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DISTRICT IV

November 17, 2014

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

2013AP2709

State of Wisconsin v. Rick D. Freeman (L.C. # 2007CF3578)

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

Rick Freeman appeals an order denying his WIS. STAT. § 974.06 (2011-12)¹ motion in which he alleged ineffective assistance of trial counsel based on his attorney's failure to argue lack of probable cause to support a search warrant and his attorney's failure to request a falsus in uno instruction. Upon our review of the parties' briefs and the record, we conclude at conference that the order should be summarily affirmed because the motion is procedurally barred.

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

In September 2008, Freeman was convicted of first-degree intentional homicide. His postconviction counsel filed a motion for a new trial based on ineffective assistance of trial counsel and newly discovered evidence, and also in the interest of justice. The circuit court denied the motion and this court affirmed the judgment and order. Freeman then filed the present motion, again alleging ineffective assistance of trial counsel and also postconviction counsel.

The motion is barred by the rule against successive postconviction proceedings set out in *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). An exception exists if the moving party shows “sufficient reason” for his failure to have raised the issue in his earlier motion or appeal. *Id.* Ineffective assistance of postconviction counsel may, in some circumstances, constitute a sufficient reason. *State v. ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). However, the moving party must do more than identify an issue and allege that his postconviction counsel was ineffective for not raising that issue. *See State v. Balliette*, 2011 WI 79, ¶¶68-70, 336 Wis. 2d 358, 805 N.W.2d 334. A *Rothering* motion must allege with particularity how and why his current claims were “obvious and very strong.” *Id.*

Freeman argues that the language in *Balliette* restricting his issues to those that are obvious and very strong was merely dicta. This court may not dismiss a statement by the Wisconsin Supreme Court as mere dictum. *See Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682. Furthermore, in *State v. Starks*, 2013 WI 69, ¶6, 349 Wis. 2d 274, 833 N.W.2d 146, the court held that the procedural bar set out in *Escalona-Naranjo* precludes a second postconviction motion unless the moving party establishes that the issues he seeks to raise are “clearly stronger” than the issues that were raised in his counsel’s

postconviction motion and appeal. Freeman argues that the holding in *Starks* applies only to a claim of ineffective assistance of appellate counsel, not postconviction counsel. The “clearly stronger” rule also applies to a claim of ineffective assistance of postconviction counsel. See *State v. Romero-Georgana*, 2014 WI 83, ¶4, ___ Wis. 2d ___, 849 N.W.2d 668.

Freeman’s motion was properly denied without an evidentiary hearing because the motion fails to establish that the issues raised in the motion are clearly stronger than the issues raised by his counsel’s previous postconviction motion and appeal. Freeman does not identify the issues raised in the earlier postconviction proceedings, much less establish that his current issues are clearly stronger. The issues raised in his present motion are very weak. Citing *United States v. Stallings*, 413 F.2d 200 (7th Cir. 1969), he argues that the warrant application was based on an informant’s statements to police that were not adequately corroborated. *Stallings* relies on *Aguilar v. Texas* 378 U.S. 108, 114-15 (1964), which was abrogated by *Illinois v. Gates*, 462 U.S. 213 (1983). In addition, a jail prisoner has no reasonable expectation of privacy in his non-privileged mail. See *Smith v. Shimp*, 562 F.2d 423, 426-27 (7th Cir. 1977).

The second issue raised in Freeman’s motion is that his trial counsel failed to request a falsus in uno instruction. As the circuit court noted, that instruction is disfavored. *State v. Robinson*, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988). The circuit court strongly implied that it would not have given that instruction if it had been requested. Counsel is not ineffective for failing to pursue a meritless argument. *State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

Because Freeman has not established that his current motion presents issues that are clearly stronger than the issues presented in his counsel's earlier postconviction motion and appeal, the motion is procedurally barred.

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals