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DISTRICT II

November 13, 2013

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

2012AP2211

State of Wisconsin v. Paul C. Wozny (L.C. #2001CF394)

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

Paul C. Wozny appeals an order denying his postconviction motion seeking resentencing. He contends his trial and postconviction/appellate attorneys rendered ineffective assistance in regard to the use of a State-requested psychological report at sentencing. As Wozny fails to offer a sufficient reason for not raising this issue in one of his two prior postconviction motions or two prior appeals, his claim is barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82,

517 N.W.2d 157 (1994). Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹

In late 2001, Wozny was charged with nine sexual offenses involving children. He intended to present *Richard A.P.*² evidence at trial. The trial court granted the State's motion to have Wozny submit to a psychosexual evaluation performed by its expert, Dr. Charles Lodl. Wozny asserted that the Lodl report "reflect[ed] poorly" on him. The trial court ruled that the Lodl report could be used only on rebuttal and, if Wozny later decided not to offer *Richard A.P.* evidence, the prosecution would be barred from "introducing any evidence derived from the state-sponsored exam on the issue of guilt."

Wozny pled no contest to three of the charges in March 2002. Accordingly, although trial counsel introduced the Lodl report at sentencing, it was not used on the issue of guilt. Counsel explained that he introduced it to show that Lodl found that Wozny "did not subscribe to a significant number of distortions which men who molest children usually endorse," and that, like Wozny's own experts, Lodl saw only "suggestions that may lead down the path" of pedophilia or personality disorder but he could not diagnose either at that time. The Lodl report was among the materials the sentencing court considered. Others included reports from Wozny's experts, two presentence investigation reports (PSIs), and numerous letters of support. It ordered Wozny to twenty-five years' initial confinement and forty-five years' extended supervision.

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

² *See State v. Richard A.P.*, 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998). *Richard A.P.* evidence is character evidence a defendant introduces to show that he or she lacks the psychological characteristics of a sex offender and thus was unlikely to have committed the charged crime. *State v. Davis*, 2002 WI 75, ¶¶1, 37, 254 Wis. 2d 1, 645 N.W.2d 913.

Wozny claims on appeal that his lengthy sentence derived from the Lodl report's negative depiction of him. He asserts that his trial counsel was ineffective for introducing the report at sentencing and postconviction/appellate counsel was ineffective for failing to identify trial counsel's prejudicial error. Wozny contends his postconviction/appellate lawyers could not have raised the issue in a prior filing because they "never saw" the Lodl report and so could not have "realized the extent of trial counsel's mistakes if the documents relating to these issues were never turned over to" them. We are not persuaded.

Wozny filed his prior postconviction motions and appeals between February 2003 and April 2008. His postconviction/appellate counsels testified in 2012 only that they did not recall seeing the Lodl report years earlier. It is highly unlikely, however, that they did not see it. In 2002, the Lodl report was paired in the record with other expert reports and an alternative PSI. The record also is replete with other references to Lodl's evaluation. It was referred to in the sentencing transcript and was the subject of several motions and an exchange of letters. The court's ruling on the limits of the Lodl report's use figures prominently as well.

If a ground for relief was not raised in an original postconviction motion or appeal, a defendant must show a sufficient reason why it was not asserted previously. See *Escalona-Naranjo*, 185 Wis. 2d at 181-82. That either counsel could not recall reviewing a particular expert report years after the fact does not state a sufficient reason.

Beyond that, to the extent Wozny alleges appellate counsels' ineffectiveness for either missing or failing to recognize trial counsel's prejudicial introduction of the Lodl report, this is a *Knight* petition. See *State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). To prove

ineffective assistance, Wozny must demonstrate that counsels' performance was both deficient and prejudicial. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Trial counsel introduced the Lodl report to show that Wozny did not present as a typical child molester and that, like Wozny's expert, Lodl was unable to diagnose personality disorder or pedophilia. Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable" and do not constitute ineffective assistance. *Id.* at 690-91; see also *State v. Hubanks*, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992) (trial strategy decisions reasonably based in law and fact generally do not constitute ineffective assistance of counsel). Because trial counsel was not ineffective, it logically follows that appellate counsel were not ineffective for failing to challenge his performance. See *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to make meritless arguments).

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