



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

August 10, 2016

To:

Hon. Todd K. Martens
Circuit Court Judge
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095

Mark Bensen
District Attorney
Washington County
P.O. Box 1986
West Bend, WI 53095-1986

Theresa Russell
Clerk of Circuit Court
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095-1986

Nancy A. Noet
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Eugene L. Cherry 195977
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2015AP1704

State of Wisconsin v. Eugene Cherry (L.C. # 2010CF463)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Eugene L. Cherry appeals pro se from orders denying his motions for postconviction relief and reconsideration. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).¹ We affirm the orders of the circuit court.

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

In 2011, Cherry was convicted following a jury trial of burglary and criminal damage to property, both as a party to a crime. The circuit court sentenced him to a total of seven years of initial confinement followed by five years of extended supervision.

In 2013, this court affirmed Cherry's convictions. *State v. Cherry*, No. 2012AP1137-CR, unpublished slip op. (WI App June 19, 2013). In doing so, we rejected his claim that his convictions were based on evidence obtained following an allegedly unlawful arrest. The same issue had been the subject of an unsuccessful suppression motion in the circuit court.

In 2014, Cherry petitioned this court for a writ of habeas corpus based on several claims that his appellate counsel had been ineffective. We denied the petition. *Cherry v. Foster*, No. 2014AP1000-W, unpublished op. and order (WI App June 10, 2014). Cherry quickly filed another habeas petition, which we also denied. *Cherry v. Foster*, No. 2014AP2838-W, unpublished op. and order (WI App Jan. 7, 2015).

Approximately six months later, Cherry filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06. In it, he claimed that his postconviction counsel was ineffective for not challenging trial counsel's performance in two respects: (1) trial counsel's failure to investigate the case and obtain police reports that would have permitted him to impeach one of the police witnesses (Detective James Wolf) at the hearing on the suppression motion and (2) trial counsel's actual failure to impeach that witness with the reports.

The circuit court denied Cherry's motion due to its lack of specificity. Cherry moved for reconsideration, explaining further the basis for his claim. He argued that Wolf's testimony that police identified themselves to Cherry upon making contact with him is contradicted by a police report indicating that Wolf was driving an unmarked car. Cherry further argued that Wolf's

testimony about when he received a description of the burglary suspects from another officer (Detective Thomas Abbott) is contradicted by police reports. Again, the circuit court denied Cherry's motion, concluding that the alleged contradictions were inconsequential. This appeal follows.

On appeal, Cherry contends that the circuit court erred in denying his motions. He renews the arguments made in them and seeks either an evidentiary hearing or a reversal of his convictions.

“We need finality in our litigation.” *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, any claim that could have been raised in a prior postconviction motion or direct appeal cannot form the basis for a subsequent motion under WIS. STAT. § 974.06 unless the defendant demonstrates a sufficient reason for failing to raise the claim earlier. *Escalona-Naranjo*, 185 Wis. 2d at 185. Whether a defendant's claim is procedurally barred by *Escalona-Naranjo* presents a question of law that we review de novo. *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

In some instances, ineffective assistance of postconviction counsel may constitute a sufficient reason for failing to raise a claim earlier. *State ex. rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). However, a defendant claiming that postconviction counsel was ineffective for not challenging trial counsel's performance must 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. Demonstrating ineffectiveness requires a showing that counsel's performance was both deficient and prejudicial. *Id.* These, too, are questions of law that we review de novo. *Id.*, ¶17.

Here, we are not persuaded that Cherry's allegations support a claim of ineffective assistance of trial counsel. The fact that Wolf was driving an unmarked car does not contradict his testimony that police identified themselves to Cherry upon making contact with him. Indeed, it appears that the identification was done verbally by another officer. As for Cherry's complaint about the timing of Wolf's conversation with Abbott (i.e., whether it was done before Cherry was taken to the station for questioning), the police reports do not clearly contradict Wolf's testimony that he spoke to Abbott at the scene of the crime while Cherry was in a squad car. At worst, the wording of Wolf's report renders the timing a bit vague, and Abbott's report does not address the conversation at all.² However, given the relative weakness of Cherry's proposed impeachment, we cannot say that he was prejudiced by counsel's failure to present it.

Because Cherry's allegations do not support a claim of ineffective assistance of trial counsel, his derivative challenge to the effectiveness of his postconviction counsel also fails. *See State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (postconviction counsel not deficient for failing to pursue meritless claim). Accordingly, he cannot overcome the procedural bar of *Escalona-Naranjo*, and his motions were properly denied.

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

² Cherry erroneously equates an omission of fact in a police report with a contradiction in an officer's testimony.