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DISTRICT II

September 18, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2783 State of Wisconsin v. Cesar D. Pantoja (L.C. #2008CF1216)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Cesar D. Pantoja appeals from an order denying without a hearing his WIS. STAT. § 974.06 (2011-12)[1] motion for postconviction relief. We agree with the circuit court and affirm. Based on our review of the briefs and the record, we conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21.

In 2009, Pantoja pled guilty to operating while intoxicated, seventh, eighth, or ninth offense. In 2012, his appellate counsel filed a no-merit report. Pantoja filed a response in which

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

he alleged that his guilty plea was not knowing, intelligent, and voluntary, and that his trial counsel ineffectively failed to obtain accurate information about his prior OWI convictions. This court affirmed his conviction.

Shortly thereafter, Pantoja filed the underlying WIS. STAT. § 974.06 motion. He claimed the State breached the plea agreement by recommending a sentence consecutive to one he already was serving, and that his trial counsel was ineffective for leading him to believe the State would recommend a concurrent sentence and for failing to object to the breach. The circuit court determined that Pantoja failed to establish that he had sufficient reason for not raising the claims in his prior appeal, and summarily denied the motion. Pantoja appeals.

The State argues Pantoja's current challenge to his conviction is procedurally barred because he failed to raise it in his response to the no-merit report. We agree. Under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and WIS. STAT. § 974.06(4), "a prior no merit appeal may serve as a procedural bar to a subsequent postconviction motion and ensuing appeal [that raise issues] that could have been previously raised." ***State v. Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574. To raise issues in a subsequent postconviction proceeding that could have been raised in response to a no-merit report, the defendant must demonstrate a "sufficient reason" for failing to have done so. ***State v. Allen***, 2010 WI 89, ¶92, 328 Wis. 2d 1, 786 N.W.2d 124.

Pantoja did not allege in his postconviction motion that the no-merit procedure was in any way faulty or not followed. We therefore assume the process in fact was followed. *See* ***id.***, ¶82. Pantoja has demonstrated no reason, let alone a sufficient one, for his failure to bring to the court's attention in that earlier proceeding his postconviction claims that the State breached the

plea agreement and that his postconviction counsel was ineffective for not objecting to the alleged breach or for misleading him about the negotiated plea.

Pantoja likewise has not sufficiently alleged that the State breached the plea agreement or that counsel was ineffective in any way related to the purported breach. A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle him or her to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). The motion must include facts that "allow the reviewing court to meaningfully assess [the defendant's] claim." ***Id.*** at 314. That is, it should allege who, what, where, when, why, and how. ***State v. John Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion is sufficient to warrant an evidentiary hearing is a legal issue this court reviews de novo. ***Bentley***, 201 Wis. 2d at 310.

"A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement," ***State v. Howard***, 2001 WI App 137, ¶13, 246 Wis. 2d 475, 630 N.W.2d 244, and to effective assistance of counsel, ***State v. Roberson***, 2006 WI 80, ¶23, 292 Wis. 2d 280, 717 N.W.2d 111. To prevail on a claim of ineffective assistance of trial counsel, a defendant must establish both that trial counsel's performance was deficient and that this performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must establish that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the proceeding unreliable. ***Id.*** Prejudice is presumed if the State substantially and materially breaches a plea agreement because it results in a manifest injustice to the defendant. *See* ***State v. Smith***, 207 Wis. 2d 258, 281, 558 N.W.2d 379 (1997).

Pantoja's motion alleged that the State breached the agreement by recommending his sentence be made consecutive to a prison term he was serving for a Kenosha county conviction. The agreement placed on the record said nothing about consecutive or concurrent terms, only that the State would recommend an "unspecified" sentence. Pantoja does not allege in any way how the consecutive sentence constituted a breach of the agreement. The motion did not allege, for instance, who, what, where, when, why or how the State indicated or promised that "unspecified" unambiguously meant "concurrent," that the parties agreed that "unspecified" meant "concurrent," or that the State could not or would not make a recommendation for a consecutive sentence. Rather, the motion vaguely and nonspecifically alleged that his counsel told him that if he pled guilty, the State would recommend that his sentence be run concurrent with any other sentence, and that, but for his belief that the State would recommend a concurrent sentence, he would have gone to trial. Conclusory allegations do not establish a sufficient reason. *See* ***Allen***, 328 Wis. 2d 1, ¶86.

Pantoja has not established either that he had a sufficient reason for failing to raise these claims in his response to the no-merit report or that his claims now are supported by sufficient reasons to warrant an evidentiary hearing. The summary denial of his motion was proper.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals