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July 7, 2015

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

2014AP1329 State of Wisconsin v. Christopher D. Smith (L.C. #2001CF6402)

Before Curley, P.J., Kessler and Brennan, JJ.

Christopher D. Smith, *pro se*, appeals from a March 31, 2014 order of the circuit court that denied his motion for postconviction relief without a hearing. 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 (2013-14).[1] We summarily affirm the order.

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

Smith was convicted in 2002 on three counts of armed robbery with the threat of force as party to a crime. He was sentenced to a combined total of forty-five years' initial confinement and fifteen years' extended supervision. With the assistance of appointed counsel, Smith filed a postconviction motion, then a direct appeal. We affirmed the convictions. *See* ***State v. Smith***, No. 2004AP1727-CR, unpublished slip op. (Feb. 7, 2006).

On December 26, 2013, Smith filed a *pro se* WIS. STAT. § 974.06 motion for postconviction relief. He alleged that postconviction counsel was ineffective for failing to claim trial counsel was ineffective for failing to: (1) raise Fourth and Fourteenth Amendment issues regarding a warrantless entry into Smith's home to effect a warrantless arrest and to seek suppression of post-arrest statements as a result of these constitutional violations; (2) raise a Fourteenth Amendment due process claim for failing to seek suppression of Smith's post-arrest statements as a result of a claimed ***Riverside***[2] violation; (3) call alibi witnesses; and (4) raise a Sixth Amendment confrontation clause claim based on hearsay testimony given at a preliminary hearing.

The circuit court denied the motion in part, rejecting the latter two issues by order dated January 6, 2014, but it ordered the State to respond to Smith's remaining claims.[3] After the State's brief and Smith's reply were submitted, the circuit court denied the remainder of the

[2] *See* ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991) (requiring a probable cause determination within forty-eight hours of a warrantless arrest).

[3] This order was entered by the Honorable Dennis J. Flynn.

motion on March 31, 2014.[4] Smith moved for reconsideration, but that motion was denied on April 28, 2014. Smith appealed on June 11, 2014.

The State first asserts that we should dismiss this appeal for lack of jurisdiction, and Smith does not respond to that argument. While arguments not refuted are generally deemed admitted, *see* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979), this court has a duty to inquire as to its own jurisdiction, *see* ***State ex rel. Teaching Assistants Ass'n v. University of Wis.-Madison***, 96 Wis. 2d 492, 495, 292 N.W.2d 657 (Ct. App. 1980). Here, the State's claim that we lack jurisdiction is simply incorrect.

"An order denying a motion to reconsider an earlier order is not necessarily appealable." ***Harris v. Reivitz***, 142 Wis. 2d 82, 86, 417 N.W.2d 50 (Ct. App. 1987). There is no right to appeal from a reconsideration motion where the only issues raised were disposed of in the prior order. *See* ***Ver Hagen v. Gibbons***, 55 Wis. 2d 21, 25, 197 N.W.2d 752 (1972). The ***Ver Hagen*** rule exists in part because of a concern that reconsideration "should not be used as a ploy to extend the time to appeal … when the time to appeal has expired." *See* ***Silverton Enters., Inc. v. General Cas. Co. of Wis.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988).

Relying on the ***Ver Hagen*** rule and its reading of WIS. STAT. § 808.04(1), the State argues that Smith's reconsideration motion raised no new issues and this court thus has no jurisdiction over this appeal because "the current notice of appeal from the order denying reconsideration, filed on June 11, 2014, was untimely as to the circuit court's original March 31,

[4] This order was entered by the Honorable M. Joseph Donald.

2014 order, because it was filed more that 45 days after that order was issued—72 days, to be exact." (Record cite omitted.)

However, the actual time for appeal is ninety days, not forty-five. "An appeal to the court of appeals must be initiated within 45 days of entry of a final judgment or order appealed from *if written notice of the entry of a final judgment or order is given* … or within 90 days of entry if notice is not given." WIS. STAT. § 808.04(1) (emphasis added). That is, the default time to file a notice of appeal is ninety days, unless notice of entry of judgment is given to shorten the appeal time to forty-five days.[5] There is no notice of entry of judgment in this record, so the ordinary ninety-day deadline applies, and we have jurisdiction over this appeal.[6]

The State alternatively invokes the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), which holds that a prisoner who has had a direct appeal or other postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a "sufficient reason" for failing to raise it earlier. But because claims of ineffective assistance of trial counsel must be raised in the circuit court by postconviction motion prior to a direct appeal, *see* WIS. STAT. RULE 809.30(2)(h), postconviction counsel's failure to raise ineffective assistance of trial counsel may

[5] Of course, the appeal-time rule is different if an appellant is permitted to proceed under WIS. STAT. RULE 809.30.

