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DISTRICT IV

January 27, 2015

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

2013AP1766 State of Wisconsin v. Courtney M. Cowins (L.C. # 2009CF247)

Before Lundsten, Sherman and Kloppenburg, JJ.

Courtney Cowins appeals an order that denied his pro se motion for postconviction relief from a criminal conviction for armed burglary, burglary with intent to commit sexual assault, first-degree reckless endangerment, and four counts of sexual assault. Cowins contends that he is entitled to a hearing on his motion, notwithstanding the fact that the conviction has already been affirmed by this court in a no-merit proceeding. After reviewing the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm.

Cowins' postconviction motion raises four primary claims, several of which involve multiple subissues: (1) Cowins was prejudiced by a two-year investigation between the time of the assault and being charged; (2) close-up photographs of the victim's injuries show that a doctor who testified for the State gave false testimony when he stated that the victim's injuries were consistent with having been struck with the barrel of a gun; (3) trial counsel provided ineffective assistance by: (a) failing to challenge the doctor's testimony through cross-examination or closing argument, (b) failing to seek dismissal of the charges based upon prosecutorial delay, (c) failing to subpoena a neighbor to highlight potential discrepancies in the victim's timeline of events, (d) failing to interrupt testimony to bring an inattentive juror to the court's attention, (e) failing to move to suppress a shoe box and trash bag on the grounds of potential cross-contamination, (f) failing to use the 9-1-1 transcript to impeach the victim regarding when during the assault he struck her with his gun, and (g) failing to seek dismissal of some of the sexual assault charges on the grounds of multiplicity; and (4) appellate counsel provided ineffective assistance by: (a) failing to conduct an adequate investigation, (b) failing to obtain and forward to Cowins the complete case file, and (c) failing to discuss the issues Cowins wanted to raise until a supplemental no-merit report was filed.

The State contends that all of the issues raised in Cowins' postconviction motion are procedurally barred under ***State v. Witkowski***, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App.

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

1991), and/or ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). ***Witkowski*** holds that a matter already litigated cannot be relitigated in subsequent postconviction proceedings "no matter how artfully the defendant may rephrase the issue." ***Witkowski***, 163 Wis. 2d at 990. ***Escalona-Naranjo*** holds that an issue that could have been raised on a prior appeal or in a postconviction motion cannot form the basis for a subsequent postconviction motion under WIS. STAT. § 974.06, unless the defendant presents a sufficient reason for failing to raise the issue earlier. ***Escalona-Naranjo***, 185 Wis. 2d at 185. The procedural bar of ***Escalona-Naranjo*** may be applied to a defendant whose direct appeal was processed under the no-merit procedure set forth in WIS. STAT. RULE 809.32, so long as the no-merit procedures were in fact followed and the record demonstrates a sufficient degree of confidence in the result. ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574.

We are satisfied that the proper no-merit procedures were followed on Cowins' prior appeal in ***State v. Cowins***, No. 2010AP2339-CRNM, unpublished slip op. (WI App Dec. 13, 2011). Cowins was afforded the opportunity to submit a response to counsel's report, and he did so. Contrary to Cowins' apparent misunderstanding of the no-merit process, it was entirely appropriate for counsel to wait until the supplemental no-merit report to address the issues Cowins wanted to discuss, because most of them related to discovery materials and other matters outside of the appellate record. *Cf.* WIS. STAT. RULE 809.32(1)(a) (no-merit to address anything "in the record" that might support an appeal), *with* RULE 809.32(1)(f) (permitting counsel to address matters "outside the record" in a supplemental no-merit report). This court then engaged in an independent review of the record and explicitly addressed the issues discussed by counsel and Cowins—including potential claims that the evidence was insufficient to support the verdict, particularly with respect to whether a gun had been used; that the circuit court erroneously

exercised its sentencing discretion; that a juror nodded off during the testimony of a witness, that the sexual assault charges were multiplicitous, that Cowins was prejudiced by a lack of speedy prosecution, that the prosecution presented false testimony, and that trial counsel provided ineffective assistance.

It is plain from this recitation that the issues raised in Cowins' current postconviction motion regarding the delay in prosecution, the inattentive juror, and multiplicity of charges have already been fully litigated, and are therefore procedurally barred by ***Witkowski***. Because we did not parse out Cowins' individual claims of ineffective assistance of trial counsel in our no-merit decision, it is less clear to what extent, if any, Cowins' current claims about counsel's failure to challenge false testimony, to subpoena the neighbor, to seek suppression of the shoe box and trash bag, and to use the 9-1-1 transcript for impeachment were previously litigated. However, nothing in our current review of the record undermines our confidence in the conclusion that the record presented to this court in the no-merit proceeding showed no arguably meritorious basis for an appeal.[2] Therefore, ***Escalona-Naranjo*** also applies here, and Cowins must demonstrate a sufficient reason why he did not raise earlier any new issues contained in his current postconviction motion.

[2] In ***State v. Fortier***, 2006 WI App 11, ¶¶24-27, 289 Wis. 2d 179, 709 N.W.2d 893, we reasoned that the failure of either counsel or this court to address an issue of "evident" merit led to the conclusion that the no-merit procedures had not been adequately followed to warrant confidence in the outcome of the appeal. The Wisconsin Supreme Court appears to have approved this logic when it noted that a defendant may not be barred from raising an issue that the court of appeals and appellate counsel "*should* have found." ***State v. Allen***, 2010 WI 89, ¶63, 328 Wis. 2d 1, 786 N.W.2d 124. It is therefore implicit in our statement that we retain confidence in the outcome of the no-merit proceeding that we do not share the defendant's view of the merits of any issues he now seeks to raise based upon the prior record. To address in detail why that is the case, however, would undermine the judicial efficiency that is supposed to be achieved by applying the procedural bar of ***Escalona-Naranjo***.

We construe Cowins' fourth claim regarding appellate counsel's performance (which would ordinarily be reviewable by means of a ***Knight***[3] petition rather than by postconviction motion) as Cowins' assertion of the reason for his failure to raise his additional claims of ineffective assistance of trial counsel in the no-merit proceeding. *See generally* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶¶23-25, 314 Wis. 2d 112, 758 N.W.2d 806 (discussing various mechanisms for reviewing claims of ineffective assistance of counsel). When the viability of a defendant's WIS. STAT. § 974.06 motion hinges on a claim that prior counsel was ineffective, the defendant must make allegations sufficient to establish both deficient performance and prejudice under the standard set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334; *see also* ***State v. Allen***, 2004 WI 106, ¶¶9-23, 36, 274 Wis. 2d 568, 682 N.W.2d 433 (discussing pleading standard necessary to obtain a hearing on a postconviction motion).

We conclude that Cowins' allegations regarding ineffective assistance of appellate counsel are insufficient to warrant a hearing on Cowins' remaining claims of ineffective assistance of trial counsel. We have already explained that it was proper for appellate counsel to wait until her supplemental no-merit report to address matters outside of the record. To the extent that Cowins contends that counsel failed to adequately investigate matters outside the record or to send him all of the discovery materials, his allegations are still insufficient to demonstrate prejudice on his postconviction claims because there is no showing that any additional investigation or materials would have led to a different result.

[3] *See* ***State v. Knight,*** 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

As to whether the doctor gave false testimony, Cowins contends that close-up photographs of each of the victim's facial injuries belied the doctor's conclusion that the injuries were consistent with the victim's account that Cowins struck her with a gun. However, the photos were merely cumulative to Exhibit 2, which showed the victim's entire face. The shape of the contusions was already apparent from the photograph shown to the jury, and the jury was entitled to determine what weight to give to the doctor's expert opinion.

As to subpoenaing the neighbor, Cowins has not presented an affidavit to demonstrate what the neighbor would actually have said at trial. Moreover, to the extent that Cowins claims there was some discrepancy between the time when the neighbor estimated in her statement to police that the victim came to seek help in the middle of the night and the actual time of the 9-1-1 call, the failure to highlight that discrepancy was harmless given the overall strength of the victim's testimony, which was corroborated by physical evidence of trauma to the victim's face, neck and wrists, as well as by DNA evidence on the victim's torn underwear linking Cowins to the assault.

As to suppressing DNA results about the shoe box and trash bag on the grounds of potential cross-contamination, we reiterate that Cowins' DNA on the victim's underwear was sufficient to link him to the assault. Moreover, whether Cowins touched other items in the victim's apartment had little relevance when Cowins admitted being in the apartment and having sexual relations with the victim and raised consent as his defense.

Finally, we do not view the summary of the victim's statement on the 9-1-1 tape stating that Cowins hit her with the gun when she attempted to grab the gun as being inconsistent in any significant way with the victim's other statements that, after she tried to grab the gun, Cowins

threw her on the floor and began strangling her. A summary, by its nature, does not include every statement made, and the purpose of calling 9-1-1 is to summon assistance, not to make a complete report of an incident. Once again, the physical evidence fully supported the victim's testimony that Cowins both struck her with the gun and choked her at some point during the assault.

Therefore,

IT IS ORDERED that the postconviction order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals