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DISTRICT III

December 5, 2017

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

2016AP1030 State of Wisconsin v. Julius L. Ivy (L. C. No. 2009CF1214)

Before Stark, P.J., Hruz and Seidl, 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).

Julius Ivy, pro se, appeals an order denying his WIS. STAT. § 974.06 (2015-16),[1] motion for postconviction relief. Ivy contends he is entitled to either sentence reduction or a new trial on grounds he was denied the effective assistance of counsel. Based upon our review of the briefs

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

and record, we conclude at conference that this case is appropriate for summary disposition. We reject Ivy's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21.

In 2010, Ivy was convicted of armed robbery and false imprisonment, both offenses as party to a crime, and sentenced to fifteen years' initial confinement and ten years' extended supervision. Ivy filed a WIS. STAT. RULE 809.30 postconviction motion that challenged the manner in which the circuit court set restitution and raised six separate allegations of ineffective assistance of trial counsel. The circuit court modified restitution but denied the remainder of Ivy's postconviction motion. On direct appeal, Ivy again challenged restitution and renewed two allegations of ineffective assistance. Specifically, Ivy asserted his trial counsel was ineffective by failing to: (1) call to the jury's attention that a testifying accomplice had received use immunity; and (2) object to the jury's receipt of a phone record summary the State prepared. On direct appeal, we affirmed the judgment of conviction. *See* ***State v. Ivy***, No. 2011AP1050-CR, unpublished slip op. (WI App Jan. 18, 2012).

In 2016, Ivy filed the underlying WIS. STAT. § 974.06 motion challenging the effectiveness of both his trial and postconviction counsel. Ivy claimed postconviction counsel should have alleged trial counsel rendered ineffective assistance by failing to argue that the circumstances of his Illinois arrest precluded his Wisconsin prosecution. The circuit court denied Ivy's motion without a hearing, and this appeal follows.

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 establish ineffective assistance of counsel, Ivy must show that his counsel's performance was deficient and that he suffered prejudice as a result of that deficiency. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficiency of his postconviction counsel, Ivy must show that the issue he believes counsel should have raised was clearly stronger than the claims counsel pursued in the original 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." ***State v. Romero-Georgana***, 2014 WI 83, ¶58, 360 Wis. 2d 522, 849 N.W.2d 688. Further, because Ivy alleges his postconviction counsel was ineffective by failing to pursue a claim of ineffective assistance of trial counsel, Ivy must establish that his trial counsel was, in fact, ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Whether a § 974.06 motion alleges a sufficient reason for failing to raise an issue earlier is a question of law we review independently. ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

We conclude that Ivy's current challenge to the effectiveness of trial counsel is barred under ***Escalona–Naranjo*** because he has not provided a sufficient reason for failing to raise it in his prior postconviction motion. Relevant to the argument on appeal, Illinois police entered an Illinois residence and arrested Ivy on an outstanding Wisconsin warrant. Following his extradition to Wisconsin, Ivy was charged and convicted of the underlying crimes. In his current WIS. STAT. § 974.06 motion, Ivy claimed Illinois police violated the Fourth Amendment when they seized and arrested him. Ivy thus argued his trial counsel performed ineffectively by not

challenging the lawfulness of his Illinois arrest, and his postconviction counsel performed ineffectively by not challenging trial counsel's effectiveness on this point.

Ivy concedes his postconviction counsel did not miss or ignore the present claim but, rather, "intelligently decided against raising" the issue. Although Ivy asserts that his new claim is clearly stronger than the claims brought by postconviction counsel, the assertion is merely conclusory, as he fails to include any discussion or analysis to explain why his new claim is clearly stronger. *See* ***Romero–Georgana***, 360 Wis. 2d 522, ¶¶43-46. Regardless, Ivy cannot satisfy the clearly stronger requirement because his present claim has no arguable merit.

In denying Ivy's WIS. STAT. § 974.06 motion, the circuit court properly invoked the ***Ker-Frisbie*** doctrine, which states that the manner of a defendant's arrest and extradition is not relevant to the power of the requesting state to convict the defendant. ***Ker v. Illinois***, 119 U.S. 436, 444 (1886); ***Frisbie v. Collins***, 342 U.S. 519, 522 (1952). Our supreme court adopted this principle in ***State v. Monje***, 109 Wis. 2d 138, 143-44, 325 N.W.2d 695 (1982), holding that even an illegal arrest does not bar the state from exercising jurisdiction to try a pending criminal charge. Thus, even if Ivy could show that irregularities occurred in his arrest and extradition to Wisconsin, such irregularities would not have affected Wisconsin's ability to lawfully prosecute and convict him. Because Ivy's present argument is meritless, there is no basis for a claim of deficient performance on the part of either trial or postconviction counsel, and the circuit court properly denied the § 974.06 motion without a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (circuit court may deny postconviction motion without a hearing if a motion presents only conclusory allegations or if a record otherwise conclusively demonstrates defendant is not entitled to relief).

Upon the foregoing,

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