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DISTRICT IV

February 12, 2015

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

2013AP2451

State of Wisconsin v. Charles J. Homelsey a/k/a Charles J.
Mayberry (L.C. # 2008CF958)

Before Lundsten, Higginbotham and Sherman, JJ.

Charles Homelsey, pro se, appeals a circuit court order that denied Homelsey's motion for relief under WIS. STAT. § 974.06 (2013-14).¹ Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In November 2008, Homelsey was tried for sexual assault and false imprisonment. He was convicted on jury verdicts and sentenced to prison. The State Public Defender's Office appointed counsel to represent Homelsey on appeal, and counsel pursued a direct appeal on Homelsey's behalf. We affirmed the judgment of conviction in July 2011, and the supreme court denied review. See *State v. Homelsey*, No. 2010AP2013, unpublished slip op. (July 21, 2011).

In June 2013, Homelsey moved the circuit court for postconviction relief under WIS. STAT. § 974.06. Homelsey asserted that he was denied the effective assistance of counsel when his trial counsel failed to argue that Homelsey was incompetent to stand trial, and when his postconviction counsel failed to argue trial counsel was ineffective. In support, Homelsey attached a psychological report dated June 1999, finding Homelsey incompetent to stand trial in a separate criminal case and opining that Homelsey was unable to regain competency.

The circuit court held a hearing in September 2013, and denied the motion in an oral ruling. In October 2013, Homelsey moved the circuit court to reconsider its decision. On November 1, 2013, the court issued an order denying postconviction relief.

Homelsey contends that he was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel. We disagree.

A claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is deficient if "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. Prejudice is shown if counsel's

errors undermine our confidence in the outcome of the trial.² *Id.* at 694. If a claim of ineffective assistance of counsel fails as to either deficient performance or prejudice, we need not address the other. *Id.* at 697.

Additionally, a defendant is entitled to an evidentiary hearing on a postconviction motion only if the motion sufficiently alleges facts that, if true, entitle the defendant to relief. *State v. Bentley*, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). If the motion does not sufficiently allege facts that would entitle the defendant to relief, we review a circuit court's decision to deny the motion without a hearing for an erroneous exercise of discretion. *Id.* at 318.

We conclude that Homelsey's postconviction motion does not show that Homelsey's trial counsel performed deficiently by failing to raise the issue of Homelsey's competence to stand trial and, for the same reason, does not show that his postconviction counsel was ineffective. A defense attorney's failure to raise competency under WIS. STAT. § 971.14 constitutes ineffective assistance of counsel if counsel had "reason to doubt" the defendant's competency. *State v. Johnson*, 133 Wis. 2d 207, 220-21, 395 N.W.2d 176 (1986). "[W]hile prior mental illness is a relevant factor affecting determination of reason to doubt competency, the issue is whether defendant is competent at the time of the proceedings, not at some time in the distant past." *State v. Weber*, 146 Wis. 2d 817, 827, 433 N.W.2d 583 (Ct. App. 1988). Here, the only fact Homelsey offered to support his assertion that he was incompetent to stand trial in 2008 was a

² The State asserts, without citation to authority, that the prejudice prong requires a showing that Homelsey would have been found incompetent had counsel raised the issue. This is not so. *See State v. Johnson*, 133 Wis. 2d 207, 223, 395 N.W.2d 176 (1986) ("Where counsel fails to bring the issue of competency to the court's attention, and there is reason to doubt the defendant's competence to stand trial, the defendant is deprived of a fair trial, thereby undermining confidence in the outcome.").

finding that Homelsey was incompetent to stand trial in 1999. Homelsey's motion does not contain any allegations with regard to his competency at the time of trial or what would have created a reason to doubt his competency at that time. Because Homelsey's motion did not allege facts to show that his trial counsel failed to raise competency to stand trial despite a reason to doubt Homelsey's competency, the motion did not entitle Homelsey to an evidentiary hearing.

We also conclude that the circuit court properly exercised its discretion by denying Homelsey's postconviction motion without an evidentiary hearing. The circuit court explained that it denied the motion because it determined there was not enough in the motion to proceed with the claim, describing the pleading as "minimal."³ We conclude that the circuit court properly exercised its discretion by denying the motion without an evidentiary hearing based on the insufficiency of the motion to raise doubt as to Homelsey's competency at the time of trial.

To the extent that Homelsey attempts to argue that the circuit court was otherwise required to proceed under WIS. STAT. § 971.14 to determine whether Homelsey was competent to stand trial, we reject those arguments based on Homelsey's failure to present any facts that would raise a doubt as to his competence at the time of trial.

Finally, we conclude that Homelsey has not developed an argument that the circuit court was required to appoint counsel to represent Homelsey in this motion for relief under WIS. STAT.

³ In its written decision, the court found that Homelsey was feigning incompetence, citing Homelsey's demeanor at the September 2013 hearing, correspondence with the court, and trial testimony. The State concedes that the circuit court was mistaken in stating that Homelsey had testified at trial. We conclude that the court's exercise of discretion was supported by the reasoning it provided at the September 2013 hearing.

§ 974.06. We decline to address this argument further. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments).

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals