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DISTRICT II

August 9, 2017

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

2016AP1769 State of Wisconsin v. Coleon M. Gallion (L.C. #2012CF479)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Coleon M. Gallion, pro se, appeals the summary denial of his WIS. STAT. § 974.06

(2015-16)[1] motion alleging ineffectiveness of his postconviction[2] counsel for failing to raise the following issues: (1) a failure to raise a ***Miranda***[3] challenge; (2) a failure to raise the claim that he was "tricked" into giving his statement to police; (3) a failure to argue that his plea was not freely, voluntarily, and knowingly entered given trial counsel's ineffectiveness; and (4) a failure to challenge the medical examiner's testimony at the preliminary hearing. Gallion further claims that the court erred in refusing to provide him with counsel for his postconviction motion and abused its discretion in denying his postconviction motion.

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 postconviction counsel was not deficient as all of Gallion's assertions were addressed in Gallion's direct appeal, ***State v. Gallion***, No. 2014AP1341-CRNM, unpublished op. and order (WI App Nov. 19, 2014), and to the extent not explicitly raised are procedurally barred.

Gallion pled guilty to first-degree reckless homicide by delivery of a controlled substance. On direct appeal, Gallion's postconviction counsel filed a no-merit report and a

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

[2] Gallion previously petitioned pro se before this court for a writ of habeas corpus pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). We denied the petition, determining that Gallion's claims of ineffective assistance of appellate counsel were actually claims that postconviction counsel performed deficiently by failing to raise trial counsel's ineffectiveness. We concluded that the circuit court, not the court of appeals, was the proper forum to hear the claim. Gallion's appointed postconviction/appellate counsel did not file any postconviction motions and instead filed a no-merit report. For ease of reference, we refer to counsel as postconviction counsel.

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

supplemental no-merit report. ***Id.*** at 1-2. Gallion filed a response to the no-merit report.[4] ***Id.*** We reviewed all submittals and independently reviewed the record. We summarily affirmed Gallion's conviction in a twelve-page decision, concluding that there was no merit to any issue that could be raised on appeal. ***Id.*** at 12.

Within our no merit decision we addressed Gallion's argument that his plea was not freely, voluntarily, and knowingly entered and his argument that his statement to police was inadmissible (i.e., a ***Miranda*** challenge). ***Gallion***, No. 2014AP1341-CRNM, unpublished op. and order at 3-4. We found that the plea colloquy established that Gallion was satisfied with his trial counsel, that he was not pressured or rushed into a plea, and that he understood the plea procedure. ***Id.*** Gallion admitted that the facts in the criminal complaint were substantially true and that he had reviewed the elements of first-degree reckless homicide with his trial counsel. ***Id.*** at 4. We found Gallion's argument that his statement to police was inadmissible to be without merit. ***Id.***

We also addressed within our no-merit decision Gallion's argument that his trial counsel was ineffective. Gallion claimed that trial counsel was ineffective for waiving the time limit for the preliminary hearing. ***Id.*** at 6. As Gallion did not explain why allowance of hearsay testimony at the preliminary hearing resulted in his decision to enter a guilty plea, we dismissed that argument on grounds of forfeiture. ***Id.*** at 6-7. Gallion argued that his trial counsel was ineffective for not making a strong enough argument in opposition to other acts evidence.

[4] Gallion's response consisted of a six-page summary of arguments and incorporated by reference an attached sixteen-page proposed motion to withdraw Gallion's guilty plea. ***State v. Gallion***, No. 2014AP1341-CRNM, unpublished op. and order at 2 n.2 (WI App Nov. 19, 2014). Gallion also filed a reply to counsel's supplemental no-merit, which, although not allowed, we considered. ***Id.***

Id. at 7. We dismissed that argument as the court's decision to allow other acts evidence was proper and therefore trial counsel was not deficient. ***Id.*** at 8. Gallion argued that his trial counsel was ineffective for failing to investigate OnStar and phone data evidence. ***Id.*** We found no deficiency as OnStar does not continually track a vehicle and counsel's actions were reasonable given the information that was available. ***Id.*** at 8-9. We dismissed Gallion's assertions of deficiency on the part of postconviction counsel for "advocating against him" as without merit as a no-merit report is an approved method by which appointed counsel discharges his or her duty of representation. ***Id.*** at 11-12.

Against the backdrop of our thorough no-merit review, we turn to Gallion's current assertions. A motion brought under WIS. STAT. § 974.06 after a direct appeal is typically barred, unless the defendant shows a sufficient reason why he or she did not, or could not, raise the issues in a motion preceding the first appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). ***Escalona*** requires that if an issue was previously adjudicated, was waived, or not raised in a prior postconviction motion when it could have been raised, then it may not be the basis for § 974.06 motion. ***Escalona***, 185 Wis. 2d at 181. When we follow the no-merit procedure required by ***Anders v. California***, 386 U.S. 738 (1967), and properly accept a no-merit report, ***Escalona*** bars a defendant from raising additional claims in a later § 974.06 motion. ***State v. Allen***, 2010 WI 89, ¶¶61, 63, 328 Wis. 2d 1, 786 N.W.2d 124. While ineffective assistance of postconviction counsel may sometimes constitute a sufficient reason for not raising an issue on direct appeal, ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996), we do not accept conclusory allegations of ineffective assistance of postconviction counsel, ***State v. Balliette***, 2011 WI 79, ¶¶63-70, 336 Wis. 2d 358,

805 N.W.2d 334. A defendant must show "why" it was deficient performance for postconviction counsel not to raise the issues now asserted by the defendant. ***Id.***, ¶65.

Gallion failed to show the postconviction court and fails to show this court that a ***Miranda*** challenge and a challenge to the entry of his plea were not addressed in our no-merit decision. To the extent that Gallion offers a different factual reason for his challenge to the admissibility of his statement or to the voluntariness of his plea, he fails to offer a sufficient reason why he did not make those assertions in his direct appeal. The postconviction court held two hearings, with the second hearing expressly set for the purpose of allowing Gallion to show a sufficient reason why he did not raise the issues in the direct appeal so as to warrant an evidentiary hearing. Following the second hearing, the postconviction court found that Gallion's arguments were addressed by us, and to the extent the arguments were not, the assertions were conclusory and no sufficient reason was shown by Gallion as to why he could not have raised those factual distinctions in his direct appeal.

Not only did we address the substance of Gallion's assertions (admissibility of his statement and validity of his plea) in our no-merit decision, we conclude that Gallion's assertion that the doctor's testimony at the preliminary hearing was received in error was waived by his plea. Gallion's assertion that his trial counsel was ineffective for listening to an audio recording of his statement in his car is conclusory and fails to overcome our no-merit review of the record. The postconviction court did not err in failing to provide Gallion with counsel as a defendant has no constitutional right to counsel on a WIS. STAT. § 974.06 motion. ***State v. Evans***, 2004 WI 84, ¶32, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900. Given no grounds for this motion, the postconviction court did not err in dismissing Gallion's § 974.06 motion.

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

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

Diane M. Fremgen
Clerk of Court of Appeals