESSLER, J. Kwesi B. Amonoo appeals from an order of the trial court denying his motion for postconviction relief. In October 2010, Amonoo filed a postconviction motion, pursuant to WIS. STAT. § 974.06 (2009-

10),[1] arguing ineffective assistance of trial and postconviction counsel, stemming from Amonoo's 1995 conviction of two counts of attempted first-degree intentional homicide and four counts of first-degree reckless endangerment of safety. We affirm.

BACKGROUND

¶2 In 1995, a jury found Amonoo guilty of two counts of attempted first-degree intentional homicide and four counts of first-degree reckless endangerment of safety. Amonoo appealed and we affirmed the conviction. We summarized the facts of the case as follows:

> Amonoo fired a gun at six people as they left a Kohl's Food Store shortly after having been angered by one of the six inside the store. Amonoo fired four or five shots from the middle of the street at the group. Two of the victims were hit in the chest with gunfire.

State v. Amonoo, No. 1996AP1761-CR, unpublished slip op. at 2 (WI App. Sept. 19, 1997).

¶3 Amonoo's appointed postconviction counsel filed three motions for direct postconviction relief. The first motion requested a new trial based on the denial of trial counsel's request for lesser included jury instructions on the two attempted first-degree intentional homicide charges. The second motion asserted several allegations of trial counsel ineffectiveness. Specifically, Amonoo argued that: (1) trial counsel failed to investigate Amonoo's alibi; (2) trial counsel failed to call three identified alibi witnesses who "would have testified that the Defendant could not have been present at the place of the offense at the date and

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

time it was said to have occurred";[2] (3) trial counsel implied to the jury in his opening statement that alibi evidence would be produced; and (4) after "promis[ing]" to do so in his opening statement, trial counsel failed to produce alibi evidence, prompting the State to comment on the failure during its closing argument. The third motion sought sentence modification.

¶4 The trial court denied each of the postconviction motions in a written decision and order issued on May 24, 1996. As related to the motion for a new trial, the trial court found that no evidence would have supported Amonoo's acquittal of the greater charge, a necessary prerequisite to a lesser included offense jury instruction. *See* ***State v. Muentner***, 138 Wis. 2d 374, 387, 406 N.W.2d 415 (1987). As to the motion asserting ineffective assistance of trial counsel, the trial court found that: (1) the allegations were conclusory because (a) there was no affidavit from any of the alleged alibi witnesses describing what he/she would have testified; (b) there was no affidavit from Amonoo or anyone else stating Amonoo's whereabouts at the time of the crime or other facts supporting an alibi; and (c) eyewitness testimony placing Amonoo at the scene as the shooter was overwhelming. The trial court also found that a lack of factual support for Amonoo's allegations could not lead to a finding that there was a reasonable probability that the outcome of Amonoo's trial would have been different. The trial court denied the motion for sentence modification, citing the sentencing factors considered, and noting a lack of cited authority in Amonoo's motion.

[2] The three alibi witnesses named in the motion are Eric Cole, Bernice Cole and Bertha Collier Amonoo. In this appeal, Amonoo only challenges the effect of trial counsel's unfulfilled "promise[]" to call Eric Cole to testify at trial.

¶5 Postconviction counsel for Amonoo appealed from the entirety of the order and from the judgment of conviction.[3] Only the jury instruction issue was briefed on appeal. We summarily affirmed the judgment and the order on September 19, 1997. The Wisconsin Supreme Court denied review.

¶6 On October 1, 2010, new counsel for Amonoo filed a motion pursuant to WIS. STAT. § 974.06 requesting a new trial based on ineffective assistance of trial and postconviction counsel. Amonoo's motion argued that postconviction counsel was ineffective for failing to properly raise issues of trial counsel ineffectiveness with the trial court and on direct appeal. The factual basis for the claimed ineffective assistance of trial counsel appears to be:[4]

> (1) Trial counsel did not move to suppress a suggestive photo array because Amonoo was the only person wearing a jacket, and one eyewitness said the shooter wore a jacket.
>
> (2) Trial counsel mentioned an alibi witness, Eric Cole, in his opening statement to assert that Amonoo was at Eric Cole's house at the time of the shooting; however, trial counsel did not call Eric Cole to testify, nor did Amonoo testify as to his alibi. This allowed the State to comment in closing that: "The defense that was to be developed was to be through the defense witnesses, and to by [sic] honest, I didn't hear it."

[3] Specifically, the appeal was noticed as "from the Judgment of Conviction and the Order denying Post-Conviction Relief, entered on August 3, 1995 and May 28, 1996, respectively[.]"

[4] To the extent that there are facts provided in support of the motion, they are found in Amonoo's four-paragraph affidavit, and counsel's brief. We have difficulty determining what factual basis Amonoo asserts for the various ineffective assistance claims. Counsel filed an extremely sparse motion for a new trial, relying on the accompanying brief and on Amonoo's affidavit for factual support. Amonoo's affidavit identifies several partial police reports as genuine.

(3) Trial counsel did not object to the State's comment or ask for a curative instruction.

(4) Trial counsel did not call a witness, Darnetta Williams, to counteract the testimony of Crystal Long, who identified Amonoo in the photo array.

(5) Trial counsel did not call a witness, Dale Murphy, to impeach the identification testimony of Avery Nimox, a witness and a victim of the shooting.

¶7 Amonoo argued that postconviction counsel was ineffective because rather than challenge trial counsel's ineffectiveness based on the above-mentioned allegations, postconviction counsel made only conclusory allegations regarding the alibi witnesses and only argued the jury instruction issue on appeal.

¶8 The 2010 postconviction court issued a written decision and order denying Amonoo's WIS. STAT. § 974.06 motion. The court rejected all claims of ineffective assistance of counsel, finding either that the allegations were insufficient, or that the record conclusively showed the allegations were without merit. As relevant to this appeal, the postconviction court specifically found that: (1) Amonoo failed to meet his factual burden under § 974.06 by not providing the court with the photo array, which was not otherwise a part of the record;[5] (2) with no evidence that the photo array was suggestive, trial counsel's failure to move to suppress subsequent identifications cannot be ineffective assistance; and (3) no

[5] Amonoo claims the photo array is suggestive because he is the only person wearing a jacket and cites trial testimony to that effect. An eyewitness described the shooter as wearing a jacket. The State's brief represents that the exhibits from the trial have been withdrawn, including the police photo array, the line-up photo, and the line-up police reports. Without a record of the photo array, it is impossible for the postconviction court, or for this court, to determine that it was suggestive.

affidavits were provided from any of the witnesses trial counsel did not call, making it impossible to evaluate the reasonable probability that their testimony would have changed the outcome of the trial.

¶9 This appeal follows. Additional facts are provided as relevant to the discussion.

DISCUSSION

¶10 On appeal, Amonoo contends that his trial counsel, and subsequently his postconviction counsel, were ineffective for: (1) failing to move to suppress the photo array; (2) failing to move to suppress subsequent identifications that Amonoo contends were based on the photo array; (3) allowing the State to comment on the lack of an alibi defense as a result of trial counsel's failure to call Eric Cole and failure to object to the State's comment; and (4) failing to call alibi witnesses Darnetta Williams and Dale Murphy to testify. Amonoo also argues that his postconviction counsel was ineffective for pursuing the jury instruction issue on his direct appeal, rather than focusing on the "correct issues." We disagree.

Standard of Review

¶11 We consider *de novo* whether a postconviction motion on its face alleges material facts that, if true, would entitle the defendant to an evidentiary hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The motion must specifically allege within its four corners material facts answering the questions "who, what, where, when, why, and how" the defendant would successfully prove at an evidentiary hearing that he is entitled to a new trial. ***Id.***, ¶23. To obtain an evidentiary hearing on an ineffective assistance of counsel

claim, the defendant must allege the facts that establish both deficient performance and prejudice. ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove constitutional prejudice, "[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." ***Id.*** at 694. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" ***Id.*** (citation omitted). "Because the defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other." ***State v. Chu***, 2002 WI App 98, ¶47, 253 Wis. 2d 666, 643 N.W.2d 878. A defendant may not rely on conclusory allegations of deficient performance and prejudice, hoping to supplement them at an evidentiary hearing. *See* ***Bentley***, 201 Wis. 2d at 313-14.

¶12 Counsel is not ineffective for failing to pursue challenges that have no merit. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (An attorney is not ineffective for not bringing a motion that would have been denied.); *see also* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit.").

¶13 Whether postconviction counsel was ineffective for failing to raise the additional claims of ineffective assistance of trial counsel in the 1997 postconviction proceedings and appeal depends on whether trial counsel was

ineffective at trial. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Applying these standards, we conclude that Amonoo's WIS. STAT. § 974.06 motion does not provide us with sufficient factual information to entitle Amonoo to a hearing.

A. The Photo Array and Subsequent Identifications.

¶14 To demonstrate that postconviction counsel was ineffective for not challenging trial counsel's failure to move to suppress the photo array, and to overcome the ***Escalona***[6] bar, Amonoo must demonstrate that trial counsel was actually ineffective. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15. Therefore, Amonoo must demonstrate that trial counsel's performance was both deficient and prejudicial. *See* ***Bentley***, 201 Wis. 2d at 311-12. He has not done so.

¶15 Amonoo contends that of all the persons pictured in the photo array, he was the only one wearing a jacket. This is prejudicial, Amonoo argues, because the police report detailing the shooting indicates that Nimox stated the shooter was wearing a jacket. We disagree. The record, which does not contain the array, does not contain facts which tend to suggest the array was unduly suggestive. In fact, three of the seven witnesses to the shooting did not even identify Amonoo from the photo array. Eyewitnesses Williams,[7] Andres Torres and Dennis Maldonado did not identify Amonoo in the photo array. Further, there was no consistency among those eyewitnesses who identified Amonoo from the

[6] *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), holding that a defendant cannot raise ineffective assistance of counsel claims in a WIS. STAT. § 974.06 motion when those claims could have been raised on direct appeal. Ineffective assistance of postconviction counsel may be a sufficient reason to overcome the bar. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

[7] Williams did not testify at trial. Amonoo indicates in his brief that a police report indicates that she could not identify him from the photo array.

photo array and those who identified Amonoo in a line-up. While neither Torres nor Maldonado identified Amonoo from the photo array, both identified Amonoo in a line-up. And, while eyewitness Richard Alvarado selected Amonoo from the photo array, he did not select Amonoo from a line-up. These facts strongly suggest that the array was not unduly suggestive, even if Amonoo was the only one wearing a jacket. Because Amonoo has not demonstrated that he was prejudiced by the photo array, we conclude that a motion to suppress the identification based on photo array would not have succeeded. *See* ***Berggren***, 320 Wis. 2d 209, ¶21.

B. The Alibi Defense.

¶16 To the extent that Amonoo contends that postconviction counsel was ineffective for not adequately challenging trial counsel's failure to call Eric Cole, we note that Amonoo's proper remedy was by filing a ***Knight***[8] petition with this court because postconviction counsel did raise the issue, but did not pursue it on appeal. *See* ***State v. Evans***, 2004 WI 84, ¶39, 273 Wis. 2d 192, 682 N.W.2d 784, *overruled on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900; *see also* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 602, 516 N.W.2d 362 (1994) (claim of ineffective assistance of appellate counsel due to the failure to file no merit report is addressed in a ***Knight*** petition filed with the court of appeals). However, because Amonoo's argument is before us along with his others, we conclude that it is most efficient to address the merits of Amonoo's argument.

[8] *See* ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

¶17 Amonoo argues that trial counsel's mention of Eric Cole during opening statements was prejudicial because it allowed the State to comment on the weakness of Amonoo's defense. He claims he was further prejudiced by his trial counsel's failure to object to the State's comment. We conclude that Amonoo's claim must fail on the merits because he provides no support for his contention that he was prejudiced as a result of trial counsel's failure to call Eric Cole. Amonoo's claims are nothing more than conclusory arguments, unsupported by the record. *See* ***Bentley***, 201 Wis. 2d at 309-10. We are not convinced that the jury was left to speculate about the missing alibi defense as a result of remarks made by trial counsel and the State, nor are we convinced that the outcome of Amonoo's trial would have been different had Eric Cole's name never been mentioned. Regardless of whether Eric Cole's name was used, eyewitnesses placed Amonoo at the scene of the shooting and identified him as the shooter. Accordingly, we cannot conclude that any of Amonoo's claims relating to Eric Cole as an alibi witness were prejudicial.

C. Trial Counsel's Failure to Call Darnetta Williams and Dale Murphy.

¶18 Amonoo also argues that postconviction counsel was ineffective for failing to challenge trial counsel's failure to call Williams and Murphy as witnesses. Amonoo contends that Williams, who did not identify Amonoo in the photo array, could have testified to impeach Long, who did identify Amonoo in the photo array. Amonoo also argues that Murphy, the principal of the school attended by Amonoo, Nimox and Torres, could have impeached Nimox's identification testimony. Nimox, who was both a witness and one of the victims of the shooting, testified to knowing Amonoo both from school and "by face." A police report indicates that Nimox identified Amonoo with certainty because he recognized Amonoo from fights at school "several months ago." A police report

of Murphy's statements suggests that as to two fights in late December 1994, Murphy thought that Amonoo either arrived after the fights, or was not in school at all on those days. The same police report also suggests that Murphy could confirm that Amonoo, Nimox, and Torres knew each other before the shooting and that Amonoo "had confrontations with Avery Nimox and Andres Torres" in the past. Thus, based solely on the police report, Murphy could arguably dispute parts of Nimox's testimony and could arguably give Amonoo a motive for shooting Nimox and Torres.

¶19 Amonoo provides no statements or affidavits from either Williams or Murphy confirming what he believes both parties would say. The State actually indicates that Williams was on *its* witness list, although she did not testify at trial. The record contains no affidavit as to what Williams would have said if called to testify,[9] but experience suggests that a person named by the State as a witness is unlikely to be helpful to the defense. Indeed, the record does not even establish whether Williams is still alive and available to testify in Wisconsin. As to Murphy, the record also does not establish whether he would have been available to testify or what he would have said. We are unwilling to rely on police reports in lieu of affidavits to establish what those witnesses would testify to at a trial.

¶20 A defendant who alleges that his or her attorney was ineffective because the attorney did not do something must show with specificity what the attorney should have done, how the results of the trial would have been altered, or at the very least, how the failure made the result either unreliable or fundamentally unfair. ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994).

[9] We are not prepared to assume that a witness will necessarily testify consistently with what a police report indicates was said. We are particularly wary of such an assumption many years after the fact.

Here, Amonoo provides nothing but his own conclusory statements in support of what Williams's and Murphy's testimonies would have been at trial. Consequently, Amonoo cannot meet the prejudice prong of the ***Strickland*** test as to trial counsel's effectiveness. *See* ***id.***, 466 U.S. at 694. Because trial counsel was not ineffective for failing to call Williams and Murphy to testify at trial, postconviction counsel was not ineffective for failing to raise this issue.

D. The Assistance of Postconviction Counsel.

¶21 Among his multiple arguments of trial counsel ineffectiveness, and subsequent postconviction counsel ineffectiveness, Amonoo also argues that postconviction counsel's challenge of the jury instruction issue on direct appeal was inappropriate because the correct issues for direct appeal centered around trial counsel ineffectiveness. We disagree.[10]

¶22 A defendant does not have the right to insist that his postconviction attorney raise particular issues. *See* ***Evans***, 273 Wis. 2d 192, ¶30. Counsel has the duty to determine which issues have merit for appeal. ***Id.*** "'[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of [postconviction] counsel be overcome.'" ***Smith v. Robbins***, 528 U.S. 259, 288 (2000) (citation omitted). Amonoo has not demonstrated that his additional issues are "'clearly stronger'" than those pursued. *See* ***id.*** (citation omitted).

¶23 As stated, the record contains no facts telling us why any of the witnesses at issue were not called, nor does the record provide factual support for

[10] Amonoo also seems to suggest that the fact that we summarily affirmed the trial court's findings in his direct appeal establishes postconviction counsel's ineffectiveness; however, he cites no authority for that proposition.

what any of them would have said. Without such information, an appellate court cannot conclude that there is a reasonable probability that the result of the proceeding would have been different. *See* ***Thiel***, 264 Wis. 2d 571, ¶20. Nor does the record suggest that Amonoo was prejudiced by the photo array or any other identification. We conclude that Amonoo has not shown that any of the issues he claims postconviction counsel should have raised were obvious and clearly stronger than the issue postconviction counsel actually raised. Moreover, Amonoo provides no affidavits or statements from his postconviction counsel explaining his decision to pursue the jury instruction issue over others. We are not prepared to conclude that postconviction counsel's decision was a result of ineffective assistance, rather than strategy. The law presumes that postconviction counsel's decision to raise the particular challenge to trial counsel's performance on direct review was reasonable. *See* ***State v. Harris***, 133 Wis. 2d 74, 81, 393 N.W.2d 127 (Ct. App. 1986).

CONCLUSION

¶24 We have concluded that the record does not contain facts which, if true, would support a finding of prejudice under ***Strickland*** and thus entitle Amonoo to a hearing on the various actions of trial counsel about which Amonoo complains. Postconviction counsel was not ineffective in the direct appeal for failing to raise conduct by trial counsel which was not ineffective.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.