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DISTRICT IV

December 9, 2016

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

2015AP1175 State of Wisconsin v. James P. Bohanan (L.C. # 2007CF1445)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

James P. Bohanan appeals the circuit court's order denying his motion for postconviction relief filed pursuant to WIS. STAT. § 974.06 (2013-14).[1] 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.

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

A jury found Bohanan guilty of the first-degree intentional homicide of K.C. On direct appeal, Bohanan argued that his constitutional rights to confrontation and to a fair trial were violated by evidentiary error. We rejected his arguments, and affirmed. ***State v. Bohanan***, No. 2010AP3122-CR, unpublished slip op. (WI App June 7, 2012). The supreme court denied Bohanan's petition for review. Bohanan was represented by counsel both at trial and on appeal.

Bohanan subsequently filed a pro se WIS. STAT. § 974.06 motion that the circuit court denied without a hearing. In his motion, Bohanan argued that the criminal complaint was defective because it was signed by a circuit court judge rather than by the district attorney. Alternatively, Bohanan argued that his prior attorneys were ineffective for not raising the issue either at trial or on direct appeal. The circuit court denied the motion without a hearing.

A hearing on a postconviction motion is required only when the defendant states sufficient facts that, if true, would entitle him to relief. ***State v. Allen***, 2004 WI 106, ¶¶9, 14, 274 Wis. 2d 568, 682 N.W.2d 433. That inquiry is a question of law which we review de novo. ***Id.***, ¶9. If 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 has the discretion to grant or deny a hearing." ***Id.***; *see also* ***State v. Balliette***, 2011 WI 79, ¶50, 336 Wis. 2d 358, 805 N.W.2d 334 (circuit court has discretion to deny a motion without an evidentiary hearing if the record conclusively demonstrates that the movant is not entitled to relief).

A defendant must raise all grounds for relief in one postconviction motion or direct appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). A defendant cannot raise an argument in a second postconviction motion that was not raised in a

prior postconviction motion unless there is a "sufficient reason" for the failure to raise the issue in the original motion. ***Id.*** at 185; *see also* WIS. STAT. § 974.06(4). A claim of ineffective assistance of postconviction or appellate counsel, however, may overcome the ***Escalona-Naranjo*** bar. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996).

We conclude that the record conclusively shows that Bohanan is not entitled to relief. Therefore, we affirm the circuit court's denial of his WIS. STAT. § 974.06 motion without a hearing.

A criminal prosecution is initiated by the filing of a criminal complaint. *See* WIS. STAT. § 968.01(2) ("The complaint is a written statement of the essential facts constituting the offense charged."). In most cases, a criminal complaint is signed by the district attorney prior to filing. WIS. STAT. § 968.02(1) ("Except as otherwise provided in this section, a complaint charging a person with an offense shall be issued only by a district attorney of the county where the crime is alleged to have been committed."). Section 968.02(3) sets forth the exception to that general rule, and states: "If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing."

In this case, the criminal complaint was signed by a circuit court judge rather than by a member of the district attorney's office.[2] The record does not show that the judge held a

[2] It appears that the Honorable Patrick J. Fiedler signed the criminal complaint. The criminal complaint was filed with the circuit court on July 30, 2007, and a warrant for Bohanan's arrest was issued. Bohanan was not arrested until May 17, 2008.

probable cause hearing before signing the complaint. However, Bohanan did receive a preliminary hearing at which the court found probable cause that Bohanan committed a felony.

As noted above, Bohanan is barred from arguing that the criminal complaint was defective unless he can show a "sufficient reason" for why the issue was not raised previously. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. Bohanan did not include any reason in his postconviction motion, and in his appellate brief Bohanan suggests that the defect was brought to his attention by a prison library clerk. That late discovery, however, does not alter the fact that the claimed issue existed in the record at the time of Bohanan's trial and direct appeal.

To avoid the procedural bar, Bohanan argues that his trial, postconviction, and appellate attorneys were all ineffective for not challenging the criminal complaint. "To prevail [on] a claim of ineffective assistance of counsel, a defendant must prove that his counsel's actions constituted deficient performance, and that the deficiency prejudiced his defense." ***State v. Hubanks***, 173 Wis. 2d 1, 24-25, 496 N.W.2d 96 (Ct. App. 1992). The questions of whether counsel's actions were deficient and whether such actions prejudiced the defense are questions of law that we review de novo. ***Id.*** at 25. If we conclude that Bohanan could not have been prejudiced, we need not address whether each of his attorney's performance was deficient. *See* ***State v. Kuhn***, 178 Wis. 2d 428, 438, 504 N.W.2d 405 (Ct. App. 1993). Here we move directly to the second prong of the test because Bohanan could not have been prejudiced by his counsels' performance.

The lack of the district attorney's signature on the criminal complaint was a defect of form. As such, the criminal complaint was not invalid. *See* WIS. STAT. § 971.26 ("No … complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be

affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant."). Even if Bohanan had successfully moved to dismiss the criminal complaint, there is no doubt under the facts here that the State would have filed a second complaint. *See* WIS. STAT. § 971.31(6) ("If the court grants a motion to dismiss based upon a defect in the … complaint, … it may order that the defendant be held in custody or that the defendant's bail be continued for not more than 72 hours pending issuance of a new ... complaint."). Here, although a district attorney did not sign the criminal complaint, the district attorney prosecuted the case, including showing probable cause at the preliminary hearing and presenting proof beyond a reasonable doubt at trial. Therefore, Bohanan was not prejudiced by his attorneys' failure to challenge the form of the criminal complaint.

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