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DISTRICT I

Amended December 21, 2018
December 18, 2018

To:

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

2017AP1834 State of Wisconsin v. Ronald Marion Carpenter
(L.C. # 2007CF5359)

Before Kessler, P.J., Brennan 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).

Ronald Marion Carpenter, *pro se*, appeals the orders denying his various requests for postconviction relief. Based upon our review of the briefs and record, we conclude at conference

that this case is appropriate for summary disposition and affirm. *See* WIS. STAT. RULE 809.21 (2015-16).[1]

Background

This is not the first time Carpenter has been before this court and to the extent the underlying facts surrounding his conviction are addressed in our prior opinions, they need not be repeated. *See* ***State v. Carpenter*** (***Carpenter I***), No. 2009AP2496-CR, unpublished slip op. (WI App Apr. 13, 2011); *see also* ***State ex rel. Carpenter v. Haines*** (***Carpenter II***), 2012AP2274-W, unpublished slip op. and order (WI App Jan. 18, 2013). As relevant for purposes of this appeal, it suffices to state that following a jury trial, Carpenter was convicted of kidnapping, false imprisonment, four counts of second-degree sexual assault by use of force, and four counts of first-degree sexual assault as a party to the crime.[2]

Postconviction/appellate counsel was then appointed for Carpenter at county expense.[3] Before postconviction counsel filed a notice of appeal on Carpenter's behalf, Carpenter filed his own notice of appeal indicating that he wished to discharge postconviction counsel. Postconviction counsel then filed a motion to withdraw with this court and requested that the motion be held in abeyance until the trial court advised whether it would appoint successor counsel for Carpenter. In response to our inquiry, the trial court advised that it would not appoint successor counsel for Carpenter.

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

[2] The Honorable Daniel L. Konkol entered the judgment of conviction.

[3] Carpenter was not financially eligible for representation for postconviction purposes through the State Public Defender's office.

Carpenter then filed a letter with this court stating both that he wished to proceed *pro se* and to have new counsel appointed. We explained the disadvantages of self-representation and further directed Carpenter to provide this court with a clear indication of the following: (1) that he understood the risks of self-representation; (2) that he understood that new counsel would not be appointed for him but he nevertheless wished to proceed *pro se*; and (3) that he knew of no reason he would be unable to represent himself.

Carpenter's response failed to demonstrate that he was aware of the risks of self-representation. He also failed to acknowledge that new counsel would not be appointed for him. We gave Carpenter another chance to do so when we directed him to file a supplemental response. Again, he did not address our concerns about his awareness of the risks of self-representation. As a result, we denied postconviction counsel's motion to withdraw.

In the direct appeal, the sole issue was whether Carpenter was denied his constitutional right to a public trial. *See* ***Carpenter I***, No. 2009AP2496-CR, ¶1. We affirmed the judgment, *see* ***id.***, and the Wisconsin Supreme Court denied Carpenter's petition for review.

Carpenter subsequently filed a *pro se* postconviction motion under WIS. STAT. § 974.06. In the motion, he sought postconviction discovery and a new trial on the following grounds: (1) trial counsel was ineffective for failing to investigate and present evidence of the victim's prior untruthful allegations of sexual assault; (2) trial counsel was ineffective for failing to obtain the victim's mental health records; and (3) trial counsel was ineffective for failing to impeach various aspects of the victim's testimony. Carpenter further alleged that his postconviction

counsel was ineffective for failing to previously raise these claims. The postconviction court denied the motion without a hearing.[4]

This brings us to the orders at issue in the present appeal.[5] Approximately six years after he filed his first WIS. STAT. § 974.06 motion, Carpenter, *pro se*, filed a motion seeking sentence modification. In its decision denying Carpenter's motion, the postconviction court explained that Carpenter had not set forth a new factor so as to warrant modification of his sentence.[6] The postconviction court additionally explained that even if it were to liberally construe Carpenter's filing as a motion for a new trial under § 974.06, his claims would be procedurally barred. The postconviction court concluded that Carpenter's allegations "are conclusory and do not warrant relief of any kind."

Carpenter asked the postconviction court to reconsider its decision. In his reconsideration motion, Carpenter appeared to make the following additional claims: (1) there was insufficient evidence to support his convictions; (2) trial counsel was ineffective for failing to impeach aspects of the victim's testimony; and (3) the interest of justice warranted a new trial. The postconviction court denied Carpenter's motion for the reasons set forth in its original decision.

[4] The Honorable Rebecca F. Dallet issued the decision and order denying Carpenter's WIS. STAT. § 974.06 motion.

[5] The unsuccessful writ proceedings Carpenter pursued in the interim do not warrant discussion here.

[6] The Honorable Mark A. Sanders issued the orders underlying this appeal: the order denying Carpenter's postconviction motion for sentence modification; the order denying Carpenter's motion for reconsideration; and the order denying Carpenter's motion for an evidentiary hearing.

Two weeks later, Carpenter filed a motion seeking an evidentiary hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), and a motion to supplement the record. The postconviction court denied the motion explaining that it was based on claims of ineffective assistance of counsel that were previously raised and addressed. The postconviction court additionally made clear that Carpenter was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), from seeking a new trial based on the ineffective assistance of counsel.

This appeal follows.

Discussion

(1) Carpenter is not entitled to sentence modification.

In his motion for sentence modification, Carpenter alleged that the victim committed perjury and additionally appeared to argue that his good behavior and rehabilitation in prison were new factors warranting sentence modification.

A trial court may modify a sentence upon a defendant's showing of a new factor. ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law we review independently. *See* ***id.***, ¶33.

Carpenter's assertion that the victim committed perjury, which was seemingly connected to vague allegations of ineffective assistance of trial counsel and of a ***Brady*** violation, is not

grounds for sentence modification. *See* ***Brady v. Maryland***, 373 U.S. 83 (1963). As support for his claim, Carpenter relied on an incident report prepared by the Milwaukee police department. On appeal, he submits that his trial counsel had the report but failed to use it. Carpenter's dissatisfaction related to trial counsel's use of evidence does not amount to a fact or set of facts that were either not in existence or were unknowingly overlooked by all of the parties. *See* ***Harbor***, 333 Wis. 2d 53, ¶40. Additionally, Carpenter's progress in prison does not constitute a new factor meriting sentence modification. ***State v. Krueger***, 119 Wis. 2d 327, 335, 351 N.W.2d 738 (Ct. App. 1984) (holding that consideration of an appellant's progress in the rehabilitation system is not a "new factor").

Given that he has not shown the existence of a new factor, the postconviction court properly concluded that Carpenter was not entitled to sentence modification.

(2) Carpenter's other claims are procedurally barred.

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." ***Escalona-Naranjo***, 185 Wis. 2d at 185. 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). Whether a procedural bar applies is a question of law we review independently. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

Carpenter submits that ***Escalona***'s procedural bar should not apply because "post[]conviction counsel was forced on [him]" by this court. He additionally asserts that it was the trial court's duty to address withdrawal motions and to advise him on the record of the risks of proceeding *pro se*. He argues: "[A]bsent this error by the trial court on direct appeal, it's reasonable to assume that the court would have appointed counsel for the defendant[']s appeal, thereby providing more issues on appeal and[/]or provided better research on developing the issues and arguments[.]" He contends that postconviction counsel was ineffective for abandoning Carpenter's request to file a WIS. STAT. RULE 809.30 motion alleging ineffective assistance of trial counsel.

These are not sufficient reasons. First, the State, citing WIS. STAT. RULE 809.30(4)(a), submits, and Carpenter does not refute in his reply brief, that this court properly decided postconviction/appellate counsel's motion to withdraw. By failing to refute the argument, Carpenter concedes it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Second, contrary to Carpenter's assertion, the record shows that the trial court would not have appointed successor counsel for Carpenter at county expense. Third, this court provided Carpenter with two opportunities to demonstrate his ability to proceed *pro se* and to potentially raise the issues he wished to pursue. Carpenter's failure to

take advantage of these opportunities does not amount to a sufficient reason to overcome the procedural bar.[7]

In his reply brief, Carpenter argues that the procedural bar cannot be applied here because neither of the underlying motions—for sentence modification and for an evidentiary hearing—were brought pursuant to WIS. STAT. § 974.06. We agree that a motion requesting sentence modification based on a new factor is not subject to ***Escalona***'s procedural bar and have, therefore, addressed that claim above. *See* ***State v. Grindemann***, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507. As to Carpenter's motion for an evidentiary hearing, we are not bound by the labels parties place on their filings. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983) (explaining that courts look beyond the label that a prisoner applies to pleadings to determine if he or she is entitled to relief). Regardless of the label Carpenter attached, his motion for an evidentiary hearing was necessarily a motion under § 974.06.

(3) Carpenter is not entitled to a new trial in the interest of justice.

Carpenter additionally asks this court to exercise its power to grant a new trial in the interest of justice. Pursuant to WIS. STAT. § 752.35, we may order a new trial in the interest of justice on two grounds: "[I]f it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Carpenter seeks a new trial on both grounds.

[7] To the extent that Carpenter's brief can be read to add new bases for this court to conclude that a sufficient reason exists, we do not consider them. This court's review of the sufficiency of the pleadings is limited to the four corners of the underlying motion, not additional claims made in appellate briefs. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433.

In order to establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted). "In order to grant a discretionary reversal for a miscarriage of justice, there must be a substantial probability of a different result on retrial." *See* ***State v. Wery***, 2007 WI App 169, ¶21, 304 Wis. 2d 355, 737 N.W.2d 66.

Carpenter claims a new trial in the interest of justice is warranted because the jury did not hear about a statement to police provided by the victim's mother or hear her testify. "Discretionary reversals based on a determination that the jury was denied the opportunity to hear important evidence have occurred when 'the jury was erroneously denied the opportunity' to hear important, relevant evidence while other evidence was erroneously admitted." ***State v. Burns***, 2011 WI 22, ¶45, 332 Wis. 2d 730, 798 N.W.2d 166 (citation omitted). "The 'erroneous' denial of relevant evidence refers to a legal evidentiary error by the trial court." *See* ***id.*** (citation omitted). Here, Carpenter does not explain how the jury was *erroneously* denied the opportunity to hear important evidence. We need not consider arguments which are undeveloped and will not do so here. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

As "miscarriages of justice," Carpenter alleges: the ineffectiveness of trial counsel; postconviction counsel being "forced" on him; the victim's perjured and contradictory testimony; and being charged and convicted of aiding and abetting men who do not exist. Carpenter does not, however, develop an argument that, due to these alleged miscarriages of justice, there is a substantial probability of a different result on retrial—he offers only conclusory

assertions. This argument also is undeveloped and, therefore, we will not consider it further. *See* ***Pettit***, 171 Wis. 2d at 646.

Therefore,

IT IS ORDERED that the orders are summarily affirmed. *See* 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