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DISTRICT IV

January 24, 2014

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

2012AP453 State of Wisconsin v. Glenn A. Smiley (L.C. # 2007CF29)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Glenn Smiley appeals an order denying his postconviction motion brought under WIS. STAT. § 974.06 (2011-12).[1] 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(1). We affirm.

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

In 2007 Smiley was convicted of one count of repeated sexual assault of the same child. He filed the current postconviction motion in 2010. The court denied the motion in 2012.

Smiley first argues on appeal that his trial counsel was ineffective by not arguing that police violated his constitutional rights by not advising him of his right to remain silent and by refusing his request for counsel. The State correctly notes that Smiley did not raise this issue in his postconviction motion. We usually do not address issues that are raised for the first time on appeal, and we see no reason to do that in this case. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52.

In reply, Smiley states that he only recently discovered this issue with the help of a new inmate assistant, and he asks that we give him permission to return to the circuit court and raise this issue. Smiley does not need our permission to file a second motion under WIS. STAT. § 974.06. However, if he does file a second motion, the circuit court will consider whether Smiley had a sufficient reason for not raising this issue in the current motion. *See* § 974.06(4).

Smiley's second argument appears to be that his trial counsel was ineffective in some manner related to Smiley's assertion that police used a device that allows them to "see through walls." It does not appear that Smiley raised this issue in his postconviction motion, and therefore we again do not address this issue. Even if certain references may have been made to Smiley's assertion at the evidentiary hearing on the current motion, there was no developed argument or focus on that point.

Smiley's third argument is that his trial counsel was ineffective by not having a second evaluation of him done for the purpose of supporting a plea of not guilty by reason of mental disease or defect. To establish ineffective assistance of counsel a defendant must show that

counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. ***Id.*** at 697. To demonstrate prejudice, the "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 one sufficient to undermine confidence in the outcome. ***Id.***

At the postconviction hearing, Smiley did not present the opinion of any expert that Smiley's mental state at the time of the crime would have satisfied the legal requirements of a mental disease or defect plea. Without that expert opinion, Smiley is unable to show a reasonable probability that the ultimate outcome would have been different if his attorney had sought a second evaluation. Therefore, Smiley has failed to show prejudice.

To the extent Smiley's brief also argues other issues of ineffective assistance, we do not address those because they were not raised in the postconviction motion.

Finally, we commend the State for providing with its brief copies of necessary documents from the record that were not in the appellant's appendix.

IT IS ORDERED that the order appealed from is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals