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DISTRICT I

July 21, 2017

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

2016AP141 State v. Bradley S. Gallentine
(L.C. # 2007CF700)

Before Brennan, P.J., Kessler and Brash, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Bradley S. Gallentine, *pro se*, appeals circuit court orders denying his postconviction motion without a hearing and denying reconsideration. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We further conclude ***State v. Escalona-Naranjo***, 185 Wis.

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

2d 168, 517 N.W.2d 157 (1994), applies to procedurally bar Gallentine's claims. Therefore, we summarily affirm.

Background

In 2008, a jury found Gallentine guilty of one count of repeated sexual assault of a child. In the direct appeal that followed, Gallentine's appointed counsel argued that his trial counsel provided ineffective assistance by failing to introduce testimony from his employer limiting the time frame in which Gallentine had the opportunity to commit the assaults and that the circuit court erred when it admitted hearsay testimony. *See* ***State v. Gallentine***, No. 2010AP29-CR, unpublished slip op. ¶1 (WI App Dec. 14, 2010). We affirmed, *see* ***id.***, and the Wisconsin Supreme Court denied Gallentine's petition for review. Since that time, Gallentine has filed numerous motions and petitions challenging his conviction in the circuit court, this court, and the supreme court.

In February 2016, Gallentine filed his most recent postconviction motion alleging that his trial counsel was ineffective for not investigating and calling various witnesses, including his sister and his niece, during his trial. The circuit court denied Gallentine's motion for two reasons: (1) Gallentine's claims were barred by ***Escalona***; and (2) the motion, on its face, failed to raise sufficient facts to entitle Gallentine to relief. Gallentine sought reconsideration, arguing that his motion was based on newly discovered evidence, namely, a 2011 letter from his niece and a 2015 affidavit from his sister. The circuit court denied Gallentine's motion for reconsideration. This appeal follows.

Discussion

The postconviction procedures of WIS. STAT. § 974.06 allow a convicted offender to attack a conviction after the time for a direct appeal has expired. *See* ***Escalona***, 185 Wis. 2d at 176. The opportunity to bring postconviction motions, however, is not limitless. Section 974.06(4) requires a prisoner to raise all constitutional and jurisdictional grounds for postconviction relief in his or her original, supplemental, or amended motion. *See* ***id.***; *see also* ***Escalona***, 185 Wis. 2d at 185. If a convicted offender did not raise his or her grounds for postconviction relief in a prior postconviction proceeding, or if prior litigation resolved the offender's claims, they may not become the basis for a subsequent postconviction motion under § 974.06 unless the offender demonstrates a sufficient reason for failing to allege or adequately raise the claims in the prior proceeding. ***Escalona***, 185 Wis. 2d at 181-82. On appeal, we independently determine the sufficiency of an offender's reason for serial litigation by examining the four corners of his or her postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

The postconviction motion underlying this appeal failed to include any reason, let alone a sufficient reason, that Gallentine did not raise or fully explore his current claims in the course of his prior postconviction litigation. By a generous reading, the closest he came to doing so was one sentence in the reply brief he submitted in support of his WIS. STAT. § 974.06 motion to the circuit court referencing inadequate research by his postconviction counsel. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (Postconviction counsel's ineffectiveness may, in some circumstances, constitute a sufficient reason for serial litigation.). Gallentine grasps at this premise on appeal by submitting an undeveloped argument to the effect that he did not previously pursue his current claims because

his postconviction counsel was ineffective for failing to discover and present them.[2] We could reject his argument for this reason alone. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (the court of appeals may decline to consider arguments that are undeveloped).

In any event, to obtain an evidentiary hearing below, a defendant must do more than merely assert in a conclusory fashion that postconviction counsel was ineffective. *See* ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. Rather, a convicted defendant must "make the case" of postconviction counsel's ineffectiveness. ***Id.***, ¶67.

Gallentine decidedly did not make the case of postconviction counsel's ineffectiveness in his postconviction filings. He was required to set forth with particularity facts showing that postconviction counsel's performance was both deficient and prejudicial. *See* ***id.***, ¶21 (A defendant claiming that postconviction counsel provided ineffective assistance must allege that postconviction counsel's performance was deficient and prejudicial.). While Gallentine's motion details what he believes were trial counsel's deficiencies, it fails to explain why or how postconviction counsel erred by failing to raise the issues he identifies. *See* ***id.***, ¶65 (A defendant may not identify a number of alleged errors and then simply claim that postconviction counsel should have pursued them.). Again, it appears that Gallentine offered only one sentence in what the circuit court construed to be his reply brief in support of his WIS. STAT. § 974.06 motion, where he alleged postconviction counsel was ineffective. He wrote:

[2] Although Gallentine, at times, references the perceived failings of appellate counsel, his current litigation actually raises claims that counsel was ineffective in his role as postconviction counsel. (continued)

> If [trial counsel] or [postconviction counsel] had done adequate research into the testimony of Gallentine's possible witnesses, they would have raised these issues tantamount to critical impeachment testimony evidence, because of untrustworthy statements [a witness and the victim] have made in regards to [an evidentiary] ruling and the jury needing additional testimony.

However, by omitting any facts concerning, for example, the content of his discussions with postconviction counsel about which issues were viable or postconviction counsel's stated reasons for not raising certain issues, Gallentine's assertions are merely conclusory. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶62, 360 Wis. 2d 522, 849 N.W.2d 668 (The mere fact that postconviction counsel did not pursue certain claims does not demonstrate ineffectiveness, and "[w]e will not assume ineffective assistance from a conclusory assertion."). Nor has Gallentine demonstrated how he would prove postconviction counsel's deficient performance at an evidentiary hearing. *See* ***Balliette***, 336 Wis. 2d 358, ¶68 ("The evidentiary hearing is not a fishing expedition to discover ineffective assistance; it is a forum to prove ineffective assistance."). Given the strong presumption that postconviction counsel rendered effective assistance, *see* ***id.***, ¶¶26, 28, Gallentine's motion fails to establish a reason sufficient to overcome the procedural bar.[3]

Upon the foregoing reasons,

See ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-79, 556 N.W.2d 136 (Ct. App. 1996) (describing forum for raising claims of ineffective assistance of trial counsel).

[3] Insofar as Gallentine tried to avoid this outcome by arguing newly discovered evidence in his subsequent motion for reconsideration to the circuit court, he has seemingly abandoned this theory on appeal. Accordingly, we need not address it further. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (An issue raised in the circuit court, but not raised on appeal, is deemed abandoned.).

IT IS ORDERED that the circuit court's orders are summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals