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May 18, 2016

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

2014AP1388 State of Wisconsin v. Ronald E. Schroeder (L.C. #2007CF496)

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

Ronald E. Schroeder appeals pro se from orders denying his WIS. STAT. § 974.06 (2013-14),[1] postconviction motion, and his requests for judicial recusal, a continuance, and reconsideration. 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 Schroeder's postconviction claims are procedurally barred by WIS. STAT. § 974.06(4), and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and the trial court properly denied his other motions, we affirm.

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

In March 2008, a jury found Schroeder guilty of thirty-one counts. The State Public Defender (SPD) appointed counsel to represent Schroeder and we affirmed his judgment on direct appeal. ***State v. Schroeder***, No. 2008AP2810-CR, unpublished slip op. (WI App Feb. 17, 2010). The Wisconsin Supreme Court denied Schroeder's petition for review.

In February 2011, Schroeder filed a pro se WIS. STAT. § 974.06 postconviction motion asserting thirty-eight claims of error. In a 2011 written decision, the trial court denied all but three claims and referred the matter to the SPD, who declined to appoint counsel. The case was reassigned and the new trial judge appointed an attorney for Schroeder. Counsel successfully moved to withdraw citing "a 'genuine and unbridgeable disagreement' about the direction of the case." The court appointed a second attorney who moved to withdraw within six months based on a "complete breakdown" in his relationship with Schroeder. At a hearing, Schroeder stated he would be "grateful and relieved to have [the attorney] off my case." Counsel was permitted to withdraw and the trial court declined to appoint a third attorney. Following a number of adjournments granted at Schroeder's request, the court denied his remaining three postconviction claims at a March 10, 2014 hearing. Schroeder appeals.

We conclude the trial court properly denied Schroeder's WIS. STAT. § 974.06 postconviction motion without an evidentiary hearing because all claims raised therein are procedurally barred.[2] *See* WIS. STAT. § 974.06(4); ***Escalona-Naranjo***, 185 Wis. 2d at 181-82

[2] 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). Whether a WIS. STAT. § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier or alleges sufficient facts requiring a hearing 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.

(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). Though the bulk of Schroeder's claims allege the ineffective assistance of trial counsel, his § 974.06 postconviction motion fails to provide a sufficient reason explaining why these claims were not raised earlier, as part of his direct appeal. Insofar as Schroeder asserts postconviction counsel's ineffectiveness as a sufficient reason, his motion fails to allege "sufficient material facts—e.g., who, what, where, when, why, and how—that, if true, would entitle [the defendant] to the relief he seeks." ***State v. Romero-Georgana***, 2014 WI 83, ¶37, 360 Wis. 2d 522, 849 N.W.2d 668 (alteration in original; citation omitted). Schroeder was required to set forth with particularity facts showing that postconviction counsel's performance was both deficient and prejudicial. ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334 (citing ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984)). While Schroeder's motion catalogues trial counsel's alleged deficiencies, it fails to explain why or how postconviction counsel erred by failing to raise these issues. *See* ***Balliette***, 336 Wis. 2d 358, ¶65 (a defendant may not identify a number of alleged errors and then simply claim that postconviction counsel should have pursued them). By omitting any factual assertions concerning, for example, the content of his discussions with postconviction counsel about which issues were viable or postconviction counsel's stated reasons for not raising certain issues, Schroeder's allegations of deficient performance are merely conclusory. ***Romero-Georgana***, 360 Wis. 2d 522, ¶62 (the mere fact that postconviction counsel did not pursue certain claims does not demonstrate ineffectiveness, and "[w]e will not assume ineffective assistance from a conclusory assertion"). Nor has Schroeder demonstrated how he would prove postconviction counsel's deficient performance at an evidentiary hearing. *See* ***Balliette***, 336 Wis. 2d 358, ¶68 ("The evidentiary hearing is not a fishing expedition to

discover ineffective assistance; it is a forum to prove ineffective assistance."). Given the strong presumption that postconviction counsel rendered effective assistance, *see* ***id.***, ¶¶26, 28, Schroeder's motion fails to establish a reason sufficient to overcome the procedural bar. [3]

We further conclude that the trial court properly denied Schroeder's recusal motion. At a hearing, Schroeder argued the court displayed bias in granting his second attorney's withdrawal motion, and unfairly failed to disclose that the attorney served as a supplemental court commissioner. WISCONSIN STAT. § 757.19(2)(g), requires disqualification "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." This paragraph concerns the judge's subjective determination of his or her own impartiality and does not require disqualification where one other than the judge objectively believes there is an appearance of impartiality. *See* ***Sharpley v. Sharpley***, 2002 WI App 201, ¶¶16-17, 257 Wis. 2d 152, 653 N.W.2d 124. Explaining that the attorney was a limited-purpose commissioner not on the county's payroll, the judge determined this created "no conflict of interest whatsoever" and did not affect her ability to act impartially. Nothing in the record contradicts the judge's determination of her own impartiality.

In a similar vein, we reject Schroeder's contention that the trial judge was objectively biased. In "determining whether a defendant's right to an objectively impartial decisionmaker

[3] With regard to his due process and sentencing claims, Schroeder failed to allege any reason explaining why they were not raised earlier, and he is procedurally barred from raising them now. *See* ***State v. Allen***, 2010 WI 89, ¶46, 328 Wis. 2d 1, 786 N.W.2d 124 ("Defendants must, at the very minimum, allege a sufficient reason in their motions to overcome the ***Escalona-Naranjo*** bar."). As to the claim that his sentence was "illegal," we write to clarify that it was not. The sentencing court ordered a nine-month jail sentence consecutive to Schroeder's prison sentence, which, pursuant to WIS. STAT. § 973.03(2), was properly served in prison. To the extent Schroeder is attempting to argue the service of his jail sentence in prison constitutes a "new factor," he has completed his sentence and the issue is moot. *See* ***State ex rel. Jones v. Gerhardstein***, 135 Wis. 2d 161, 169, 400 N.W.2d 1 (Ct. App. 1986).

has been violated we consider the appearance of bias in addition to actual bias." ***State v. Herrmann***, 2015 WI 84, ¶46, 364 Wis. 2d 336, 867 N.W.2d 772. Schroeder points to statements made by the trial court as evidence of a "deep-seated antagonism." Schroeder has not shown any "objective facts demonstrating … the trial judge in fact treated [Schroeder] unfairly." ***State v. Goodson***, 2009 WI App 107, ¶9, 320 Wis. 2d 166, 771 N.W.2d 385. Similarly, any alleged appearance of bias arising from these facts does not reveal "a great risk of actual bias." ***Herrmann***, 364 Wis. 2d 336, ¶46. We are satisfied that Schroeder has failed to overcome the presumption that the trial judge "acted fairly, impartially, and without bias." ***Goodson***, 320 Wis. 2d 166, ¶8.[4]

Next, we conclude the trial court properly exercised its discretion in denying Schroeder's requests to adjourn the March 10, 2014 hearing. *See* ***State v. Wright***, 2003 WI App 252, ¶49, 268 Wis. 2d 694, 673 N.W.2d 386 (the decision to grant or deny a continuance is a matter left to the trial court's sound discretion). Two weeks before the hearing, Schroeder requested a continuance because trial counsel was unavailable to testify. The court denied the request, explaining that the matter was not scheduled as an evidentiary ***Machner***[5] hearing. In court, Schroeder renewed his continuance request, asserting that he lacked access to case law. Observing that Schroeder had been granted multiple adjournments for various reasons, including an asserted lack of preparation, the court determined that three years to prepare "should have

[4] We reject Schroeder's argument that the trial court's decisions declining to appoint a third attorney or grant his recusal motion exhibit bias. Adverse judicial rulings alone do not demonstrate impermissible bias. ***Liteky v. United States***, 510 U.S. 540, 555 (1994).

[5] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

been more than enough [,]" and declined to reschedule the hearing. The trial court's discretionary decision was reasonable and explainable.

Finally, the trial court properly exercised its discretion in denying Schroeder's reconsideration motions. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853 (a trial court's reconsideration decision is reviewed for an erroneous exercise of discretion). As to Schroeder's March 25, 2014 letter, the bulk of his more than twenty objections concern an unrelated hearing addressing his conditions of supervision. The rest rehash old arguments. Schroeder filed another reconsideration motion requesting permission to amend his postconviction motion to include a claim of improper joinder. Schroeder's motions did not establish either newly discovered evidence or a manifest error of law or fact. *See* ***id.***, ¶44. A trial court is not required to make detailed findings in denying reconsideration. *See* ***State v. Brown,*** 2006 WI App 44, ¶18, 289 Wis. 2d 691, 712 N.W.2d 899.[6]

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[6] We are not required to address appellate arguments in the manner in which a party has structured the issues. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). To the extent we do not address one of Schroeder's arguments, that argument is deemed rejected. ***Id***. ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").