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DISTRICT II

December 30, 2014

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

2014AP324

State of Wisconsin v. Tony J. Lalicata (L.C. #2009CF277)

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

Tony Lalicata appeals pro se from an order denying his Wis. STAT. § 974.06 (2011-12)¹ motion alleging prosecutorial misconduct and ineffective assistance of trial and postconviction counsel. He asserts that newly discovered evidence is the sufficient reason allowing him to evade the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157

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

(1994). Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

A jury found Lalicata guilty of first-degree sexual assault of a child under twelve. He was sentenced to twenty-five years of initial confinement and six years and three months of extended supervision. Postconviction counsel filed a WIS. STAT. RULE 809.30 motion seeking either a new trial on the basis that trial counsel ineffectively failed to meaningfully inform Lalicata of a plea offer or resentencing on the basis that the court and the parties erroneously believed that probation was unavailable to him. The trial court denied the motion after an evidentiary hearing. This court affirmed his conviction on his direct appeal in which he pursued only the probation issue. *See State v. Lalicata*, 2012 WI App 138, 345 Wis. 2d 342, 824 N.W.2d 921.

Lalicata then filed a WIS. STAT. § 974.06 motion alleging that: (1) the prosecutor engaged in “over-reaching” and “misconduct” by arguing the case during voir dire and improperly questioning witnesses; (2) trial counsel ineffectively failed to arrange for him to undergo a psychological evaluation and to investigate using recognized experts on child victim/witness testimony; and (3) postconviction counsel ineffectively failed to allege prosecutorial misconduct on direct appeal and to call his fiancée, the victim’s aunt, as a witness at the evidentiary hearing on his WIS. STAT. RULE 809.30 postconviction motion. The trial court denied the motion without a hearing. Lalicata appeals.

When a defendant files a WIS. STAT. § 974.06 motion after having filed a previous postconviction motion or direct appeal, the claim is barred unless the trial court ascertains that a sufficient reason exists for the failure to raise the issue earlier. *Escalona-Naranjo*, 185 Wis. 2d

at 181-82; § 974.06(4). Whether the claim is procedurally barred is a question of law this court reviews de novo. *See State v. Allen*, 2010 WI 89, ¶15, 328 Wis. 2d 1, 786 N.W.2d 124.

Lalicata contended that newly discovered evidence—his own research while in prison and “vital” materials from trial counsel’s file provided only after his direct appeal—precluded raising these claims earlier. Without specifically determining that this constituted a sufficient reason, the court turned to the merits of the motion. While we believe the motion was procedurally barred, we affirm as the trial court reached the right ultimate result. *See Hoekstra v. Guardian Pipeline, LLC*, 2006 WI App 245, ¶33, 298 Wis. 2d 165, 726 N.W.2d 648.

The defense described the alleged victim as a typical attention-seeking five-year-old who was known to “barge in” on family members while they used the bathroom and to comment on their anatomy. Its theory was that she got the notion to say that “Tony put his wiener in my mouth” after happening on an adult DVD cover portraying a woman and man engaged in fellatio.

Lalicata’s WIS. STAT. § 974.06 motion falls short. To adequately raise a claim for relief, a defendant must allege “sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle [the defendant] to the relief he seeks.” *State v. John Allen*, 2004 WI 106, ¶2, 274 Wis. 2d 568, 682 N.W.2d 433. He has not shown, let alone by clear and convincing evidence, what new, genuinely material, and noncumulative information he received from his trial attorney that provided a basis for his claim of trial counsel ineffectiveness or of prosecutorial misconduct. *See State v. Love*, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62. He professed his innocence and challenged the child’s credibility from the outset. The prosecutor’s allegedly objectionable manner and tactics should have been evident to him at the trial. Lalicata does not suggest why the same research he did postconviction could not have been

done pretrial or why allegedly exculpatory information in counsel's file about the victim's sexual interest was not cumulative to her own grandfather's testimony for the defense about that very thing. See *State v. Armstrong*, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98.

In addition, “a defendant who alleges in a [WIS. STAT.] § 974.06 motion that ... postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he [or she] wishes to bring are clearly stronger than the claims postconviction counsel actually brought.” *State v. Romero-Georgana*, 2014 WI 83, ¶4, ___ Wis. 2d ___, 849 N.W.2d 668. Lalicata does not say that he ever discussed with counsel having a psychological exam to rule out pedophilic tendencies or introducing evidence of child witness unreliability, nor does he explain why the arguments he now advocates are “clearly stronger” than the ones counsel pursued. See *id.* He does not show why the prosecutorial misconduct he alleges—accusing witnesses of lying, for example, and cutting off their answers—worked against him instead of portraying her as rude or why his fiancée was a necessary witness at his postconviction motion hearing. In short, Lalicata has not sufficiently shown that he was foreclosed from raising any “clearly stronger” arguments in his direct appeal.

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