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DISTRICT II

September 24, 2014

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

2013AP1311 State of Wisconsin v. Rodrigo Rodriguez
(L.C. #1998CF343, 2000CF1134)

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

Rodrigo Rodriguez appeals pro se from orders denying his WIS. STAT. § 974.06 (2011-12)[1] motion for postconviction relief challenging the competency of the court to hear his motion, the sufficiency of the court's ruling, and the court's determination that a hearing was not warranted. Based upon our review of the briefs and the record, we conclude that this case is

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

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm the orders.

In 2001, a jury found Rodriguez guilty of possession with intent to deliver cocaine (>40 - 100g) and conspiracy to manufacture or deliver cocaine (>100g) and Schedule I or II drugs within 1000 feet of a school. Rodriguez waged significant postconviction litigation, including a direct appeal, a state habeas challenge, and multiple postconviction motions. This WIS. STAT. § 974.06 motion arguably is procedurally barred, *see* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994), but we address it to put his claims to rest once and for all.

Rodriguez's trial was conducted in Branch 4 of the Kenosha county circuit court. His WIS. STAT. § 974.06 motion unaccountably was assigned to Branch 5. Rodriguez contends that the lack of an "official judicial reassignment" left Branch 5 without either subject matter jurisdiction or competency to address his motion, rendering the final order void. He is mistaken.

Whether a court has subject matter jurisdiction or competency is a question of law reviewed de novo. ***State ex rel. Myers v. Swenson***, 2004 WI App 224, ¶26, 277 Wis. 2d 749, 691 N.W.2d 357. The party asserting that a circuit court lacks competency has the burden of proving that assertion. ***Village of Shorewood v. Steinberg***, 174 Wis. 2d 191, 200, 496 N.W.2d 57 (1993).

Rodriguez's case was assigned to Branch 5 in 2007 by tab in accordance with local court rules. *See* Kenosha Co. Cir. Ct. Rules, CR 01-1. Under WIS. STAT. § 753.061(1), each branch of a circuit court has the same powers as every other branch of a circuit court. ***Drow v. Schwarz***, 225 Wis. 2d 362, 365, 592 N.W.2d 623 (1999), *amended by* 226 Wis. 2d 826, 228 Wis. 2d 170, 599 N.W.2d 410 (1999) (amending mandate and disposition lines). Branch 5 therefore had subject matter jurisdiction and competency to hear and decide Rodriguez's WIS. STAT. § 974.06

motion. Simply because Judge Warren voiced his opinion that the matter before him should have gone to different branch does not mean that Judge Warren was commenting on his power to exercise jurisdiction or his competency to decide the matter. Indeed, Judge Warren *did* decide the matter. What Rodriguez does not understand is that all branches of a circuit have co-equal jurisdiction.

Rodriguez next complains that the circuit court deprived him of due process because, besides taking fifteen months to decide his motion, its "flippant," "summary dismissal" robbed him of meaningful review. We disagree.

Rodriguez alleged withheld evidence, ***Brady***[2] violations, "false and fraudulent" evidence, and ineffective assistance of counsel. The court's over-ten-page decision was hardly cursory or glib. Further, WIS. STAT. § 974.06(3) permits summary denial of a postconviction motion after review of the files, proceedings, and transcripts in the matter. ***Holmes v. State***, 63 Wis. 2d 389, 403, 217 N.W.2d 657 (1974). He was entitled to an evidentiary hearing on his claims only if he alleged facts that, if proved, would entitle him to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Rodriguez failed, however, to show that evidence he claims was withheld was exculpatory or material, that its absence was prejudicial, *see* ***State v. Harris***, 2004 WI 64, ¶15, 272 Wis. 2d 80, 680 N.W.2d 737, or that the evidence was within the exclusive possession of the State, ***State v. Armstrong***, 110 Wis. 2d 555, 580, 329 N.W.2d 386 (1983).

His ineffectiveness claims are either conclusory, not factually correct, raised for the first time on appeal, or simply without merit. A hearing is not warranted to explore conclusory

[2] *See* ***Brady v. Maryland***, 373 U.S. 83 (1963).

allegations. *See* ***State v. Allen***, 2004 WI 106, ¶¶14-15, 274 Wis. 2d 568, 682 N.W.2d 433. We ordinarily will not consider an argument not raised in the circuit court. *See* ***State v. Hansford***, 219 Wis. 2d 226, 243 n.16, 580 N.W.2d 171 (1998). Counsel does not perform deficiently by not pursuing a meritless argument. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

Finally, we decline Rodriguez's invitation to order a new trial in the interest of justice under WIS. STAT. § 752.35 due to the "cumulative effect of the errors that plagued his trial." "A new trial in the interest of justice is to be granted only in the event of a probable miscarriage of justice, and only with some reluctance and great caution." ***Roe v. State***, 95 Wis. 2d 226, 242, 290 N.W.2d 291 (1980). The test is not whether a different result might occur if a new trial were held. Rather, "'[i]t must appear, with a substantial degree of probability, that a different result will be produced.'" ***Id.*** at 242-43 (citation omitted). We cannot say with any degree of probability that such is the case here.

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals