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September 27, 2016

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

2015AP1775

State of Wisconsin v. Victor Darrel Jackson
(L.C. #2005CF137)

Before Kessler and Brash, JJ., and Daniel L. LaRocque, Reserve Judge.

Victor Darrel Jackson appeals an order denying his postconviction motion filed pursuant to WIS. STAT. § 974.06 (2013-14) and *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996).¹ Based upon our review of the briefs and the record, we

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

The Honorable David A. Hansher presided over all of the relevant circuit court proceedings leading to this appeal. In addition to issuing the underlying order, Judge Hansher presided over Jackson's plea and sentencing proceedings, and he held the *Machner* hearing on Jackson's postconviction motion. See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

conclude at conference that this case is appropriate for summary disposition and affirm. *See* WIS. STAT. RULE 809.21(1).

Background

In this court's prior opinion resolving Jackson's no-merit appeal, we set forth the facts and procedural history. *See State v. Jackson*, No. 2012AP1458-CRNM, unpublished slip op. and order (WI App Dec. 17, 2013). For purposes of this appeal, it suffices to state that in 2005, Jackson pled guilty to one count of felony murder (with armed robbery as a party to a crime as the predicate offense) for his role in the death of Floyd Edwards. *See id.* at 1-2. He pursued postconviction relief, but his appeal was voluntarily dismissed in 2008.

In 2011, we reinstated Jackson's direct appeal rights because his appointed appellate lawyer failed to pursue an appeal on his behalf. *See id.* at 1 n.1.

Jackson's newly appointed postconviction counsel filed a motion to withdraw Jackson's guilty plea. The following excerpt from our opinion resolving Jackson's no-merit appeal is relevant here:

In his postconviction motion, Jackson alleged that he did not know the elements of the crime of attempted armed robbery, as a party to a crime, the predicate crime for felony murder. The circuit court held a hearing on the motion because Jackson made a *prima facie* case that the circuit court had accepted his plea without following the procedures established in [*State v.*] *Bangert*[, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986)]; the circuit court did not inform Jackson of the elements of attempted armed robbery during the plea colloquy and the elements of attempted armed robbery were not attached to the plea questionnaire. The elements of the predicate felony are an essential component of felony murder. *See* WIS JI—CRIMINAL 1031 (2003).

At the postconviction motion hearing, Hazel Washington, Jackson's trial lawyer, testified that she remembered the case well

even though Jackson had been convicted in 2005. She testified that, although her case file had been destroyed, she remembered explaining to Jackson the elements of felony murder, attempted armed robbery, and party-to-a-crime liability. Washington testified that she discussed the case at length with Jackson using language that was simple, rather than legalese, and providing him with concrete examples. Jackson also testified at the hearing. He said that Washington did not explain the elements of party-to-a-crime liability or attempted armed robbery to him, and he did not know what the State would have to prove to show that he committed attempted armed robbery. He also testified that he could not remember Washington reviewing the elements of felony murder with him. Jackson acknowledged, however, that he gave his co-defendant August White the gun that White used to kill Edwards and that he knew that White was going to use it to rob Edwards.

After hearing the testimony, the circuit court concluded that Washington's testimony that she explained the elements of attempted armed robbery and party-to-a-crime liability was more credible than Jackson's testimony that she did not explain the elements to him. The circuit court therefore concluded that Jackson knew the nature of the crime to which he was pleading guilty.

Jackson points out in his response that Washington testified that it was her usual practice to attach a copy of the jury instructions listing the elements of the crime to the plea questionnaire and she could not explain why the jury instructions for felony murder were attached, but the elements of attempted armed robbery were not attached. He contends that this shows she failed to explain the elements of attempted armed robbery to him. The circuit court considered this testimony when it ruled, but apparently found more convincing Washington's unequivocal testimony that she remembered reviewing the elements of attempted armed robbery with Jackson. There would be no arguable merit to an appellate argument that Jackson did not enter his plea knowingly, intelligently and voluntarily.

....

In his response, Jackson argues that he was denied the effective assistance of counsel because Washington did not explain to him that he was admitting that he committed attempted armed robbery by pleading guilty to felony murder. He also contends that Washington told him he would receive only five years in prison. As explained above, Washington testified at the postconviction motion hearing that she carefully reviewed the elements of the crime with Jackson. She also testified that she never guaranteed that he would receive only a five-year sentence. The circuit court

concluded that Washington's testimony was credible and Jackson's testimony was not credible on these points. Based on the circuit court's findings, which are supported by the testimony, there would be no arguable merit to a claim that Jackson was denied the effective assistance of counsel.

Jackson, No. 2012AP1458-CRNM, unpublished slip op. and order at 2-5. Our supreme court denied Jackson's petition for review.

Jackson then filed a motion to reopen the evidentiary hearing to withdraw his guilty plea. He argued that his postconviction counsel was ineffective for not addressing trial counsel's criminal conviction for tax fraud. Jackson asserted that his trial counsel's prior conviction was particularly relevant to her credibility and that not addressing it during the evidentiary hearing on his motion to withdraw his guilty plea—where credibility was key—amounted to deficient performance.

He went on to argue that he was prejudiced by this omission because so much of the postconviction court's conclusions hinged on its credibility assessment. For example, at the conclusion of the hearing, the postconviction court stated “the court believes Miss Washington was credible. That he's [i.e., Jackson's] not credible. Clearly not credible. She said especially when I'm dealing with young men, I try to go through the case very slowly and in simple terms. And it sounded very credible.” Jackson further asserted that the fact that his trial counsel was indicted less than one month before he pled guilty bolstered the legitimacy of his claim that trial counsel spent little time discussing the plea with him because she was preoccupied with her own pending case. As relief, Jackson sought to reopen the evidentiary hearing.

In its decision and order denying Jackson’s motion, the postconviction court explained that even if it assumed postconviction counsel was deficient for failing to impeach trial counsel with her prior conviction, Jackson was not prejudiced. The postconviction court elaborated:

[T]he court was *aware* of the federal conviction at the time it ruled on the defendant’s postconviction motion and that factor did not figure into the court’s credibility determination. The court focused solely on the demeanor of the witnesses and the content of their testimony. Consequently, even if postconviction counsel had cross-examined trial counsel about her criminal conviction and suspended license to practice law, it would not have altered the court’s ruling.

(Emphasis in original.)

Discussion

“We need finality in our litigation.” *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A defendant therefore is barred from pursuing claims under WIS. STAT. § 974.06 that could have been raised in an earlier postconviction motion or direct appeal absent a sufficient reason for not raising the claims previously. *Escalona-Naranjo*, 185 Wis. 2d at 181-82. Postconviction counsel’s ineffectiveness may, in some circumstances, constitute a sufficient reason for an additional postconviction motion. *See Rothering*, 205 Wis. 2d at 682. A convicted defendant, however, may not merely allege that postconviction counsel was ineffective but must “make the case” of postconviction counsel’s ineffectiveness. *See State v. Balliette*, 2011 WI 79, ¶67, 336 Wis. 2d 358, 805 N.W.2d 334.

A familiar two-prong test governs claims that counsel was constitutionally ineffective. The defendant must show both that counsel’s performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We may address either deficient performance or prejudice first, and if the defendant fails to satisfy one prong, we need not address the other. *See id.* at 697.

To prove deficiency, a defendant must show that trial counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. To prove prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

To earn a hearing on a postconviction motion, a person is required to allege sufficient material facts that, if true, would entitle the person to relief. See *Balliette*, 336 Wis. 2d 358, ¶¶18, 79. If, however, “the motion does not raise such facts, ‘or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,’” the circuit court may deny the motion without a hearing. See *id.*, ¶18 (citation omitted). With these standards of review in mind, we turn to the issues.

Jackson argues that his postconviction counsel provided ineffective assistance for failing to attack his trial counsel’s credibility. Specifically, Jackson submits that postconviction counsel should have questioned his trial counsel regarding her prior criminal conviction and the fact that her law license was subsequently suspended.

Assuming without deciding that Jackson’s postconviction counsel performed deficiently in this regard, we nevertheless agree with the State that Jackson has not established any prejudice from postconviction counsel’s alleged deficiency. Absent prejudice, a convicted person cannot demonstrate ineffective assistance of counsel. See *Strickland*, 466 U.S. at 687.

To establish prejudice, Jackson emphasizes that the outcome of the evidentiary hearing hinged on credibility: the postconviction court’s assessment of his credibility versus that of his trial counsel. He explains that trial counsel’s criminal conduct negatively impacted her own

credibility by calling into question her character for truthfulness. Meanwhile, trial counsel's criminal conduct bolstered his own credibility. Jackson highlights the timing of trial counsel's indictment, which purportedly took place less than one month before Jackson pled guilty. He submits that this chronology supports his claim that trial counsel spent little time discussing the plea with him because she was preoccupied with her own pending case. Jackson continues: "And if trial counsel acknowledged she did not give to Jackson's case the time it needed and therefore lend[s] credibility to Jackson's testimony, his credibility on the other issues in dispute—whether trial counsel advised him about the elements of the offense and the sentence he might receive—would also be supported."

Following the evidentiary hearing, the postconviction court concluded that Jackson's testimony was so lacking that he was "[c]learly not credible." In contrast, the postconviction court found Jackson's trial counsel was credible. At one point, the postconviction court explained: "She spoke softly. She spoke clearly. She seemed to—And she understood this case, her file was destroyed, and she remembered this case obviously because of the seriousness of the actions here and what happened here. And again, I find her credible here." In its written decision denying Jackson's motion to reopen the evidentiary hearing, the postconviction court noted it was familiar with Jackson's trial counsel and was aware of her criminal conviction.

In light of the forgoing, we agree with the State's assessment:

[T]he issue is not whether postconviction counsel could have challenged [trial counsel]'s credibility generally, but whether there was a reasonable probability that postconviction counsel could have damaged [trial counsel]'s credibility so severely that her testimony at the [*State v.*] *Machner*[, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)] hearing would be found less credible than Jackson's. And the answer to that question is no.

Insofar as Jackson argues that the postconviction court should have granted an evidentiary hearing because if postconviction counsel had questioned trial counsel about her criminal conviction *it might have* supported his claims that trial counsel did not devote sufficient time to his case, his argument fails. A defendant alleging ineffective assistance of counsel may not merely speculate that counsel's inaction might have prejudiced the defense. *See State v. Provo*, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 681 N.W.2d 272. Rather, the defendant must demonstrate precisely how the omitted action would have altered the outcome of the proceeding. *See id.*

Because Jackson failed to allege sufficient facts to establish that he was prejudiced by postconviction counsel's alleged failures and because the record conclusively demonstrates that he is not entitled to relief, we conclude that the postconviction court properly denied his motion to reopen the evidentiary hearing. *See Balliette*, 336 Wis. 2d 358, ¶18.

Upon the foregoing reasons,

IT IS ORDERED that the postconviction court's order is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals