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DISTRICT IV

June 28, 2017

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

2016AP529

State of Wisconsin v. Byron Ramon Stewart (L.C. # 2007CF1295)

Before Lundsten, Sherman and Blanchard, JJ.

Byron Stewart, pro se, appeals the circuit court's order denying his WIS. STAT. § 974.06 (2015-16)¹ motion without a hearing. He also appeals the denial of his motion for reconsideration. 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.

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

In April 2007, Stewart was charged with first-degree intentional homicide as a party to a crime. According to the criminal complaint, police responded to reports of fighting and gunshots inside an apartment, and found Carlos Lak dead from a gunshot wound to the head. Police also received a report that, after the shots were fired, two men left the apartment and drove away in a green Pontiac Bonneville. Police located a green Pontiac Bonneville in the area, and followed it. The vehicle sped away from police, and ultimately crashed into a tree. The driver, Stewart, fled on foot, and the passenger, Thomas Conner, was thrown to the ground with a leg injury. A gun was found 15 feet from Conner, in the direction that Stewart had fled.

Stewart and Conner were both charged with first-degree intentional homicide as a party to a crime. Stewart was appointed counsel for his trial, which took place in December 2007. At Stewart's trial, Conner testified that he and Stewart went to Lak's apartment, and that Stewart unexpectedly drew a gun and shot Lak multiple times. Stewart testified that he and Conner went to Lak's apartment, and that Conner unexpectedly drew a gun and shot Lak multiple times. The jury found Stewart guilty of first-degree intentional homicide as a party to a crime.

Stewart was appointed postconviction counsel, who pursued a postconviction motion on Stewart's behalf. The postconviction motion asserted that Stewart was entitled to a new trial based on Stewart's claims that: (1) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose to Stewart an "understanding" between the State and Conner that, if Conner testified against Stewart, the State would dismiss the pending first-degree intentional homicide charge against Conner; and (2) that the State's dismissal of the homicide charge against Conner following Stewart's conviction was newly discovered evidence.

After an evidentiary hearing, the circuit court found that there was no agreement between Conner and the State, and that there was not a reasonable probability of a different result at trial had the jury known that the charges against Conner would be dismissed. The court denied Stewart's postconviction motion, and we affirmed on appeal.

Stewart then pursued a pro se *Knight*² petition, arguing that his appointed appellate counsel was ineffective by failing to argue on appeal that the circuit court erred by: (1) allowing hearsay testimony at the preliminary hearing; and (2) denying Stewart's motion for a mistrial after the State violated an order prohibiting it from commenting on Stewart invoking his Fifth Amendment rights. We denied the petition, concluding that the issues Stewart identified were not clearly stronger than the issues Stewart's counsel pursued on appeal.

On May 7, 2013, Stewart filed a pro se WIS. STAT. § 974.06 motion in the circuit court. Stewart argued that his postconviction counsel was ineffective by failing to raise claims of ineffective assistance of trial counsel in Stewart's postconviction motion. Specifically, Stewart alleged that his trial counsel was ineffective by: (1) failing to investigate a potential defense witness, Conner's cousin Arthur Conner, after Stewart informed his trial counsel that Arthur Conner would testify that Conner had admitted to Arthur Conner that Conner, not Stewart, shot Lak; (2) failing to object to statements by the circuit court that Stewart believed demonstrated judicial bias; (3) failing to discover the correct number of Conner's prior convictions until the third day of trial, after Conner had already testified; and (4) failing to object to the State's assertions during closing arguments that Conner was credible. Stewart also argued that his

² *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

postconviction counsel was ineffective by failing to argue that the State committed a *Brady* violation by failing to disclose the correct number of Conner's prior convictions, that the State offered knowingly false testimony as to the number of Conner's convictions, and that the court erred by reading the party-to-a-crime jury instruction to the jury. Stewart asserted that those claims were clearly stronger than the issues his postconviction counsel did pursue. The circuit court denied the motion without a hearing. Stewart moved for reconsideration, which the court also denied.

If a WIS. STAT. § 974.06 motion sets forth sufficient material facts that, if true, would entitle the defendant to relief, the defendant is entitled to a hearing on the motion. *State v. Balliette*, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. We independently review whether a defendant is entitled to a hearing on a § 974.06 motion. *See id.* “[I]f 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 grant or denial of the motion is a matter of discretion entrusted to the circuit court.” *Id.* (quoted source omitted).

When, as here, a WIS. STAT. § 974.06 motion follows a prior postconviction motion, a defendant must show a “sufficient reason” for failing to previously raise the issues in the current motion. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel may, in some circumstances, be a “sufficient reason” as to why an issue was not raised earlier. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To demonstrate ineffective assistance of postconviction counsel, a defendant must show that the issues the defendant believes that counsel should have raised were “clearly stronger” than the claims that counsel pursued in a postconviction motion “by alleging ‘sufficient material facts—*e.g.*, who, what, where, when,

why, and how—that, if true, would entitle him to the relief he seeks.’’ See *State v. Romero-Georgana*, 2014 WI 83, ¶58, 360 Wis. 2d 522, 849 N.W.2d 668 (quoted source omitted). Whether a § 974.06 motion alleges a sufficient reason for failing to raise an issue earlier is a question of law that we review independently. *State v. Kletzien*, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

We conclude that Stewart’s current claims are barred under *Escalona-Naranjo* because he has not provided a sufficient reason for failing to raise those claims in his prior postconviction motion. Stewart’s asserted sufficient reason is that his postconviction counsel was ineffective by failing to raise those claims of ineffective assistance of trial counsel in his postconviction motion. However, Stewart’s claim of ineffective assistance of postconviction counsel fails because he has not demonstrated that his current claims are “clearly stronger” than the claims counsel chose to pursue. See *Romero-Georgana*, 360 Wis. 2d 522, ¶¶43-46.

Stewart’s postconviction motion focuses on the strength of the claims he believes his postconviction counsel should have raised. It then asserts, in conclusory fashion, that those claims are “clearly stronger” than the claims postconviction counsel pursued. However, it is silent as to the relative strength of the claims postconviction counsel pursued in Stewart’s direct postconviction motion.

Stewart’s assertion that the issues he now wishes to pursue were obvious and that Stewart alerted his postconviction counsel to the issues does not establish that counsel was ineffective by failing to include those issues in the postconviction motion. “[I]f the defendant fails to allege why and how his postconviction counsel was constitutionally ineffective—that is, if the

defendant asserts a mere conclusory allegation that his counsel was ineffective—his ‘reason’ is not sufficient.” *Id.*, ¶36.

“[D]efendants must allege sufficient facts in their [WIS. STAT.] § 974.06 motions so that reviewing courts do not grant frivolous hearings. We will not read into the § 974.06 motion allegations that are not within the four corners of the motion.” *Id.*, ¶64. “[A] defendant who alleges in a § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought.” *Id.*, ¶4. Because Stewart did not address the issues counsel chose to pursue in Stewart’s postconviction motion, Stewart did not demonstrate that his current claims are clearly stronger than those claims. Accordingly, the circuit court properly denied Stewart’s motion without a hearing.³

Therefore,

³ The circuit court denied Stewart’s motion without a hearing on grounds that Stewart was required to raise his current claims in this court via a *Knight* petition, that Stewart was barred from asserting ineffective assistance of postconviction counsel because he had already filed a *Knight* petition and failed to allege ineffective assistance of postconviction counsel, and that our decision denying Stewart’s *Knight* petition was a final decision as to Stewart’s claims of ineffective assistance of appellate and postconviction counsel. That was incorrect; our decision on Stewart’s *Knight* petition was limited to Stewart’s claims of ineffective assistance of *appellate* counsel, and Stewart’s claims of ineffective assistance of *postconviction* counsel were properly raised in his WIS. STAT. § 974.06 motion. *See Knight*, 168 Wis. 2d at 520 (ineffective assistance of appellate counsel properly raised via petition in court of appeals); *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996) (ineffective assistance of postconviction counsel properly raised via motion in the circuit court). In any event, we may affirm on different grounds than relied on by the circuit court. *See State v. Earl*, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 (“On appeal, we may affirm on different grounds than those relied on by the [circuit] court.”).

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals