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DISTRICT II

September 3, 2014

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

2013AP1478

State of Wisconsin v. Daryise L. Earl (L.C. # 2005CF210)

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

Daryise L. Earl appeals from an order denying his WIS. STAT. § 974.06 (2011-12),¹ postconviction motion for a new trial. 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 the trial court properly determined that an evidentiary hearing was required on only one of Earl's three issues and that at that hearing Earl failed to establish the ineffective assistance of postconviction counsel, we affirm.

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

Following a jury trial, Earl was convicted of first-degree intentional homicide and armed robbery, both as a party to the crime. After sentencing, appointed counsel filed a WIS. STAT. RULE 809.30 motion for postconviction relief challenging the effectiveness of trial counsel and alleging prosecutorial misconduct. The trial court conducted an evidentiary hearing and denied Earl's postconviction motion. On appeal, this court affirmed the judgment of conviction and the order denying postconviction relief, *State v. Earl*, No. 2009AP1274-CR, unpublished slip op. (WI App August 11, 2010). The Wisconsin Supreme Court denied Earl's petition for review.

Thereafter, Earl filed a pro se postconviction motion in the trial court pursuant to WIS. STAT. § 974.06. At a nonevidentiary hearing, the trial court denied the bulk of Earl's motion from the bench,² including his claims that (1) the State intentionally delayed filing charges to avoid juvenile court jurisdiction, and (2) the State's intentional delay in filing charges gave "the State a tactical advantage over Earl's defense." The trial court then held an evidentiary hearing to determine whether trial counsel should have filed a suppression motion and if postconviction counsel's failure to raise this claim as part of Earl's WIS. STAT. RULE 809.30 direct appeal constituted ineffective assistance of counsel. After considering the evidence including the hearing testimony of Earl, his father, trial counsel and two police officers, the trial court entered an order denying Earl's motion in full.

On appeal, Earl first contends that the trial court was required to hold a further hearing to determine whether the State intentionally delayed filing charges to avoid juvenile jurisdiction

² Earl seeks appellate review of three of the nine claims raised in his postconviction motion.

and/or to gain a tactical advantage. We disagree.³ A trial court has the discretion to deny a motion without an evidentiary hearing if the motion is insufficient on its face or the record conclusively demonstrates that the movant is not entitled to relief. *State v. Balliette*, 2011 WI 79, ¶50, 336 Wis. 2d 358, 805 N.W.2d 334. Earl was required to demonstrate a sufficient reason for failing to raise these alleged due process violations in his prior postconviction motion. See WIS. STAT. § 974.06(4); *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 184-86, 517 N.W.2d 157 (1994). To the extent Earl intimates that postconviction counsel's ineffectiveness constitutes a sufficient reason, he must first establish that trial counsel was ineffective. See *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. On its face, Earl's motion was insufficient to trigger an evidentiary hearing because his allegations did not support a finding that trial counsel's failure to raise these claims constituted prejudicially deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (an ineffective assistance of counsel claim requires the defendant to establish that counsel's performance was both deficient and prejudicial). As explained by the trial court, the State's ongoing investigation produced additional evidence in the form of witness statements and, even if true, Earl's allegations failed to establish that the four and one-half-year charging delay was for any purpose other than ensuring the State possessed sufficient evidence to obtain a conviction. Trial

³ Though Earl raises these due process violations as separate claims, both require the defendant to establish that the State delayed filing charges with a specific intent. As to Earl's claim that his due process rights were violated by the filing of charges in adult court, he is required to demonstrate that the delay was for the purpose of avoiding juvenile court jurisdiction. See *State v. Velez*, 224 Wis. 2d 1, 9, 14-15, 589 N.W.2d 9 (1999). In order to set forth a colorable claim that the filing delay violated his due process right to mount a defense, Earl must show that (1) he suffered actual prejudice as a result of delay, and (2) the delay arose out of an improper purpose, such as to give the State an unfair tactical advantage over the defendant. *State v. Wilson*, 149 Wis. 2d 878, 903-05, 440 N.W.2d 534 (1989). Because Earl failed to demonstrate that the charging delay was for any manipulative or improper purpose, we address these claims together.

counsel's failure to raise Earl's meritless due process claims was not deficient. *State v. Swinson*, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12.

We further conclude that based on the evidence adduced at the postconviction hearing, the trial court properly determined that neither trial nor postconviction counsel performed deficiently in failing to challenge the police officers' taking of Earl's fingerprints in 2000, shortly after the offense occurred. The police reports from 2000 state that Earl's fingerprints were taken with his consent after he agreed to travel with an officer to the station for a short interview. At the postconviction evidentiary hearing, Earl testified that he accompanied officers to the station only after they told him he was going to the station "the easy way or the hard way," thereby conveying to Earl that he had no real choice in the matter. The officers testified that they did not threaten to arrest Earl and denied telling him he had to go to the station "one way or the other" or that he could "do this this easy way or the hard way." It was undisputed that Earl was neither handcuffed nor told he was under arrest, changed his clothes before heading to the station, was transported in the front seat of the squad, and, after a short twenty-five minute interview, left the station and returned home. Trial counsel testified that he reviewed all of the police reports, it was his practice to discuss police reports with his clients and obtain their version of events, he discussed with Earl all aspects of the case and that had Earl told him the version alleged in his postconviction motion, they would have considered filing a suppression motion. Trial counsel testified that he assumed he discussed the issue with Earl and that neither his memory nor his notes suggested that Earl ever told him about the officers' alleged threats. The trial court found that the police did not tell Earl he would be taken to the station "one way or the other" or "the easy way or the hard way," and that Earl never presented this version of events to trial counsel. These findings are not clearly erroneous. See *State v. Pitsch*, 124 Wis.2d 628,

634, 369 N.W.2d 711 (1985). Given the trial court's factual findings, Earl has not established that trial counsel's failure to file a suppression motion was deficient.⁴

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

⁴ Earl did not elicit any testimony from postconviction counsel. Therefore, aside from the trial court's findings, we conclude that as a matter of law Earl failed to establish postconviction counsel's deficient performance.