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DISTRICT II

September 12, 2018

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

2017AP2038 State of Wisconsin v. Andre W. Warfield (L.C. #2005CF191)

Before Reilly, P.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).

Andre W. Warfield appeals pro se from an order denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case

is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2015-16).[1] We affirm the order of the circuit court.

In 2005, Warfield was convicted following a jury trial of kidnapping, armed burglary, conspiracy to commit armed robbery by use of force, physical abuse of a child, and seven counts of taking hostages. He filed a direct appeal, we affirmed his conviction, and the Wisconsin Supreme Court denied his request for review. In 2011, Warfield filed pro se a WIS. STAT. § 974.06 motion, which the circuit court denied following an evidentiary hearing. His appeal was unsuccessful. In 2015, he filed another postconviction motion, which the circuit court denied, and we affirmed the circuit court. Then, in 2016, Warfield filed the postconviction motion now before us, pursuant to § 974.06. At a hearing on the motion, the State argued that Warfield's claims are procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The circuit court agreed and denied the motion. Warfield appeals.

"We need finality in our litigation." ***Id.*** at 185. Absent a showing of a sufficient reason, "claims of error that could have been raised on direct appeal or in a previous [WIS. STAT.] § 974.06 motion are barred from being raised in a subsequent § 974.06 motion." ***State v. Lo***, 2003 WI 107, ¶15, 264 Wis. 2d 1, 665 N.W.2d 756; ***Escalona-Naranjo***, 185 Wis. 2d at 185. Whether a defendant's claim is procedurally barred and whether a sufficient reason exists for the failure to previously assert the claim present questions of law we review de novo. ***State v. Kletzien***, 2011 WI App 22, ¶¶9, 16, 331 Wis. 2d 640, 794 N.W.2d 920.

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

Warfield asserts on appeal that his trial counsel provided him with ineffective assistance "by refusing to investigate and hiding evidence of witnesses Prentice Lee, Cedrick Stevenson statements that [Warfield] was not involved in the alleged crimes [of which he] was convicted." Relatedly, he also asserts that the statements by Lee and Stevenson, respectively dated October 10, 2013, and April 29, 2015, constitute newly discovered evidence that require reversal of his convictions.[2]

In the statements/affidavits of Lee and Stevenson, which Warfield included with his postconviction motion and fully relies upon on appeal, Lee attests that he and Warfield never "met," "talked" or "planned" anything in relation to the crimes of which Warfield was convicted, and Stevenson attests he has "never known or met" Warfield. Warfield conclusorily claims these statements by Lee and Stevenson constitute newly discovered evidence that would have resulted in a not guilty verdict had trial counsel brought them to light for his trial and that trial counsel performed deficiently by not doing so.

Warfield previously filed two postconviction motions in which he failed to raise the claim that his trial counsel performed ineffectively by failing to use Lee's or Stevenson's statements. He appears to indicate, however, that he has a sufficient reason for failing to include such a claim—the statements by Lee and Stevenson are newly discovered. *See* ***State v. Love***, 2005 WI 116, ¶51, 284 Wis. 2d 111, 700 N.W.2d 62 (newly discovered evidence can constitute a sufficient reason for failing to previously raise an issue). As noted, he also independently asserts

[2] In this most recent postconviction motion, Warfield raised a plethora of issues. The circuit court rejected his motion as barred on procedural grounds per ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and on appeal Warfield has failed to claim error by the circuit court with regard to all of those issues except the ones we address here, so we deem him to have abandoned them. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the [circuit] court, but not raised on appeal, is deemed abandoned.").

he is entitled to reversal of his convictions based upon these statements constituting newly discovered evidence.

To establish that the statements of Lee and Stevenson constitute newly discovered evidence, Warfield would have to prove by clear and convincing evidence that (1) the evidence was discovered after his conviction, (2) he was not negligent in seeking the evidence, (3) the evidence is material to an issue in the case, and (4) the evidence is not merely cumulative. *See* ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42; ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). We must reject outright Warfield's claim that the statements constitute newly discovered evidence because he developed no legal argument before the circuit court or us as to how they meet these requirements. *See* ***Clean Wis., Inc. v. PSC***, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 ("We will not address undeveloped arguments."); ***W.H. Pugh Coal Co. v. State***, 157 Wis. 2d 620, 634, 460 N.W.2d 787 (Ct. App. 1990) (we do not consider arguments unsupported by legal authority). Because Warfield thus fails to establish that the statements constitute newly discovered evidence, he has not shown that they provide a sufficient reason for his failure to previously raise the ineffective assistance of trial counsel issue he raises in this appeal and they provide us with no independent basis to reverse his conviction.

Furthermore, we observe that Lee's statement is signed a year and a half before Warfield filed his 2015 postconviction motion, suggesting Warfield may have known about the statement prior to filing that motion and thus could have raised the current claim related to it in that motion. And as to Stevenson's statement, signed around the time Warfield filed his 2015 postconviction motion, the crux of it is that Stevenson has "never known or met" Warfield. However, accepting for the moment that the statement is true, if Warfield and Stevenson never

knew each other, Warfield would have known that fact prior to his trial and the filing of his postconviction motions.

Even if Warfield's ineffective assistance of trial counsel claim was not procedurally barred, it would fail on the merits. To establish ineffective assistance of counsel, a defendant must prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice, a "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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Cooks***, 2006 WI App 262, ¶33, 297 Wis. 2d 633, 726 N.W.2d 322 (citation omitted).

As the State points out in its response brief, "the only statements identified are the affidavits Warfield attached to his motion. And these affidavits, and the statements in them, did not exist at the time of Warfield's trial or direct appeal. So his counsel could not have found them, let alone hide them from Warfield." Furthermore, neither Warfield's postconviction motion nor his supportive brief to the circuit court on this matter indicate trial counsel was aware Lee and Stevenson would have provided such statements. Thus, Warfield has not articulated a basis upon which trial counsel could be found deficient. Additionally, Warfield only conclusorily states that the result of his trial would have been different if his trial counsel had performed as Warfield claims he should have; he develops no argument to demonstrate a reasonable probability of a different result. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (stating we need not address undeveloped arguments). Without a developed argument, he cannot satisfy the prejudice prong and thus cannot prevail.

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.

Sheila T. Reiff
Clerk of Court of Appeals