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DISTRICT IV

July 8, 2014

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

2013AP525 State of Wisconsin v. Guy L. Gerken (L.C. #2005CF1640)

Before Lundsten, Sherman and Kloppenburg, JJ.

Guy Gerken, pro se appellant, appeals the circuit court's order denying his motion for postconviction relief. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We summarily affirm on the basis that Gerken's claims are procedurally barred under ***State v. Allen***, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124.

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

Gerken was convicted, after no contest pleas, of two counts of first-degree sexual assault of a child, one count of child enticement, and six counts of possession of child pornography. Gerken filed a motion after sentencing to withdraw his pleas, arguing that the plea colloquy was defective and that he did not understand the nature of the charges. The circuit court held a hearing, at which the State had the burden of establishing by clear and convincing evidence that Gerken understood the nature of the charges. At the motion hearing, Gerken's postconviction counsel stated specifically that Gerken was not asserting any breach of duty against his trial counsel. The circuit court denied the motion.

Gerken's postconviction counsel then filed a no-merit notice of appeal. Gerken's postconviction counsel later sought to stay the no-merit appeal to permit an additional postconviction motion. We granted a stay, and Gerken filed a motion for plea withdrawal based on newly discovered evidence. Gerken did not allege any claims of ineffective assistance of trial counsel. The circuit court denied the motion, and Gerken filed an additional notice of appeal.

On December 17, 2009, we issued an opinion and order in the no-merit appeal. We summarily affirmed Gerken's convictions and the order denying postconviction relief, concluding that there were no issues of arguable merit that he could raise on appeal. We specifically concluded that there would be no arguable merit to the several claims of ineffective assistance of trial counsel that Gerken raised in his no-merit response. Gerken filed a motion for reconsideration, and we denied the motion. On December 13, 2010, we issued an opinion and order affirming the circuit court's order denying Gerken's motion for plea withdrawal based on newly discovered evidence.

Gerken then filed a motion in circuit court under WIS. STAT. § 974.06, seeking to withdraw his pleas based on several claims of ineffective assistance of trial and postconviction counsel. The circuit court denied the motion on the basis that his claims were procedurally barred. Gerken now appeals.

The State argues that Gerken's claims are barred under ***Allen***, 328 Wis. 2d 1. In ***Allen***, the supreme court held that a defendant may not raise issues in a subsequent WIS. STAT. § 974.06 motion that he could have raised in a response to a no-merit report, absent a "sufficient reason" for failing to raise the issues earlier in the no-merit appeal. ***Allen***, 328 Wis. 2d 1, ¶92. Gerken asserts that, by alleging ineffective assistance of postconviction counsel based on a failure to assert trial counsel's ineffectiveness, he has provided a specific reason for his failure to raise the issues in his response to his counsel's no-merit report. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) ("It may be in some circumstances that ineffective postconviction counsel constitutes a sufficient reason as to why an issue which could have been raised on direct appeal was not.").

When, as here, a defendant claims ineffective assistance of postconviction counsel based on a failure to assert trial counsel's ineffectiveness, the defendant bears the burden of proving that trial counsel's performance was deficient and prejudicial. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Gerken has not met this burden, and he has not alleged other circumstances that would constitute a sufficient reason for not having raised his claims previously.

Gerken makes various arguments as to what his trial counsel should have done differently. He asserts that his trial counsel was ineffective for failing to suppress information

recovered from his computer and for failing to object to the district attorney's breach of the plea agreement. We previously considered these arguments when Gerken raised them in his response to the no-merit report, and, in our opinion and order dated December 17, 2009, we concluded that they were without merit. We again considered the same arguments when Gerken filed a motion for reconsideration of that order, which we denied.

Gerken also argues that his trial counsel failed to review discovery materials and conduct interviews of the victim, the victim's mother, and the victim's sister. However, a closer examination of his arguments reveals that they are nothing more than an attempt to revisit, with different wording, Gerken's argument made in his motion for plea withdrawal that the victim's partial recantation constituted newly discovered evidence. We rejected that argument in our opinion and order dated December 13, 2010, and we will not now reconsider it. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

The only arguably "new" issue that Gerken raises is his argument that his postconviction counsel did not thoroughly review all discovery material or discuss the possibility of a ***Machner***[2] hearing. However, Gerken fails to allege any reason for his failure to raise this issue in his response to the no-merit report, let alone a sufficient reason. We agree with the State that Gerken is procedurally barred under ***Allen***, 328 Wis. 2d 1, ¶92, from raising the issue now.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

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

Diane M. Fremgen
Clerk of Court of Appeals