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DISTRICT II

April 15, 2015

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

2014AP1532 State of Wisconsin v. Nicholas M. Gimino (L.C. # 2009CF1492)

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

Nicholas M. Gimino appeals from an order denying his WIS. STAT. § 974.06 (2013-14),[1] postconviction motion for a new trial. Gimino argues that the trial court erred by failing to reach the merits of his motion based on its conclusion that the motion challenged appellate counsel's performance and was therefore filed in the wrong forum. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See*

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

WIS. STAT. RULE 809.21. Though we agree that the trial court erroneously determined that it was without jurisdiction to hear the motion, we affirm. [2]

Following a court trial, Gimino was convicted of two counts of child abuse arising out of an incident in which his young daughter was ejected from a go-kart.[3] Gimino filed a postconviction motion seeking a new trial based on alleged discovery violations as well as trial counsel's failure to retain an accident reconstructionist and impeach a witness. The motion was denied, Gimino appealed, and we affirmed the judgment. ***State v. Gimino***, No. 2012AP1498-CR, unpublished slip op. ¶45 (WI App Mar. 7, 2013). In his appellate brief, Gimino claimed for the first time that he had the parental prerogative to address his daughter's injuries on his own rather than seeking medical attention. ***Gimino***, ¶19 n.7. We determined the issue was forfeited for review. ***Id.*** In a concurring opinion, Judge Sherman agreed with the outcome "given the forfeiture of the issue of parental prerogative to make decisions in the child's best interest," but objected to the "prosecution of Gimino for failing to seek medical attention for his daughter" as charged in count three. ***Id.***, Concurrence, ¶46.

Thereafter, Gimino filed a WIS. STAT. § 974.06 postconviction motion in the trial court alleging that trial counsel was ineffective for failing to raise a constitutional parental privilege

[2] A challenge to the effectiveness of postconviction counsel is properly raised in the trial court. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996). However, when a trial court's decision is correct, this court may affirm "on a theory or on reasoning not presented to the trial court." ***State v. Baudhuin***, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987).

[3] Specifically, the trial court found Gimino guilty of two counts of recklessly causing bodily harm to a child in violation of WIS. STAT. § 948.03(3)(b). One count alleged that Gimino recklessly injured his two-year-old daughter when she was ejected from a go-kart he was driving. Another alleged that he recklessly caused her additional pain by failing to seek professional medical care for her injuries. Gimino was acquitted of a third charge.

defense to the charges, and that "postconviction-appellate counsel" was ineffective for not raising this issue as part of Gimino's WIS. STAT. RULE 809.30 direct appeal. The trial court summarily denied the motion and Gimino appeals.

We conclude that Gimino was not entitled to an evidentiary hearing on his WIS. STAT. § 974.06 postconviction motion because he failed to establish a sufficient reason for not raising his constitutional parental privilege defense earlier. *See* WIS. STAT. § 974.06(4); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) (successive postconviction motions and appeals are procedurally barred unless a defendant can establish a sufficient reason for failing to previously raise the newly alleged errors).[4] While in some circumstances the ineffective assistance of postconviction counsel may constitute a reason sufficient to overcome this procedural bar, *see* ***State v. Balliette***, 2011 WI 79, ¶37, 336 Wis. 2d 358, 805 N.W.2d 334, here, the record conclusively demonstrates that trial counsel was not ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 (to establish ineffectiveness of postconviction counsel, a defendant bears burden of proving trial counsel's performance was both deficient and prejudicial).

The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove

[4] We reject Gimino's erroneous assertion that it is "an unprecedented procedure" for this court "[t]o affirm the circuit court order on grounds not ruled on by the circuit judge, and not briefed by Gimino in his appellate brief." The sufficiency of Gimino's postconviction motion to merit an evidentiary hearing is a question of law subject to de novo review. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690.[5] It is well-established that trial counsel's failure to raise a novel constitutional claim cannot be deemed deficient. *See* ***State v. Maloney***, 2005 WI 74, ¶¶28-30, 281 Wis. 2d 595, 698 N.W.2d 583. Successful ineffective assistance claims "should be limited to situations where the law or duty is clear." ***Id.***, ¶29 (citation omitted).

Gimino's proposed defense is without clear precedent. *See* ***State v. Thayer***, 2001 WI App 51, ¶14, 241 Wis. 2d 417, 626 N.W.2d 811 (counsel not required to argue a point of law that is unclear); ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994) (counsel not deficient for failing to argue an unsettled or "murky" point of law). Though he points out that there is a pattern jury instruction concerning a parent's privilege to discipline his or her child, he acknowledges that there is no similar instruction for cases where, as here, a parent engages in reckless conduct with his child and fails to seek medical care for the ensuing injuries. This situation is a far cry from a parent's right to use appropriate discipline under WIS. STAT. § 939.45(5)(b). Because trial counsel's failure to raise a novel constitutional defense did not fall below an objective standard of reasonableness, postconviction counsel's failure to challenge trial counsel's performance did not constitute ineffective assistance of counsel.

Upon the foregoing reasons,

[5] To satisfy the prejudice prong, the defendant must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697.

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