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DISTRICT III

April 3, 2018

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

2015AP411 State of Wisconsin v. Damonta D. Jones (L. C. No. 2010CF779)

Before Hruz, Seidl and Blanchard, 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).

Damonta Jones, pro se, appeals an order denying his WIS. STAT. § 974.06 (2015-16)[1] motion for a new trial or, alternatively, sentence modification. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We conclude that Jones's claims are procedurally barred under WIS. STAT.

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

§ 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and on this basis summarily affirm the order. *See* WIS. STAT. RULE 809.21.

In 2011, Jones and a codefendant, John Bullock, were each convicted upon jury verdicts of two counts of first-degree sexual assault, as party to a crime, in connection with the sexual assaults of Carmen.[2] The circuit court sentenced Jones to thirty-five years of initial confinement and fifteen years of extended supervision on each count, to run concurrently to each other but consecutive to any other sentence. Jones, by counsel, filed a postconviction motion alleging that his trial counsel was ineffective by failing to challenge the charges as multiplicitous and by failing to move to dismiss the charges for insufficient evidence at the close of the State's case. Jones alternatively sought resentencing, claiming that the sentence was unduly harsh and excessive and that the circuit court failed to give specific reasons for sentencing Jones to fifteen years more than Bullock. The circuit court denied the motion after a ***Machner***[3] hearing.

On direct appeal, Jones argued that his trial counsel was ineffective by failing to challenge the charges as multiplicitous, that the State presented insufficient evidence to support his convictions, and that the circuit court erroneously exercised its sentencing discretion. We rejected these arguments and affirmed both the judgment of conviction and the order denying Jones's postconviction motion. *See* ***State v. Jones***, No. 2012AP1390-CR, unpublished slip op. (WI App Mar. 26, 2013).

[2] Pursuant to WIS. STAT. RULE 809.86(4), we use a pseudonym instead of any part of the victim's real name.

[3] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

In June 2015, Jones filed the underlying WIS. STAT. § 974.06 motion for postconviction relief, seeking a new trial in the interest of justice based on "numerous pre-trial and trial issues." Jones alleged that previous convictions were improperly admitted against a defense witness and that the circuit court improperly admitted evidence over defense counsel's objection. Jones also claimed that his trial counsel was ineffective by failing to object to "leading and improper questioning" of Carmen; failing to fully cross-examine Carmen and two other witnesses; failing to prevent the introduction of "overly prejudicial evidence"; and failing to move for a change of venue. Jones's postconviction motion also asserted that the jury was not impartial and that prosecutorial misconduct deprived Jones of due process, justifying habeas relief. The circuit court denied the motion after a hearing, and this appeal follows.[4]

We conclude that Jones's claims are procedurally barred under WIS. STAT. § 974.06(4) and ***Escalona-Naranjo***. In ***Escalona-Naranjo***, our supreme court held that "a motion under sec. 974.06 could not be used to review issues which were or could have been litigated on direct appeal." ***Escalona-Naranjo***, 185 Wis. 2d at 172. The statute, however, does not preclude a defendant from raising "an issue of constitutional dimension which for *sufficient reason* was not asserted or was inadequately raised in his [or her] original, supplemental or amended postconviction motions." ***Id.*** at 184 (emphasis added).

[4] The circuit court's order currently on appeal denied Jones's motion "[f]or the reasons stated on the record at the hearing held on January 30, 2015." The appellate record, however, does not include a transcript of this hearing. An initial statement on transcript was defective because it failed to include the court reporter's signature. Although we could not accept that statement on transcript for filing, we extended the time for filing a statement on transcript. After granting four additional extensions, Jones failed to timely file a statement on transcript. We therefore ordered this appeal to proceed without further transcripts, noting that this court would assume that any missing transcripts support the circuit court's findings of fact and discretionary decisions. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). This provides an independent basis supporting our affirmance.

We determine the sufficiency of a defendant's reason for circumventing ***Escalona-Naranjo***'s procedural bar by examining the "four corners" of the subject postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. 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, Jones 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 ineffectiveness of his postconviction counsel, Jones must show that the issues he believes counsel should have raised were 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." *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶58, 360 Wis. 2d 522, 849 N.W.2d 688 (citation omitted). Whether a WIS. STAT. § 974.06 motion alleges a sufficient reason for failing to raise an issue earlier is a question of law that we review independently. ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

Here, as the State points out, Jones's motion does not provide a sufficient reason for failing to earlier raise his issues. Jones failed to reply to the State's response brief and, therefore, concedes the point. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Even liberally construing his pro se motion, Jones makes only a conclusory assertion that his postconviction/appellate counsel was ineffective by failing to argue the issues included in his WIS. STAT. § 974.06 motion. Jones's conclusory allegation does not establish that his present issues are "clearly stronger" than the claims counsel pursued in his

first postconviction motion or on direct appeal. Because Jones's claims could have been raised earlier, and Jones fails to establish a sufficient reason for failing to do so, Jones is barred from raising them now.

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.

Sheila T. Reiff
Clerk of Court of Appeals