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DISTRICT III

January 21, 2015

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

2014AP886

State v. David J. Marshall (L. C. No. 2008CF270)

Before Hoover, P.J., Stark and Hruz, JJ.

David Marshall, pro se, appeals orders denying his WIS. STAT. § 974.06 motion for postconviction relief and subsequent motion for reconsideration. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Marshall's arguments, and summarily affirm the orders. *See* WIS. STAT. RULE 809.21.¹

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

A criminal complaint charged Marshall with seven counts of identity theft for financial gain and one count of fraudulent use of a credit card, all counts as party to a crime and as a repeater. The complaint alleged Marshall had been identified through surveillance cameras at banks and gas stations. Through a warranted search of Marshall's apartment, victims' credit cards, personal identification and checks were seized, along with false drivers' licenses created with the victims' identities. After opening arguments were made at a jury trial, Marshall opted to enter no contest pleas to all eight charges. Marshall then changed attorneys, but before his new attorney formally entered the case, Marshall filed a pro se motion for plea withdrawal on the ground that the State withheld evidence.² Marshall's presentence plea withdrawal motion was denied, and the court ultimately imposed consecutive sentences totaling thirty-two years and nine months, consisting of twenty-three years and nine months' initial confinement followed by nine years' extended supervision.

A postconviction/appellate attorney was appointed for Marshall. When Marshall disagreed with counsel's decision to close the case without a postconviction motion or appeal, he elected to proceed pro se. Marshall wrote this court, indicating he did not consent to counsel closing the file and wished to proceed pro se with a postconviction motion. From his correspondence, it appeared Marshall had delayed filing a pro se postconviction motion because he believed it was necessary for counsel to formally withdraw from the case first. In an order

² The evidence consisted of recordings of conversations with an accomplice while Marshall was in custody in which Marshall allegedly emphasized the need to get property out of his residence. At the motion hearing, Marshall conceded the evidence might not impact the defense generally. He nevertheless argued that the existence of this evidence compromised the voluntariness of his pleas because it created a possible avenue for challenging the validity of the search warrant. Defense counsel emphasized at the hearing, however, that Marshall was not claiming his trial attorney had rendered ineffective assistance of counsel in failing to discover the recordings before Marshall entered his pleas.

from this court, we indicated that because counsel had not made an appearance in this case, she did not need the court's permission to withdraw and Marshall could proceed pro se. We consequently set the time for Marshall to file a pro se postconviction motion.

In his postconviction motion, Marshall asserted his trial counsel was ineffective by failing to discover or investigate the recorded conversations between Marshall and his associate, and their connection to the search warrant. Marshall also claimed the circuit court erred by denying his presentence plea withdrawal motion without listening to the recordings. The circuit court denied the postconviction motion and, on direct appeal, Marshall renewed his presentence and postconviction plea withdrawal claims. We rejected Marshall's arguments and affirmed both the judgment of conviction and the order denying postconviction relief. *See State v. Marshall*, No. 2010AP2641-CR, unpublished slip op. (WI App Oct. 25, 2011).

In March 2014, Marshall filed the underlying WIS. STAT. § 974.06 motion for postconviction relief, alleging his "postconviction counsel" was ineffective by (1) failing to challenge the lawfulness of the search warrant on direct appeal; (2) failing to discover evidence listed in the discovery material; and (3) failing to raise a claim of ineffective assistance of trial counsel. The circuit court denied both the § 974.06 motion and a subsequent motion for reconsideration.

On appeal, Marshall challenges the validity of the warrant used to search his home and claims his postconviction attorney was ineffective by failing to challenge the warrant's validity. Marshall also claims postconviction counsel was ineffective by failing to investigate evidence provided in the discovery materials and by failing to challenge the effectiveness of Marshall's trial counsel. We conclude Marshall's claims are procedurally barred under WIS. STAT.

§ 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). In *Escalona-Naranjo*, our supreme court held that “a motion under [Wis. STAT. §] 974.06 could not be used to review issues which were or could have been litigated on direct appeal.” *Escalona-Naranjo*, 185 Wis. 2d at 172. The statute, however, does not preclude a defendant from raising “an issue of constitutional dimension which for *sufficient reason* was not asserted or was inadequately raised in his [or her] original, supplemental or amended postconviction motions.” *Id.* at 184.

Here, Marshall’s claims either were or could have been litigated on direct appeal. Marshall nevertheless asserts that the ineffectiveness of his postconviction counsel provides a sufficient reason for failing to raise his claims earlier. We are not persuaded. To establish ineffective assistance of counsel, Marshall must show that his counsel’s performance was not within the range of competence demanded of attorneys in criminal cases and that he suffered prejudice as a result. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Marshall, however, discharged his postconviction/appellate counsel and chose to represent himself in postconviction proceedings and on appeal. Marshall’s own failure to raise his present claims in the original postconviction motion or on direct appeal does not provide a sufficient reason to overcome *Escalona-Naranjo*’s procedural bar. To the extent Marshall alleges postconviction/appellate counsel was ineffective by refusing to pursue certain issues *prior* to her discharge, Marshall’s claims are conclusory and do not, therefore, provide a sufficient reason to circumvent the procedural bar.³ *See generally State v. Allen*, 2010 WI 89, ¶¶84–87, 328 Wis. 2d

³ Marshall also intimates that this court had an obligation to independently review his direct appeal for issues of arguable merit, as we would in the context of a no-merit appeal. *See Anders v. California*, 386 U.S. 738 (1967). Marshall’s direct appeal, however, was not a no-merit appeal.

1, 786 N.W.2d 124 (conclusory and legally insufficient allegations that postconviction counsel was ineffective are not sufficient reasons to circumvent procedural bar).

Upon the foregoing,

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

Diane M. Fremgen
Clerk of Court of Appeals