[6] It is irrelevant that the notice of appeal referenced only the April 28, 2014 order denying reconsideration by date; such omission does not deprive us of jurisdiction, *see* ***Carrington v. St. Paul Fire and Marine Ins. Co.***, 169 Wis. 2d 211, 217 n.2, 485 N.W.2d 267 (1992), and the notice indicates that Smith seeks to challenge the decision that denied his motion for WIS. STAT. § 974.06 relief.

present a "sufficient reason" to overcome the ***Escalona*** procedural bar. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Ct. App. 1996).

Apparently cognizant of ***Escalona***, Smith alleged ineffective assistance of postconviction counsel in his motion for relief, although he addresses neither ***Escalona*** nor ***Rothering*** in his appellate brief. The State points this out, and also argues that, in order to show a "sufficient reason," Smith had to show how the issues of ineffective trial counsel, unraised by postconviction counsel, were "clearly stronger" than the issues postconviction counsel did raise. *See* ***State v. Starks***, 2013 WI 69, ¶¶58-60, 349 Wis. 2d 274, 833 N.W.2d 146; ***State v. Romero-Georgana***, 2014 WI 83, ¶¶44-46, 360 Wis. 2d 522, 849 N.W.2d 668. Here, too, Smith fails to respond to the State's arguments.

We question, however, whether it is appropriate to apply ***Romero-Georgana*** to this case, since it was decided *after* the circuit court rendered its decisions in this case.[7] We also note that the circuit court did not expressly invoke ***Escalona*** to dispose of Smith's motion but, rather, addressed his claims on their merits. This is likely because when an ineffective-assistance-of-postconviction-counsel claim is premised on the failure to raise ineffective assistance of trial counsel, the defendant must first establish that trial counsel actually was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. We therefore question whether we should rely on ***Escalona*** to dispose of this appeal.

[7] ***State v. Starks***, 2013 WI 69, ¶¶58-60, 349 Wis. 2d 274, 833 N.W.2d 146, discussed the "clearly stronger" test relative to appellate counsel, not postconviction counsel.

But in his postconviction motion, Smith claimed four points of error that he says trial counsel should have raised. On appeal, he has abandoned three of those. The only point Smith argues about on appeal is whether his arrest was lawful and whether trial counsel should have moved to suppress Smith's post-arrest statements as a result. Smith believes his arrest was unlawful because, he says, it was a warrantless arrest made following a warrantless entry into his home. The circuit court rejected this argument, explaining that there were open warrants for Smith's arrest in other cases. Smith does not address this part of the circuit court's holding.

Further, the circuit court also explained that even if the arrest was an unlawful, warrantless arrest, police had probable cause to arrest Smith based on statements from co-actor Yolanda Brown. Thus, the circuit court reasoned, under ***State v. Felix***, 2012 WI 36, ¶51, 339 Wis. 2d 670, 811 N.W.2d 775, suppression of statements was not required. Consequently, trial counsel was not ineffective for failing to pursue a suppression motion, and postconviction counsel was not ineffective for not challenging such failure by trial counsel.

On appeal, Smith argues that Brown's statements to police were "hearsay information which was not verified towards truthfulness and reliability[.]" But probable cause to arrest may be based on hearsay that is reliable and from a credible source. *See* ***State v. McAttee***, 2001 WI App 262, ¶9, 248 Wis. 2d 865, 637 N.W.2d 774. The fact that Brown was a co-actor does not automatically make her unreliable, *see* ***Illinois v. Gates***, 462 U.S. 213, 233-34 (1983), and Smith does not develop any further argument as to why Brown's statements are so unreliable that they could not create probable cause. Smith also does not address ***Felix*** in any meaningful way, save for a conclusory assertion that it does not apply. Further, Smith utterly neglects to discuss any portion of the ineffective-assistance-of-counsel framework.

Because we do not develop a party's arguments, *see* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992), we conclude that Smith has failed to demonstrate that the circuit court erred in concluding that neither trial nor postconviction counsel were ineffective and in denying his postconviction motion.

Upon the foregoing, therefore,

IT IS ORDERED that the March 31, 2014 order is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals