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DISTRICT I

January 11, 2019

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

2018AP404	State of Wisconsin v. Deontaye Terrell Lusk (L.C. # 2009CF4148)
2018AP405	State of Wisconsin v. Deontaye Terrell Lusk (L.C. # 2009CF4173)
2018AP406	State of Wisconsin v. Deontaye Terrell Lusk (L.C. # 2009CF5801)
2018AP407	State of Wisconsin v. Deontaye Terrell Lusk (L.C. # 2010CF1596)

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

In these consolidated matters, Deontaye Terrell Lusk, *pro se*, appeals the order denying his postconviction motion.[1] Based on our review of the briefs and record, we conclude at

[1] The Honorable Mark A. Sanders presided over the postconviction proceedings underlying these appeals.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[2] We summarily affirm the order.

Background

As set forth in our 2013 decision resolving Lusk's direct appeal:

> Lusk was charged and convicted by a jury of thirteen felonies in four cases, all of which were joined for trial. On appeal of all cases, Lusk argue[d] that joinder of his cases for trial was improper and prejudicial to his defense. Lusk also argue[d] that a photo lineup shown to one witness, Katie Dean, was unduly suggestive and that Dean's identification should have been excluded. We conclude[d] that under the facts alleged in the criminal complaints, joinder of these cases for trial was proper under applicable Wisconsin law. We also conclude[d] that under the facts of this case, the photo lineup was not suggestive.

State v. Lusk, Nos. 2012AP587-CR, 2012AP588-CR, 2012AP589-CR, 2012AP590-CR, unpublished slip op. ¶1 (WI App July 16, 2013). We affirmed, *see* ***id.***, and the Wisconsin Supreme Court denied Lusk's petition for review.[3]

More than three years after our decision resolving his direct appeal, Lusk, *pro se*, filed the postconviction motion underlying this appeal. He claimed his trial and postconviction counsel gave him ineffective assistance, he had newly discovered evidence, and he was entitled to relief in the interest of justice.

As to his newly discovered evidence claim, Lusk asserted that a key witness, Dennis Avant, had recanted his trial testimony. Lusk further alleged that affidavits by fellow inmates

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

[3] The Honorable Rebecca F. Dallet presided over Lusk's trial and sentencing.

established that a police officer intimidated them into providing false information about Lusk. In addition, Lusk claimed that in a new affidavit Timothy Carter confessed to a homicide Lusk was convicted of committing.

Following briefing, the postconviction court issued a written decision denying, in part, Lusk's postconviction motion. The postconviction court concluded that Lusk was entitled to an evidentiary hearing on his claim concerning Avant's recantation.[4] However, as to Lusk's claim that Carter took responsibility for one of the homicides that Lusk was convicted of committing, the postconviction court found: "Nothing in Carter's affidavit constitutes an admission to the shooting." The postconviction court further held that Lusk's claim that trial counsel was ineffective was procedurally barred and that his assertions about postconviction counsel's performance were conclusory. The postconviction court denied Lusk's request for a new trial in the interest of justice.

The postconviction court subsequently denied Lusk's remaining newly discovered evidence claim. This appeal follows.

[4] The postconviction court additionally granted Lusk's motion for the appointment of counsel to assist him at the hearing.

Discussion

(1) Lusk's ineffective assistance of counsel claim is procedurally barred.

Lusk's primary claim on appeal is that trial counsel was ineffective for failing to call certain witnesses, object at trial, introduce what he believes was exculpatory evidence, and move for a mistrial. The postconviction court properly denied this claim because it is barred.

The postconviction procedures of WIS. STAT. § 974.06 allow a convicted offender to attack a conviction after the time for a direct appeal has expired. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 176, 517 N.W.2d 157 (1994). The opportunity to bring postconviction motions, however, is not limitless. Section 974.06(4) requires a prisoner to raise all constitutional and jurisdictional grounds for postconviction relief in his or her original, supplemental, or amended motion. *See* ***id.***; *see also* ***Escalona***, 185 Wis. 2d at 185. If a convicted offender did not raise his or her grounds for postconviction relief in a prior postconviction proceeding, or if prior litigation resolved the offender's claims, they may not become the basis for a subsequent postconviction motion under § 974.06 unless the offender demonstrates a sufficient reason for failing to allege or adequately raise the claims in the prior proceeding. ***Escalona***, 185 Wis. 2d at 181-82. On appeal, we independently determine the sufficiency of an offender's reason for serial litigation by examining the four corners of his or her postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

Lusk's claim that his trial counsel was ineffective stems from proceedings that took place *before* he filed his direct appeal. Therefore, he could have raised this claim earlier. As a sufficient reason for failing to do so, Lusk argues that his trial counsel could not be expected to

challenge his own effectiveness. This reason is not sufficient because Lusk was represented by a different attorney when he pursued his direct appeal.

Lusk also claims that his postconviction counsel was ineffective for not challenging trial counsel's ineffectiveness.[5] Postconviction counsel's ineffectiveness may, in some circumstances, constitute a sufficient reason for serial litigation. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

To obtain an evidentiary hearing, a defendant must do more than merely assert in a conclusory fashion that postconviction counsel was ineffective. *See* ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. Rather, a convicted defendant must "make the case" of postconviction counsel's ineffectiveness. ***Id.***, ¶67.

Lusk did not make the case of postconviction counsel's ineffectiveness in his postconviction motion. He was required to set forth with particularity facts showing that postconviction counsel's performance was both deficient and prejudicial. *See* ***id.***, ¶21 (a defendant claiming that postconviction counsel provided ineffective assistance must allege that postconviction counsel's performance was deficient and prejudicial). While Lusk's motion details what he believes were trial counsel's deficiencies, it does not adequately explain why or

[5] Although Lusk, at times, references the perceived failings of appellate counsel, his current litigation actually raises claims that counsel was ineffective in his role as postconviction counsel. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-79, 556 N.W.2d 136 (Ct. App. 1996) (describing forum for raising claims of ineffective assistance of trial counsel). As the State points out, to the extent Lusk is making a stand-alone claim of ineffective assistance of appellate counsel, such a claim is properly raised by a petition for a writ of habeas corpus in this court. *See* ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992); *see also* ***State v. Starks***, 2013 WI 69, ¶35, 349 Wis. 2d 274, 833 N.W.2d 146. Even on the merits, Lusk's conclusory challenge to the effectiveness of his appellate counsel on direct appeal does not establish a sufficient reason for circumventing the procedural bar.

how postconviction counsel erred by failing to raise the issues he identifies. *See* ***id.***, ¶65 (a defendant may not identify a number of alleged errors and then simply claim that postconviction counsel should have pursued them).

Moreover, Lusk's assertions are conclusory. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶62, 360 Wis. 2d 522, 849 N.W.2d 668 (the mere fact that postconviction counsel did not pursue certain claims does not demonstrate ineffectiveness, and "[w]e will not assume ineffective assistance from a conclusory assertion"). Lusk has not developed why the issues he identifies were "clearly stronger" than the ones that were actually brought. *See* ***id.***, ¶73. To succeed on his motion, Lusk needed to do more than identify potential issues for appeal. *See* ***Balliette***, 336 Wis. 2d 358, ¶67.

In the context of his ineffective assistance of counsel claim, Lusk asks that we exercise our discretionary reversal power under WIS. STAT. § 752.35 because "the real controversy has not been fully tried[.]" Discretionary reversal is granted "infrequently and judiciously." ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). Nothing in this appeal, in which Lusk has not shown ineffective assistance of counsel, persuades us that the real controversy was not fully tried. The extraordinary remedy of discretionary reversal is not warranted.

(2) Lusk has not shown the existence of newly discovered evidence warranting a new trial.

Next, Lusk challenges the postconviction court's ruling on his newly discovered evidence claim. Whether to grant a new trial due to newly discovered evidence was within the postconviction court's discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. Evidence is newly discovered when a defendant satisfies the following factors: "(1) the

evidence was discovered after conviction; (2) the defendant 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." ***Id.***, ¶32 (citation omitted). If the defendant succeeds in proving all four factors, "then it must be determined whether a reasonable probability exists that had the jury heard the newly[ ]discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." *See* ***id.***

We conclude that the postconviction court properly exercised its discretion when it denied Lusk's request for a new trial. Lusk argues that Avant's affidavit recanting his trial testimony constitutes newly discovered evidence. To support this claim Lusk submitted affidavits signed by Avant, and other fellow inmates. As detailed above, the postconviction court concluded that Lusk was entitled to an evidentiary hearing on his claim concerning Avant's recantation. Lusk, however, did not obtain a transcript of the postconviction court's oral ruling on this issue. In its absence, we must assume that the missing transcript supports the postconviction court's denial of this facet of his newly discovered evidence claim.[6] *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993) ("[W]hen an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling.").

[6] The postconviction court's written order that followed the evidentiary hearing provides only that the motion was denied "for reasons stated on the record[.]"

The remaining facet of Lusk's newly discovered evidence claim—Carter's purported confession—fails because it is undeveloped.[7] *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). The postconviction court found that Carter's undated affidavit lacked an admission to the shooting for which Lusk was convicted. Lusk does not explain how the affidavit satisfies all of the factors needed to qualify as newly discovered evidence. In light of the inadequate briefing, we decline to address this claim. *See* ***id.*** at 647.

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.

Sheila T. Reiff
Clerk of Court of Appeals

[7] In his opening brief, Lusk offers only that Carter's affidavit is included in the appendix to the brief and suggests that it provides a circumstantial guarantee of trustworthiness as to Avant's recantation. In his reply brief, Lusk focuses on whether he was negligent in seeking the evidence. He does not analyze the other factors.