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DISTRICT II

March 19, 2014

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

2012AP1472

State of Wisconsin v. Daniel L. Olmstead (L.C. #2008CF230)

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

Daniel L. Olmstead appeals from an order denying his WIS. STAT. § 974.06 (2011-12)¹ postconviction motion for plea withdrawal. 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. Because Olmstead has failed to establish that the trial court improperly denied his claims as procedurally barred, we affirm.

¹ We construe Olmstead's pleading, which was filed outside of the time for a WIS. STAT. RULE 809.30 direct appeal, as a postconviction motion filed pursuant to WIS. STAT. § 974.06. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

In 2008, pursuant to a plea agreement, Olmstead pled no contest to three counts of first-degree sexual assault of a child and the trial court imposed three consecutive fifteen-year prison sentences. Thereafter, as part of Olmstead's WIS. STAT. RULE 809.30 direct appeal, postconviction counsel filed a RULE 809.30(2)(h) postconviction motion² for resentencing alleging that during the pendency of Olmstead's trial court case, all parties mistakenly believed that the maximum penalty on each count was forty years of imprisonment. In actuality, based on their offense dates, two of the three counts carried a twenty-year maximum penalty. The trial court granted Olmstead's postconviction motion and ordered resentencing.

At resentencing, trial counsel stated that he had explained to Olmstead that because the misapprehension regarding the maximum penalties pre-dated the plea hearing, Olmstead "would probably be successful if he wished to withdraw his plea and assume a full defense of this action." Trial counsel added:

I talked with [Mr. Olmstead] quite a bit about that because I think that was an important aspect of this case, and I wanted to be clear that he understood that that was a viable means of proceeding and that he does not wish to do that.

Trial counsel argued that Olmstead's decision to pursue resentencing rather than plea withdrawal demonstrated his acceptance of responsibility. The trial court imposed the same sentence previously ordered.

Olmstead filed a pro se motion for plea withdrawal alleging that the trial court's colloquy was inadequate and that his pleas were unknowingly entered due to the ineffective assistance of

² A postconviction motion brought as part of the direct appeal process is simultaneously governed by WIS. STAT. RULE 809.30(2)(h) and WIS. STAT. § 974.02.

trial counsel.³ Following a June 8, 2012 hearing, the trial court denied Olmstead's plea withdrawal motion, concluding that his claims were procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The June 8, 2012 hearing transcript is not part of the court record.⁴

Olmstead has failed to establish that the trial court erred in applying *Escalona's* procedural bar. An issue which could have been raised in a postconviction motion under WIS. STAT. § 974.02 may not be raised in a subsequent WIS. STAT. § 974.06 postconviction motion unless the trial court ascertains that a sufficient reason exists for the defendant's failure to raise the issue in his or her original motion. *Escalona*, 185 Wis. 2d at 181-82; *see also* § 974.06(4).⁵ Even if we were to assume that Olmstead alleged a sufficient reason in his § 974.06 plea withdrawal motion,⁶ Olmstead has failed to provide a transcript of the June 8, 2012 hearing, and we must assume that it would support the trial court's decision. *State v. Provo*, 2004 WI App 97, ¶19, 272 Wis. 2d 837, 681 N.W.2d 272 (it is the appellant's responsibility to ensure that the record is complete, and we are to assume that any missing transcripts would support the trial

³ In the interim, Olmstead filed a pro se sentence modification motion alleging as a "new factor" that he never understood he was pleading no contest to two of the three counts. After a hearing, the trial court denied Olmstead's motion.

⁴ Similarly, the court record does not include transcripts from either the original July 16, 2009 postconviction hearing or the July 22, 2010 hearing on Olmstead's pro se sentence modification motion. Olmstead's July 18, 2012 statement on transcript indicated that all transcripts necessary for this appeal were already on file.

⁵ "Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived ... in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion," absent sufficient reason. WIS. STAT. § 974.06(4).

⁶ Olmstead's plea withdrawal motion fails to mention his original postconviction proceedings, and the nature of any requisite "sufficient reason" is unclear from his pleadings.

court's decision); *see also Haack v. Haack*, 149 Wis. 2d 243, 247, 440 N.W.2d 794 (Ct. App. 1989) (when transcripts are missing, we must assume that every fact essential to sustain the trial court's decision is supported by the record). On this record, we cannot conclude that the trial court erred in determining that Olmstead did not establish a sufficient reason for failing to raise his guilty plea claims in his prior postconviction motion.

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