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DISTRICT II

April 19, 2017

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

2016AP715	State of Wisconsin v. Harry Gabelbauer (L.C. #2005CF217)
2016AP1242	State of Wisconsin v. Harry Gabelbauer (L.C. #2005CF217)

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

In these consolidated cases, Harry Gabelbauer appeals pro se from orders denying his motions for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that these cases are appropriate for summary disposition. WIS. STAT. RULE 809.21 (2015-16).[1] We affirm the orders of the circuit court.

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

In 2006, Gabelbauer was convicted following a jury trial of two counts of repeated sexual assault of a child. On the first count, which was not subject to truth-in-sentencing (TIS), the circuit court imposed an indeterminate sentence of forty years. On the second count, which was subject to TIS, the court imposed a consecutive sentence of thirty-five years of imprisonment, consisting of twenty years of initial confinement and fifteen years of extended supervision.

In 2009, this court affirmed Gabelbauer's conviction. ***State v. Gabelbauer***, No. 2008AP3159-CR, unpublished slip op. (WI App Dec. 30, 2009). In doing so, we rejected claims that (1) his statements to police were involuntary and so closely associated with a computerized voice stress analysis that they should have been suppressed, (2) the prosecutor violated a pretrial ruling to limit other acts evidence, and (3) Gabelbauer was entitled to a new trial in the interest of justice.

Approximately six years later, Gabelbauer filed two motions for postconviction relief pursuant to WIS. STAT. § 974.06. In the first motion, he argued that his trial counsel was ineffective because he did not (1) subpoena work-schedule records of the victim's mother, (2) adequately cross-examine the victim, (3) subpoena records regarding the victim's school and bus schedules, and (4) subpoena records regarding Gabelbauer's work schedule. In the second motion, he complained that his pretrial counsel was ineffective for not informing him of a plea offer that he recently discovered. The circuit court denied Gabelbauer's motions in two separate orders without a hearing. These appeals follow.

On appeal, Gabelbauer contends that the circuit court erred in denying his motions for postconviction relief. He requests a ***Machner***[2] hearing on his claims.

"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).

Whether a WIS. STAT. § 974.06 motion alleges sufficient facts to require a hearing is also a question of law that we review de novo. ***State v. Romero-Georgana***, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668. If the motion raises such facts, the circuit court must hold a hearing. ***Id.*** However, if the motion presents only conclusory allegations, the court has the discretion to grant or deny a hearing. ***Id.*** We review the court's discretionary decision under the erroneous exercise of discretion standard. ***Id.*** If a defendant's § 974.06 motion is barred by ***Escalona-Naranjo***, a court properly exercises its discretion by denying the motion without a hearing. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶71.

Applying these principles, we conclude that the circuit court properly denied Gabelbauer's motions. As noted by the State, the claims in Gabelbauer's first WIS. STAT. § 974.06 motion are procedurally barred by ***Escalona-Naranjo*** because he did not provide a

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

sufficient reason for failing to raise them earlier. As for the claim in Gabelbauer's second § 974.06 motion, the recent discovery of a plea offer could be a sufficient reason for overcoming the ***Escalona-Naranjo*** bar. However, the claim itself was inadequately developed and consisted largely of conclusory allegations. Accordingly, it was within the court's discretion to deny it without a hearing.[3]

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

[3] The claim fares no better on appeal, as Gabelbauer makes no attempt to develop it in his appellant's brief. This is an additional reason for our decision to affirm. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (issue raised but inadequately briefed need not be considered).