OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

January 24, 2018

To:

Hon. Jeffrey A. Conen
Safety Building
821 W. State St.
Milwaukee, WI 53233

John Barrett
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Daniel J. O'Brien
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Rogelio Promotor 451534
Redgranite Corr. Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2017AP271 State of Wisconsin v. Rogelio Promotor
(L.C. # 2003CF2230)

Before Brennan, P.J., Brash and Dugan, 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).

Rogelio Promotor, *pro se*, appeals from a circuit court order denying his WIS. STAT. § 974.06 (2015-16) postconviction motion without a hearing.[1] Based on our review of the briefs

---

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. The Honorable Michael B. Brennan presided over Promotor's plea and sentencing hearings. The Honorable Jeffrey A. Conen issued the decision and order denying the postconviction motion at issue on appeal.

and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Background

As set forth in our 2005 decision resolving Promotor's direct appeal:

> Promotor pled no contest to four counts of homicide by use of a vehicle with a prohibited blood alcohol concentration and two counts of injury by use of a vehicle with a prohibited blood alcohol concentration, all arising from the same incident. Promotor was alleged to have driven a vehicle in an urban area at high speed, running two red lights before striking another vehicle. The court imposed consecutive sentences on all counts, with the initial confinement portion being fourteen years for each of the homicide counts and five years for each of the injury counts, for a total of sixty-six years' confinement. Promotor was nineteen years old at the time, and will therefore be confined until he is eighty-five.

State v. Promotor, No. 2004AP2242-CR, unpublished op. and order at 1-2 (WI App Oct. 14, 2005). In that appeal, Promotor argued that the circuit court relied on inaccurate sentencing information and erred in several other ways by imposing the sentence that it did. ***Id.*** at 2-3. He also argued that his trial counsel was ineffective for providing the court with the allegedly inaccurate information. ***Id.*** We summarily affirmed, *see* ***id.*** at 5, and the Wisconsin Supreme Court denied Promotor's petition for review.

More than eleven years after our decision resolving his direct appeal, Promotor, *pro se*, filed the postconviction motion that led to this appeal. He argued that his trial counsel was ineffective for promising that he would receive no more than a twenty-year period of initial confinement in prison and that his postconviction counsel was ineffective for not challenging trial counsel's ineffectiveness on this basis. In addition to submitting his own affidavit, Promotor attached affidavits from his mother and his cousin who both averred that Promotor's

trial counsel informed them that Promotor would receive a sentence of no more than twenty years.

The postconviction court denied Promotor's motion without a hearing. In its written decision, the postconviction court held that the record conclusively shows Promotor entered his pleas knowing that the circuit court could impose maximum consecutive sentences regardless of what trial counsel told him and that no one made any promises to him. Additionally, the postconviction court concluded that Promotor failed to show that he would have insisted on going to trial had trial counsel not led him to believe he would receive no more than twenty years of initial confinement. This appeal follows.

Discussion

At issue is whether the circuit court erroneously exercised its discretion when it denied Promotor's postconviction motion without a hearing. Our supreme court has summarized the applicable legal standards:

> Whether a motion alleges sufficient facts that, if true, would entitle a defendant to relief is a question of law that this court reviews *de novo*. The circuit court must hold an evidentiary hearing if the defendant's motion raises such facts. 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.

See ***State v. Burton***, 2013 WI 61, ¶38, 349 Wis. 2d 1, 832 N.W.2d 611 (italics added; citations and internal quotation marks omitted).

WISCONSIN STAT. § 974.06 permits collateral review of the imposition of a sentence based on errors of jurisdictional or constitutional dimension. ***State v. Johnson***, 101 Wis. 2d 698,

702, 305 N.W.2d 188 (Ct. App. 1981). However, it "was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Thus, a defendant who has had a direct appeal or another postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a "sufficient reason" for failing to raise it earlier. *See* ***id.*** (italics omitted). A claim of ineffective assistance from postconviction counsel may present a "sufficient reason" to overcome the ***Escalona*** procedural bar. *See, e.g.*, ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

Promotor asserts that his current claim of ineffective assistance of trial counsel was not previously raised because postconviction counsel failed to raise it. *See* ***id.*** at 677-78. When an ineffective assistance of postconviction counsel claim is premised on the failure to raise ineffective assistance of trial counsel, the defendant must first establish trial counsel was actually ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. To prevail on a claim of ineffective assistance of trial counsel, Promotor must show that counsel was deficient and that the deficiency prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because a defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Id.***

To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must demonstrate that counsel's errors were so serious that the defendant was deprived of a fair trial; that is, a trial with a reliable outcome. ***Id.*** at 687. Thus, in

order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

Promotor's motion alleged that trial counsel "assured" him that he would receive no more than twenty years of initial confinement. Promotor also alleged that both trial and postconviction counsel failed to warn him of the "possibility" he could receive more than twenty years in prison.

During the plea hearing, however, Promotor pled no contest after confirming for the circuit court that there were no promises; knowing the prosecutor would recommend initial confinement of thirty-five to forty years; and knowing that the circuit court could impose maximum consecutive sentences on all six counts, which could have amounted to 125 years. To the extent Promotor suggests a language barrier prevented him from speaking up, the record belies this claim. Promotor had an interpreter during the trial court proceedings and during his discussions with trial counsel. The State points out that Promotor could have told the interpreter at the plea or sentencing hearings to remind his attorney or to tell the circuit court that he was promised no more than twenty years of confinement. The record conclusively demonstrates that Promotor is not entitled to relief on his claim. *See* ***Burton***, 349 Wis. 2d 1, ¶38.

Additionally, Promotor has not shown prejudice. That is, he does not sufficiently allege why he would have insisted on going to trial had trial counsel not purportedly misled him. *See* ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (explaining that to establish prejudice in the context of a postconviction motion for plea withdrawal based on the ineffective assistance of counsel, the defendant must allege that "'but for the counsel's errors, he would not have pleaded … and would have insisted on going to trial'") (citation omitted). As the State

points out, Promotor did not have a viable defense and his postconviction motion does not claim otherwise. In its decision, the postconviction court highlighted the overwhelming nature of the evidence against Promotor. For instance, Promotor was identified by a deputy sheriff as being behind the wheel of one of the two cars involved in a traffic accident resulting in four fatalities, multiple eyewitnesses stated that the car Promotor was driving ran a red light at high speed and caused the accident, and Promotor had a .16 blood alcohol concentration. Promotor's general conclusory allegation that he would have went to trial is insufficient. *See **id.*** at 313 ("A defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions.") (footnote omitted).

The postconviction court properly denied Promotor's motion without a hearing.

Therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Diane M. Fremgen
Acting Clerk of Court of Appeals