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August 9, 2017

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

2016AP1880 State of Wisconsin v. Billy J. Ingram (L.C. # 2012CF774)

Before Neubauer, C.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).

Billy J. Ingram appeals pro se from an order denying his postconviction motion based on juror bias and ineffective assistance of counsel. 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 (2015-16).[1] Because Ingram's postconviction claims are procedurally barred by

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

WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), we affirm.

In 2013, a jury found Ingram guilty of first-degree intentional homicide, armed robbery with use of force, felon in possession of a firearm, and possession of tetrahydrocannabinols. The circuit court sentenced him to life imprisonment with an extended supervision eligibility date of September 2071.

In 2014, Ingram appealed on the grounds that the circuit court erred in denying a pretrial motion to suppress evidence and that the evidence was insufficient to support the verdict. ***State v. Ingram***, No. 2014AP356-CR, unpublished slip op. (WI App Nov. 26, 2014). We affirmed. ***Id.***

In 2015, Ingram filed pro se a WIS. STAT. § 974.06 motion for postconviction relief asserting the ineffective assistance of postconviction counsel for not pursuing a claim of ineffective assistance of trial counsel. He asserted that trial counsel failed to request a jury instruction on the lesser-included offense of felony murder and failed to investigate a witness. After a hearing, the circuit court denied the motion. Ingram filed an appeal, which was dismissed for failure to pay the filing fee. In January 2016, Ingram filed a petition for a writ of habeas corpus alleging ineffective assistance of appellate counsel pursuant to ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). He asserted that appellate counsel failed to seek reconsideration of this court's decision affirming the judgment of conviction and order denying the suppression of evidence. We denied the petition in a summary order. ***State ex rel. Ingram v. Clements***, No. 2016AP36-W, unpublished slip op. and order ¶¶3-4 (WI App Feb. 16, 2016).

In June 2016, Ingram moved for a new trial in the interests of justice under WIS. STAT. § 805.15. He claimed that voir dire revealed juror bias and trial counsel was ineffective for failing to strike the juror. Bias was allegedly shown when the juror was asked if she agreed that the law afforded Ingram a presumption of innocence and she responded, "Um-hmm" [sic]. He also claimed that the circuit court "concealed" the bias of another juror who had indicated that she had heard about Ingram's case in the news. Without a hearing, the circuit court denied the motion. Ingram appeals.

All grounds for postconviction relief under WIS. STAT. § 974.06 must be raised in the original, amended, or supplemental motion. Sec. 974.06(4). Successive motions and appeals are barred, unless the defendant can show a "sufficient reason" why the newly alleged errors were not raised previously. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181. There must be finality in litigation. ***Id.*** at 185. Whether a defendant's motion is procedurally barred is a question of law, which we review de novo. ***State v. Allen***, 2010 WI 89, ¶15, 328 Wis. 2d 1, 786 N.W.2d 124.

Ingram's claims are procedurally barred under ***Escalona-Naranjo***. He offers no reason—much less a "sufficient one"—for his failure to raise these claims in his direct appeal (when he asserted insufficient evidence), in his WIS. STAT. § 974.06 motion (ineffective assistance of trial and postconviction counsel), or in his ***Knight*** petition (ineffective assistance of appellate counsel). All of his current claims were previously discoverable, as they are based on the voir dire and trial transcripts. Ingram could have and should have brought these claims previously.

Ingram's citation to WIS. STAT. § 805.15 does not avoid the procedural bar. That statute applies to civil cases and simply does not afford grounds to a criminal defendant to seek a new

trial in the interests of justice. ***State v. Henley***, 2010 WI 97, ¶39, 328 Wis. 2d 544, 787 N.W.2d 350. Ingram's claims would have to be construed as having been brought under WIS. STAT. § 974.06, which authorizes such postconviction motions. But, as noted, Ingram fails to meet the "sufficient reason" standard for why these claims were not brought previously.[2]

Although the procedural bar is dispositive, we nonetheless discuss the substance of Ingram's claims. Ingram contends that two jurors were biased, thus entitling him to a new trial in the interests of justice.

A party challenging a juror's impartiality bears the burden of rebutting a presumption of impartiality and proving juror bias. ***State v. Funk***, 2011 WI 62, ¶31, 335 Wis. 2d 369, 799 N.W.2d 421. To obtain relief on a claim that a juror incorrectly or incompletely responded to voir dire questions, the defendant must prove (1) that the juror incorrectly or incompletely responded to a material question and (2) that it is more probable than not that the juror was biased against the party. ***Id.***, ¶32.

As in this case, when a claim of juror bias is not raised at voir dire, the claim should be considered within the context of ineffective assistance of counsel. ***State v. Williams***, 2000 WI App 123, ¶21, 237 Wis. 2d 591, 614 N.W.2d 11. A defendant claiming ineffective assistance of counsel must show that (1) counsel's performance was deficient and that (2) the deficient performance prejudiced the defense. ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805

[2] To the extent Ingram sought to bypass the procedural bar by generally invoking the "interests of justice," the effort fails. Although circuit courts have inherent powers, they may not order a new trial in the interests of justice at any time, "unbound by concerns for finality and proper procedural mechanisms." ***State v. Henley***, 2010 WI 97, ¶75, 328 Wis. 2d 544, 787 N.W.2d 350. Under WIS. STAT. § 974.06, Ingram's claim for a new trial in the interests of justice is procedurally barred.

N.W.2d 334. If a defendant fails to meet one prong, we need not address the other prong. ***State v. Maday***, 2017 WI 28, ¶54, 374 Wis. 2d 164, 892 N.W.2d 611.

A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief. ***State v. Pinno***, 2014 WI 74, ¶38, 356 Wis. 2d 106, 850 N.W.2d 207. This is a question of law that is reviewed de novo. ***Id.*** If the motion raises such facts, the circuit court must hold an evidentiary hearing. ***Id.*** However, "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Id.*** (citation omitted). We review a circuit court's discretionary decision under the deferential erroneous exercise of discretion standard. ***Id.***, ¶66.

We conclude that the circuit court properly denied without a hearing Ingram's claim that trial counsel was ineffective for not moving to strike for bias the juror who responded "Um-hmm" [sic] when asked if she believed that Ingram was entitled to the presumption of innocence. This claim of bias is highly speculative and, as discussed below, the record demonstrates that counsel did not perform deficiently in not seeking to strike this juror.

Ingram submitted a letter from his trial counsel with his motion, which explained counsel's view of the juror's statement. Counsel stated that "[w]hen the juror responded ['Um-hmm'] [sic], I believe that her answer was in the affirmative" and that "I would have followed up with her answer if I believed it was a negative answer."

The voir dire exchanges immediately before and after the juror's remark further indicate that "Um-hmm" [sic] was an affirmative response. When asked if news reports had caused her

to "form any opinion … about [Ingram's] guilt or innocence," the juror responded, "Not really. I do try to keep an open mind with things." When, immediately after the "Um-hmm" [sic] response, the court asked the juror if she "will hold the State to [its] burden of … proving to you beyond a reasonable doubt whether or not—," the juror interrupted, saying, "Yes, I certainly would do my best to do that." The juror agreed that she would not be influenced by anything she had heard or read about the case. Based on the foregoing, Ingram has not overcome the presumption of juror impartiality. We conclude that the circuit court did not erroneously exercise its discretion in rejecting the ineffective assistance claim without a hearing.[3]

Ingram contends that the circuit court "unreasonably concealed" the potential bias of another juror by not asking her whether she had formed an opinion about Ingram's guilt or innocence based on prior exposure to the case. We disagree.

The full exchange between the court and this juror shows that the juror had indicated that she could be impartial despite being a regular customer of the gas station across the street from the crime scene and despite seeing stories about the crime on the news. The pertinent parts of the exchange are as follows:

> THE COURT: Anytime after [the initial reports] that you might have heard something that you are aware [of] or saw something on TV?
>
> JUROR: It pretty much, you know, fizzled away. I think actually when I went back in to get tobacco there was talk, oh, yeah, that they found the guy that—

[3] In his motion, Ingram also asserted that he was entitled to a new trial because "surprise" trial testimony undermined the alibi of another potential suspect, his roommate. Ingram has abandoned this argument in this appeal.

> THE COURT: Somebody was under arrest.
>
> JUROR: Yeah.
>
> THE COURT: And now you know that somebody is Mr. Ingram, and he sits accused of those crimes. But do you also understand that as he sits here today he is presumed innocent? He is, in fact, innocent.
>
> JUROR: Until proven guilty, yup.
>
> THE COURT: And you understand that the obligation to prove the charges is on the State and to prove every element, every part of the crime beyond a reasonable doubt?
>
> JUROR: Correct.
>
> THE COURT: Not just good enough for [an] arrest, so to speak.
>
> JUROR: Yes.
>
> THE COURT: As you sit here, do you think you have an open mind about that?
>
> JUROR: I think so. I didn't know either one of them so—
>
> THE COURT: So you believe you would be willing to listen to the evidence and testimony of the various witnesses and review the documents and so on, and then form an opinion at the end of the trial?
>
> JUROR: I think I could.

The prosecutor immediately followed up, asking the juror if she believed she could be fair to both the State and Ingram. She responded, "Yes, I think—yeah."

Because the foregoing exchange shows no juror bias, there was no reason for the court or counsel to ask additional follow-up questions. The absence of a specific question about whether the juror had previously "formed an opinion" about Ingram's guilt or innocence is not evidence by itself that the juror was biased, and any alleged bias is undercut by the overall exchange. It

follows that the circuit court did not "conceal" any juror bias and counsel did not perform deficiently by not moving to strike the juror for bias.

Upon the foregoing reasons,

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