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DISTRICT I

April 19, 2018

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

2016AP2232

State of Wisconsin v. Jackie McGee (L.C. # 2001CF2774)

Before Kessler, 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).

Jackie McGee, *pro se*, appeals from an order of the circuit court that denied his postconviction motion for a new trial. 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 The order is summarily affirmed.

An amended complaint filed in July 2001 charged McGee with two counts of aggravated battery while armed with a dangerous weapon and one count of first-degree sexual assault while armed. According to the amended complaint, McGee came home to the apartment he shared with E.B. and accused her of having sex with other men. He threw a glass at her, striking her in the head. E.B. said McGee then forced her to perform fellatio on him for twenty minutes. She said she needed to get up, and he told her to go in the bedroom, where he questioned her about drugs and struck her in the face “with one or two vases” before leaving the apartment.

When interviewed by police, McGee admitted throwing a glass at E.B.’s head, then picking up a piece of broken glass and hitting her in the face with it four or five times. E.B. suffered “multiple facial fractures, lacerations and contusions,” was considered to be in critical condition when she arrived at a hospital for treatment, and had to be transferred to another hospital for surgery.²

McGee pled guilty to the battery charges; the State dismissed the sexual assault charge because E.B.’s recollection of the incident had become “inconsistent with what was charged[.]” After the plea hearing but before sentencing, McGee obtained a new trial attorney. The circuit court informed new counsel that McGee had written to the court about withdrawing his pleas.

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

² E.B. needed seven plates and thirty-nine screws in her face because “all the bone structure in her face had been destroyed in the attack.” *See State ex rel. McGee v. Douma*, No. 2013AP2211-W, unpublished slip op. and order at 6 n.5 (WI App Jan. 15, 2015).

New counsel later informed the court that he could find no basis for plea withdrawal. At sentencing, the circuit court imposed consecutive twenty-year sentences for each battery: the fifteen-year maximum base penalty plus the maximum five additional years for the dangerous-weapon penalty enhancer.

With postconviction counsel, McGee filed a postconviction motion alleging that the battery counts were multiplicitous because only a single battery was committed; the second battery charge was not properly charged with the enhancer; the second battery sentence exceeded the statutory maximum in light of the charging error; and trial counsel was ineffective for failing to discuss multiplicity or the charging defects with McGee. McGee also argued he should be allowed to withdraw his guilty pleas because there was no factual basis for both convictions and the pleas were not knowing, intelligent, and voluntary because of trial counsel's ineffectiveness. The circuit court denied the motion. McGee appealed. This court adopted the circuit court's decision by reference and affirmed McGee's conviction. *See State v. McGee*, No. 2003AP740-CR, unpublished slip op. and order (WI App Apr. 20, 2004).³

In August 2016, McGee filed a *pro se* postconviction motion under WIS. STAT. § 974.06, seeking a new trial. He claimed postconviction counsel had been ineffective for not identifying certain ways in which his trial attorneys had been ineffective. Fundamentally, the ineffective-assistance claims all stem from the Milwaukee Police Department's failure to collect as evidence the vase with which McGee allegedly struck E.B. McGee's primary theme is that "because the prosecutor did not have the vase (weapon) to present to the jury as evidence of a dangerous

³ McGee also petitioned this court for a writ of *habeas corpus*, claiming ineffective assistance of his appellate attorney. The petition was denied. *See McGee v. Douma*, No. 2013AP2211-W at 2.

weapon, and because the prosecutor cannot inform the jury of what specific great bodily harm was caused by the missing vase[, t]he prosecutor cannot meet his burden of proof at trial.”

McGee thus claimed that his original trial attorney was ineffective because he failed to inform McGee of “the only viable defense” to the second battery charge; failed to investigate the vase’s whereabouts; and failed to correctly advise McGee about the vase so he could enter knowing, intelligent, and voluntary pleas, because had he known about the vase, McGee would have insisted on going to trial. McGee also claimed that successor counsel was ineffective because he failed to investigate and find a basis—the “missing” vase—upon which to base a motion for plea withdrawal.

The circuit court denied the motion without a hearing. It noted that the physical vase itself was not the only way by which the State could meet the burden of proof; consequently, the missing vase was of no import and the attorneys could not be faulted for not pursuing it. The circuit court also appears to have invoked a procedural bar, noting that the issues in McGee’s postconviction motion were not clearly stronger than those postconviction counsel had raised in the first motion. McGee appeals.⁴

Absent a sufficient reason, a defendant may not bring claims in a WIS. STAT. § 974.06 motion if the claims could have been raised in a prior motion or direct appeal. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); *State v. Romero-Georgana*, 2014 WI 83, ¶34, 360 Wis. 2d 522, 849 N.W.2d 668. Certain claims, like claims of ineffective trial counsel, must be preserved by a postconviction motion. *See State ex rel. Rothering v.*

⁴ McGee also moved for reconsideration, which the circuit court denied.

McCaughtry, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). Thus, ineffective assistance of postconviction counsel may sometimes constitute a sufficient reason for not raising a claim in an earlier proceeding. See *id.* at 682. For a court to conclude an attorney rendered ineffective assistance, the defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. See *State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433.

“An allegation that postconviction counsel failed to bring a claim that should have been brought is an allegation that counsel's performance was constitutionally deficient.” *Romero-Georgana*, 360 Wis. 2d 522, ¶43. To prove the deficiency, the defendant must show the unraised issue was clearly stronger than the issues actually raised by postconviction counsel. *Id.*, ¶¶44-45. Additionally, when a claim of ineffective postconviction counsel is premised on the failure to raise ineffective assistance of trial counsel, the defendant must establish that trial counsel actually was ineffective. *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

We conclude McGee's claims are procedurally barred. Postconviction counsel filed a postconviction motion raising claims that included ineffective assistance of the first trial attorney. To prevail on the present motion, McGee had to demonstrate in the motion that the issues he thinks postconviction counsel should have raised are clearly stronger than the issues postconviction counsel actually did raise. See *Allen*, 274 Wis. 2d 568, ¶27 (we review only those allegations within the “four corners” of the motion); *Romero-Georgana*, 360 Wis. 2d 522, ¶¶44-45.

However, the postconviction motion makes only conclusory claims that postconviction counsel's issues were frivolous and McGee's current claims are clearly stronger; McGee does not analyze why this is so. Conclusory allegations do not suffice. *See Allen*, 274 Wis. 2d 568, ¶¶14-15. Because McGee has not demonstrated that his current issues are clearly stronger than the issues previously raised, he has not shown postconviction counsel was ineffective. Because McGee has not shown postconviction counsel was ineffective, there is no sufficient reason for his failure to raise his current issues in prior proceedings. McGee's WIS. STAT. § 974.06 motion is procedurally barred, and the circuit court properly denied it.

Therefore,

IT IS ORDERED that the order is summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals