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**DISTRICT I**

June 17, 2019

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

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2018AP608

State of Wisconsin v. Carlos Rene Delgado  
(L.C. # 1990CF900475)

Before Kessler, Brennan and Kloppenburg, 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).**

Carlos Rene Delgado, *pro se*, appeals the circuit court's order denying his *pro se* postconviction motion brought pursuant to WIS. STAT. § 974.06 (2017-18).<sup>1</sup> Delgado argues (1) that his trial counsel provided him with constitutionally ineffective assistance by failing to

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<sup>1</sup> All reference to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

call an expert witness to counter the testimony of the State's expert, and (2) that his trial counsel provided him with constitutionally ineffective assistance by failing to call his brother and sister as defense witnesses. Based on 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. We affirm.

On October 1, 1999, Delgado was convicted after a jury trial of six counts of first-degree sexual assault of a child involving two victims. Appointed counsel pursued postconviction relief and an appeal on Delgado's behalf. On May 29, 2002, we affirmed the judgment of conviction and order denying postconviction relief. On July 10, 2003, Attorney Joseph Redding filed a collateral attack on Delgado's conviction under WIS. STAT. § 974.06. The circuit court denied the motion on October 9, 2003. We affirmed the order on March 31, 2005. Over ten years later, Delgado brought the current § 974.06 postconviction motion *pro se*. The circuit court denied the motion on February 8, 2018.

To prove a claim of ineffective assistance of trial counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, “the 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.’” *State v. Carter*, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695 (citation omitted). A postconviction motion alleging ineffective assistance of counsel must include “sufficient material facts for [the] reviewing court[] to meaningfully assess [the] defendant’s claim.” *State v. Allen*, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433.

Delgado contends that his trial counsel provided him with constitutionally ineffective assistance by failing to call an expert witness to counter the testimony of the State's

psychological expert, Teresa Ortiz. However, Delgado has not provided the affidavit of a psychological expert who would offer testimony to discredit Ortiz, nor has he adequately explained how and why the testimony of a defense psychological expert would undermine Ortiz's testimony. Delgado also contends that his trial counsel provided him with constitutionally ineffective assistance by failing to call his brother Jose Delgado, and his sister, Blanca Delgado, as defense witnesses during trial. However, Delgado has not provided affidavits from his brother and sister explaining what their testimony would be, nor has he adequately explained what relevant admissible testimony either witness had to offer. Thus, Delgado has not shown a reasonable probability that the result of his trial would have been different had his trial lawyer called the three witnesses. *See Carter*, 324 Wis. 2d 640, ¶37 (the defendant must show that there is a reasonable probability that the result of the trial would have been different). Therefore, we reject these claims.

In closing, we briefly address the State's argument that Delgado's current claims are barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The State argues that Delgado's claims are barred because he has not articulated a sufficient reason for failing to raise his current claims in his prior collateral attack on his conviction. Pursuant to WIS. STAT. § 974.06(4), "[a]ll grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion ... unless the court finds a ground for relief asserted which for *sufficient reason* was not [previously] asserted" (emphasis added).

The State correctly contends that because Delgado did not have a right to counsel during his prior collateral attack on his conviction, he cannot argue that the lawyer representing him during the prior collateral attack provided him with constitutionally ineffective assistance. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (a constitutional right to effective assistance of

counsel exists only when the right to counsel is constitutionally guaranteed). The State then extrapolates that Delgado cannot argue that his lawyer’s alleged ineptness is a “sufficient reason” under WIS. STAT. § 974.06(4) because he did not have a constitutional right to effective assistance of counsel in his collateral attack. The State’s reasoning conflates the legal standards pertaining to constitutional ineffectiveness of counsel with the statutory “sufficient reason” standard of § 974.06(4). These two standards are not co-extensive. We address this point to avoid confusion in future cases even though our decision does not turn on the procedural bar of *Escalona-Naranjo*.

Upon the foregoing,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*