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DISTRICT II

January 13, 2016

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

2015AP438

State of Wisconsin v. Felipe Diaz (L.C. #2006CF298)

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

Felipe Diaz appeals from an order summarily denying his WIS. STAT. § 974.06 (2013-14)¹ postconviction motion. 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. Because Diaz's postconviction claims are procedurally barred, we affirm.

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

Diaz pled to and was convicted of five counts of delivering or manufacturing cocaine. On his behalf, appointed counsel filed a postconviction motion requesting that the court vacate the judgments and reinstate a prior plea agreement. The trial court denied Diaz's motion, and we affirmed the judgments and order denying postconviction relief. *State v. Felipe Diaz*, No. 2008AP3157-CR, unpublished slip op. and order (WI App Feb. 9, 2010). The Wisconsin Supreme Court denied Diaz's petition for review.

In 2011, Diaz filed a WIS. STAT. § 974.06 postconviction motion challenging the validity of his pleas and claiming that postconviction counsel was ineffective for failing to raise this issue as part of Diaz's original WIS. STAT. § 974.02 postconviction motion. The trial court denied the motion and Diaz did not appeal. Diaz filed another § 974.06 motion in 2012, arguing that the State failed to prove various penalty enhancers and that his convictions were multiplicitous. The trial court denied the motion and Diaz did not appeal. In May 2014, Diaz filed yet another postconviction motion, arguing that his sentences exceeded the statutory maximum. The trial court denied that motion as well as Diaz's subsequent motion for clarification. Diaz did not appeal.

In November 2014, Diaz filed the WIS. STAT. § 974.06 postconviction motion underlying this appeal. The motion listed a variety of complaints including:

[I]neffective assistance of trial counsel and postconviction counsel, illegal seizure and wire tap without a court order, speedy trial violation, sentence modification and mitigating factors, incompetency of defendant during the trial, defendant's plea was coerced by trial counsel, trial court failed to find a factual basis to accept the guilty plea on all counts, and the defendant was tricked into pleading to amended complaint without being advised that both cases were combined into one complaint.

Diaz alleged that postconviction counsel was ineffective for failing to raise these claims as part of his original postconviction motion. The trial court denied the motion and Diaz appeals.

A defendant cannot raise claims in a WIS. STAT. § 974.06 postconviction motion that could have been raised in a WIS. STAT. § 974.02 postconviction motion, on direct appeal, or in a previous § 974.06 motion, unless he or she presents a sufficient reason for failing to raise the issue earlier. See *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994); § 974.06(4) (a defendant is required to raise all available grounds for relief in his original, supplemental or amended motion, and “[a]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived ... in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion,” absent sufficient reason). Where the ineffective assistance of postconviction counsel is the asserted reason for failing to raise claims earlier, a defendant must allege sufficient material facts that, if true, would entitle him or her to relief. *State v. Balliette*, 2011 WI 79, ¶61, 336 Wis. 2d 358, 805 N.W.2d 334. This requires that the defendant set forth with particularity facts showing that postconviction counsel’s performance was deficient and that the deficiency prejudiced the defense. *Id.*, ¶21. “Whether a [§] 974.06 motion alleges a sufficient reason for failing to bring available claims earlier is a question of law subject to de novo review.” *State v. Romero-Georgana*, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668.

We conclude that the trial court properly denied Diaz’s motion because his claims are procedurally barred under WIS. STAT. § 974.06(4) and *Escalona-Naranjo*. Diaz could have but did not raise his new claims earlier and he has not shown sufficient reason for his failure. To the extent he intimates that postconviction counsel’s ineffectiveness provides a sufficient reason, we are not persuaded. First, putting aside his original WIS. STAT. § 974.02 postconviction motion,

Diaz failed to raise the new claims in any of his successive § 974.06 motions, one of which expressly challenged postconviction counsel's performance on a different ground. Second, the allegations in Diaz's motion are wholly conclusory. See *Romero-Georgana*, 360 Wis. 2d 522, ¶¶36-37 (a defendant's conclusory allegations that counsel was ineffective do not establish a reason sufficient to overcome *Escalona*'s procedural bar). His motion lists a bevy of undeveloped and unsupported complaints, such as postconviction counsel's failure to raise a speedy trial issue or "seek an order to vacate the defendant's conviction based on entrapment." He asserts without further explanation that postconviction counsel should have alleged the State committed "*Brady* violations" or raised issues concerning "Wisconsin electronic surveillance control law" Diaz has not established that his newly identified issues constitute legal error, much less alleged any facts that, if proved, would support a finding that postconviction counsel's performance was deficient and prejudicial.²

Upon the foregoing reasons,

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

² Additionally, Diaz's motion does not allege or explain how his new issues are "clearly stronger" than those previously raised, as required by *State v. Romero-Georgana*, 2014 WI 83, ¶¶45-46, 73, 360 Wis. 2d 522, 849 N.W.2d 668.