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DISTRICT II

January 18, 2017

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

2016AP381 State of Wisconsin v. Cesar O. Garcia (L.C. #2008CF426)

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

Cesar O. Garcia appeals the court's order denying his December 22, 2015, WIS. STAT. § 974.06 (2015-16)[1] motion and his judgment of conviction, alleging that his postconviction counsel was constitutionally ineffective. Garcia claims that trial counsel was ineffective for allowing double jeopardy violations and failing to object to improper questions and statements made at trial and that postconviction counsel was ineffective for failing to challenge trial

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

counsel's ineffectiveness. 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 summarily affirm as Garcia attempts to relitigate issues previously resolved on appeal.

A defendant is barred from raising issues in a WIS. STAT. § 974.06 motion that were previously raised or could have been raised on direct appeal unless he can show a "sufficient reason" for his failure to do so. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). Likewise, a defendant claiming that postconviction counsel provided ineffective assistance must allege that postconviction counsel's performance was deficient and prejudicial. ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. Where a defendant claims ineffective assistance of postconviction counsel for not challenging trial counsel's effectiveness, a defendant must also establish that trial counsel was actually ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

Garcia was found guilty after a jury trial of three counts of attempted first-degree intentional homicide, three counts of first-degree reckless endangerment, and one count of aggravated battery with intent to cause bodily harm. Garcia was sentenced on all counts. In postconviction motions, all parties agreed that the three counts of first-degree reckless endangerment are lesser-included crimes of first-degree intentional homicide, and therefore the court dismissed these convictions and the sentences for those three counts were vacated. The fact that an error was made in instructing the jury does not mean that Garcia was prejudiced by the error. In ***State v. Cox***, 2007 WI App 38, ¶15, 300 Wis. 2d 236, 730 N.W.2d 452, we determined, under a similar scenario, that a defendant is not prejudiced when convictions of lesser-includeds are dismissed and the sentences vacated when there were convictions on the greater crimes.

In Garcia's direct appeal, we rejected Garcia's claim that his trial counsel was ineffective for failing to consider, request, and argue for lesser-included offenses at his jury trial. We concluded that Garcia was not prejudiced as any error by his trial counsel was negated by the fact that he was convicted of all of the corresponding greater crimes.

In Garcia's WIS. STAT. § 974.06 motion, he first claims double jeopardy violations rooted in his argument that counsel allowed the three counts of first-degree reckless endangerment to go to the jury. As lesser-included crimes, Garcia's premise of double jeopardy violations is misplaced as the three counts of first-degree reckless endangerment would nonetheless have been argued and submitted to the jury, albeit with an instruction to the jury to consider the lesser-includeds only if they found the State had not proved one or more of the greater crimes. As trial counsel's failure to request the proper jury instruction was not prejudicial, Garcia's claim that postconviction counsel was deficient for not raising trial counsel's ineffectiveness fails. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

Garcia next claims that trial counsel was deficient in asking Garcia prejudicial questions about his prior record and failing to object to portions of the State's cross-examination of him, which were not raised in Garcia's direct appeal. Garcia fails to demonstrate how and why these claims are "clearly stronger" than the issues postconviction counsel did present, *see* ***State v. Romero-Georgana***, 2014 WI 83, ¶45, 360 Wis. 2d 522, 849 N.W.2d 668, and, as a result, these issues are procedurally barred by ***Escalona-Naranjo***. The order denying Garcia's WIS. STAT. § 974.06 motion is summarily affirmed.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the trial court are summarily affirmed. WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals