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DISTRICT II

November 20, 2013

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

2013AP981

State of Wisconsin v. Dennis R. Martinez (L.C. #2004CF183)

Before Brown, C.J., Reilly and Gundrum, JJ.

Dennis Martinez appeals *pro se* from a circuit court order denying his WIS. STAT. § 974.06 (2011-12)¹ motion alleging ineffective assistance of counsel. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

¹ Unless otherwise indicated, all subsequent references to the Wisconsin Statutes are to the 2011-12 version.

In 2005, Martinez pled no contest to repeated sexual abuse of the same child contrary to WIS. STAT. § 948.025 (2003-04). In 2013, claiming that he had been improperly charged with violations of WIS. STAT. § 948.02 (child sexual assault) and § 948.025, Martinez filed a WIS. STAT. § 974.06 motion alleging ineffective assistance of counsel because neither his trial nor postconviction counsel raised this claim. The circuit court denied Martinez's motion without a hearing after concluding that Martinez was charged only with an offense under § 948.025. Martinez appeals.

A circuit court has the discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted).

Martinez's sole support for his claim that he was charged under WIS. STAT. § 948.02 are references to § 948.02 made during his arraignment. Section 948.025 creates criminal liability for a course of conduct falling within the meaning of WIS. STAT. §§ 948.01 or 948.02. *State v. Johnson*, 2001 WI 52, ¶¶14-18, 243 Wis. 2d 365, 627 N.W.2d 455, *cert. denied*, 534 U.S. 1043

(2001).² The arraignment court's references to § 948.02 occurred in the context of the § 948.025 statutory scheme and are of no consequence.

We conclude that the circuit court properly exercised its discretion in denying Martinez's WIS. STAT. § 974.06 motion without a hearing because the record conclusively demonstrates that Martinez is not entitled to relief on his ineffective assistance of counsel claim. Counsel is not deficient if counsel fails to raise a meritless claim. *State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. The complaint, information, plea hearing, sentencing and judgment of conviction all confirm that Martinez was only charged with and convicted of an offense under WIS. STAT. § 948.025.

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

² To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).