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DISTRICT IV

April 27, 2016

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

2015AP15 State of Wisconsin v. Victor Garcia (L.C. # 2009CF807)

Before Lundsten, Higginbotham and Blanchard, JJ.

Victor Garcia appeals, pro se, an order denying his motion for a new trial filed pursuant to WIS. STAT. § 974.06 (2013-14).[1] Garcia argues that postconviction counsel was ineffective in failing to raise claims that trial counsel was constitutionally ineffective in several respects. He asserts that he is, therefore, entitled to a new trial. 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 affirm the order.

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

In 2010, Garcia was convicted of two counts of armed robbery with use of force, one count of substantial battery, and one count of armed burglary, all as party to a crime and as a repeater, and one count of felony bail jumping as a repeater. The charges arose from a violent home invasion by Garcia and several others in which the victims were robbed and beaten.

On December 4, 2014, proceeding pro se, Garcia filed a postconviction motion under WIS. STAT. § 974.06 alleging that, in failing to raise clearly stronger issues in a previous postconviction motion, postconviction counsel performed deficiently and this prejudiced Garcia. Garcia alleged that, because of this failure, his § 974.06 motion for a new trial based on trial counsel's ineffective assistance is not procedurally barred. The circuit court permitted Garcia to argue his motion. However, no testimony from postconviction counsel or any other evidence was presented. The circuit court denied the motion. Garcia appeals this denial.

Garcia's previous postconviction motion, filed by counsel in 2012, argued that trial counsel should have sought to suppress evidence tying Garcia to the crime.[2] Because of this failure, Garcia argued, he was entitled to a new trial. The circuit court denied that motion after an evidentiary hearing, and on appeal the ruling was affirmed. *See* ***State v. Garcia***, No. 2012AP1685-CR, unpublished slip op. ¶3 (WI App June 3, 2014). Our opinion concluded that any error with regard to the suppression motion was harmless because, given the strength of the State's case, a rational jury would have found Garcia guilty absent the error. *See* ***id.***, ¶¶4-14.

[2] The evidence in question was a pair of shoes that Garcia was wearing when he was arrested the day after the crime. The shoes had paint on them that, according to crime lab analysis, matched paint spilled in the home invasion.

Because Garcia could have raised these issues in his 2012 postconviction motion and appeal, the instant challenge is barred unless he shows a sufficient reason for failing to raise the issues at that time. *See* WIS. STAT. § 974.06(4); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). Garcia's motion alleges that ineffective assistance of postconviction counsel is the reason for the failure to raise the issues previously.

STANDARD OF REVIEW

WISCONSIN STAT. § 974.06 promotes finality and efficiency by requiring defendants to bring all available claims in a single proceeding unless there exists a sufficient reason for not raising some claims in that initial proceeding. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. Whether a § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier is a question of law that is subject to de novo review. ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920. Similarly, whether a § 974.06 motion alleges sufficient facts to require a hearing is a question of law that is reviewed de novo. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

DISCUSSION

"If the defendant alleges that he did not raise an issue because of ineffective postconviction counsel, '[t]he trial court can perform the necessary factfinding function and directly rule on the sufficiency of the reason.'" ***State v. Allen***, 2010 WI 89, ¶85, 328 Wis. 2d 1, 786 N.W.2d 124 (quoting ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996)). "Conversely, if the defendant fails to allege why and how his postconviction counsel was constitutionally ineffective—that is, if the defendant asserts a mere conclusory allegation that his counsel was ineffective—his 'reason' is not sufficient." ***State v.***

Romero-Georgana, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. "[D]efendants must allege sufficient facts in their § 974.06 motions so that reviewing courts do not grant frivolous hearings. We will not read into the § 974.06 motion allegations that are not within the four corners of the motion." ***Id.***, ¶64.

Romero-Georgana and ***Balliette*** addressed what it means to sufficiently allege ineffective assistance of postconviction counsel. Such a motion must identify with specificity what it is that will be accomplished in the evidentiary hearing that is sought. Case law "provide[s] the theoretical foundation for the specificity required in a § 974.06 motion, namely, the policy favoring finality, the pleading and proof burdens that have shifted to the defendant in most situations after conviction, and the need to minimize time-consuming postconviction hearings unless there is a clearly articulated justification for them." ***Balliette***, 336 Wis. 2d 358, ¶58. "A motion that alleges, *within the four corners of the document itself,* the kind of material factual objectivity we describe ... will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim." ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. No hearing is required when only conclusory allegations are presented or when the record conclusively demonstrates that the defendant is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

To state a claim for ineffective assistance of counsel, the defendant must demonstrate: (1) that his counsel's performance was deficient; and (2) that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Therefore, where the alleged sufficient reason for evading the ***Escalona-Naranjo*** bar is the ineffective assistance of postconviction counsel, the motion is required to sufficiently allege postconviction counsel's deficient performance and allege that the deficient performance was prejudicial. "[T]he court [in

State v. Starks, 2013 WI 69, ¶6, 349 Wis. 2d 274, 833 N.W.2d 146] adopted the 'clearly stronger' pleading standard for the deficiency prong of the ***Strickland*** test in Wisconsin for criminal defendants alleging in a habeas petition that they received ineffective assistance" related to counsel's failure to raise an issue. ***Romero-Georgana***, 360 Wis. 2d 522, ¶45. To get an evidentiary hearing on the question of postconviction counsel's deficient performance, then, Garcia must clearly articulate a justification for such a hearing.

The threshold question is therefore whether Garcia has sufficiently alleged that postconviction counsel performed deficiently by failing to raise claims that were clearly stronger than the claim that was raised regarding trial counsel's failure to attempt to suppress evidence. We look first at what Garcia's motion alleges about postconviction counsel's failure to raise clearly stronger issues. Garcia devotes two pages of his twenty-six page motion to the alleged failure of postconviction counsel to raise clearly stronger issues. He states that the State and the Court of Appeals "have already conceded that the issues being raise[d] in this motion is the evidence that contributed to the [appellant's] conviction and that the sole issue that [postconviction counsel] raise[d] on post-conviction was harmless [error]." He asserts that he is entitled to have an evidentiary hearing "to extract certain testimony from multiple witnesses." His motion does not, however, identify which witnesses would testify or what they would say about postconviction counsel's alleged deficient performance. The only factual support Garcia presents for the proposition that the new issues are stronger is the fact that Garcia did not prevail on the first postconviction motion. As ***Romero-Georgana*** makes clear, such conclusory allegations cannot be the basis for an evidentiary hearing:

> [B]ecause Romero-Georgana's motion contains only conclusory allegations and almost no facts relating to the relevant postconviction counsel, he has not demonstrated "how" he would

> prove his claims at an evidentiary hearing …. Who would testify on his behalf? Blanket assertions of ineffective assistance are not sufficient to alert the court or opposing counsel *how the defendant will prove his claim at a hearing ....*

Id., ¶63 (emphasis added).

Garcia argues that one factor noted in ***Romero-Georgana*** is that "reviewing courts should consider any objectives or preferences that the defendant conveyed to his attorney. A claim's strength may be bolstered if a defendant directed his attorney to pursue it." ***Id.***, ¶4. There is ample evidence in the record that Garcia sought to have postconviction counsel pursue the additional claims of ineffective assistance of trial counsel that Garcia has identified and now raises. This is not, however, dispositive of the question. Garcia's effort tells us nothing about the relative strength of other claims. Good appellate advocacy frequently necessitates winnowing out weaker arguments on appeal and focusing on one central issue or, at most, on a few key issues. *See* ***Jones v. Barnes***, 463 U.S. 745, 751-52 (1983). Postconviction counsel is not ineffective for not raising issues, even if non-frivolous, if counsel exercises his or her professional judgment in refusing to press those issues. *See* ***id.*** at 751. The fact that Garcia asked for these issues to be raised therefore does not salvage an otherwise conclusory pleading.

Because we have determined that the WIS. STAT. § 974.06 motion does not allege sufficient facts to demonstrate that postconviction counsel was deficient, we do not need to consider whether the motion sufficiently alleged prejudice. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶65. Garcia's motion for postconviction relief was therefore properly denied without an evidentiary hearing.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals