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December 12, 2019

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

2018AP742 State of Wisconsin v. Bobby L. Tate (L.C. # 2009CF2842)

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

Bobby L. Tate, *pro se*, appeals from orders denying his WIS. STAT. § 974.06 (2017-18) postconviction motion and his motion for reconsideration.[1] Based upon our review of the briefs

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Tate was charged with one count of first-degree intentional homicide, one count of second-degree reckless injury, and one count of possession of a firearm by a felon. He filed a suppression motion challenging his arrest and the search and seizure of physical evidence from his mother's home, where Tate was arrested and where detectives found incriminating evidence. After an evidentiary hearing, the trial court denied the motion.

Subsequently, Tate entered into a plea agreement with the State pursuant to which he pled no contest to two felonies: first-degree reckless homicide and possession of a firearm by a felon. He was sentenced to a total of forty-three years of initial confinement and fourteen years of extended supervision.

Tate appealed, challenging one of the trial court's rulings at the suppression hearing. Specifically, he argued "that an order allowing police to track the location of his cell phone constituted an illegal search warrant and that all evidence obtained as a result of the location data should have been suppressed." *See* ***State v. Tate***, No. 2012AP336-CR, unpublished slip op. ¶1 (WI App Dec. 27, 2012). After this court affirmed Tate's convictions, the supreme court granted Tate's petition for review and ultimately affirmed Tate's convictions. *See* ***State v. Tate***, 2014 WI 89, ¶2, 357 Wis. 2d 172, 849 N.W.2d 798.

In 2016, Tate filed a *pro se* petition for habeas corpus pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). Tate alleged that his appellate counsel provided ineffective assistance during Tate's direct appeal by not raising certain issues. As relevant to this appeal, Tate argued that appellate counsel should have presented an argument challenging the

trial court's finding that Tate's mother consented to the search of her home. In our decision denying the petition, we concluded that Tate had failed to demonstrate that this issue was "clearly stronger than the issue that his appellate counsel raised" in the direct appeal. *See* ***State ex rel. Tate v. Foster***, No. 2016AP172-W, unpublished op. and order at 4 (WI App April 17, 2017) (emphasis omitted). We explained:

> The [trial] court found that Tate's mother consented to the police search after the [trial] court heard testimony from Tate's mother and the police officers involved. The [trial] court is the arbiter of witness credibility and its factual findings will not be overturned on appeal unless they are clearly erroneous. WIS. STAT. § 805.17. Given the [trial] court's factual findings on the consent issue and our highly deferential standard of review on appeal, Tate has not met his burden of showing that his consent argument is clearly stronger than the argument presented by his appellate counsel on direct appeal.

Id. at 4-5 (citation omitted).

In 2018, Tate filed the *pro se* WIS. STAT. § 974.06 motion that is at issue in this appeal. In his motion, Tate acknowledged that his claims could be procedurally barred if he did not provide a "sufficient reason" for raising claims that were not raised in his direct appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 185, 517 N.W.2d 157 (1994) (holding that a defendant cannot raise an argument in a subsequent postconviction motion that was not raised in the defendant's prior postconviction motion or direct appeal unless the defendant provides a "sufficient reason" for not previously raising it). Tate alleged that in his case, the ineffective assistance of postconviction counsel provided a sufficient reason for raising new issues. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d. 668 ("In some instances, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal."). Specifically, Tate argued

that *postconviction* counsel provided ineffective assistance by failing to file a postconviction motion alleging that *trial* counsel was ineffective for: (1) failing to challenge the search of Tate's mother's home "on grounds that the consent was tainted by prior Fourth Amendment violations" (some bolding and capitalization omitted); and (2) failing to allege that the trial court committed a ***Bangert*** violation at the plea hearing. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986) (holding that a defendant may move to withdraw a guilty plea if the trial court did not comply with WIS. STAT. § 971.08 or other court-mandated duties during the plea colloquy).

The trial court denied the motion in a written order, without a hearing, concluding that Tate's arguments were procedurally barred by ***Escalona-Naranjo*** and ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). In addition to denying Tate's ***Bangert*** claim on procedural grounds, the trial court considered the substance of that claim, concluding that Tate's arguments "that the plea colloquy was deficient are without merit." The trial court explained that it had reviewed the transcript of the plea colloquy and found "no actionable deficiency" in its colloquy with Tate.

Tate filed an "application for relief," which the trial court construed as a motion for reconsideration. (Bolding and capitalization omitted.) The trial court denied the motion, and this appeal follows. On appeal, Tate continues to argue the two issues that he raised in his WIS. STAT. § 974.06 motion and reiterated in his motion for reconsideration.

We begin our discussion with the first issue Tate raised in his postconviction motion, which was related to the search of his mother's home. Tate's WIS. STAT. § 974.06 motion stated:

> The trial court concluded the police obtained consent to enter and search Tate's home…. Tate however contends, the record of the motion hearing demonstrates officers illegally entered and searched his home *before* they actually obtained consent…. [Trial counsel] was constitutionally ineffective for failing to challenge the consent as being "tainted" by those illegal acts. Tate contends this issue was "obvious" at the time of his direct appeal and that [trial counsel] should have learned of this potential claim while reviewing the motion hearing transcripts.

Tate's motion asserted that the illegal entry and search occurred when the officer who knocked on the door to speak to Tate's mother stepped into the home before getting her consent to search, and when two other officers stepped in behind the first officer before consent was given.

The trial court concluded that Tate's claim was procedurally barred because he was improperly attempting to relitigate an issue he raised in his 2016 ***Knight*** petition. *See* ***Witkowski***, 163 Wis. 2d at 990. The trial court quoted this court's decision denying Tate's ***Knight*** petition, where we specifically rejected Tate's claim that appellate counsel should have appealed the issue of whether Tate's mother consented to the search of her home. The trial court rejected Tate's attempt to relitigate the claim "that police entered and searched his mother's home without consent."

On appeal, we consider *de novo* whether Tate's claim is procedurally barred. *See* ***State v. Fortier***, 2006 WI App 11, ¶18, 289 Wis. 2d 179, 709 N.W.2d 893. Tate argues that his claim is not procedurally barred because the issue he raised in his WIS. STAT. § 974.06 motion is different than the issue he raised in his ***Knight*** petition. He explains:

> Unlike the consent issue raised in the ***Knight*** proceeding where the question was whether consent was giv[en] at all, the consent issue in the [§] 974.06 motion concedes [] the fact that police obtained consent and instead raises the question whether the consent was "tainted" by a prior nonconsensual warrantless entry and search.

We are not persuaded by Tate's argument. At issue at the suppression hearing was whether Tate's mother gave the officers consent to enter and search the home. The trial court heard testimony concerning the location of the officer who knocked on the front door, what he said to Tate's mother, what she said in response, whether the officers had their weapons drawn, and when the officers entered the home. After hearing detailed testimony from numerous officers and Tate's mother, the trial court found that Tate's mother had given the officers consent to search the home.

As noted, Tate's ***Knight*** petition asserted that appellate counsel should have appealed the trial court's finding that Tate's mother consented to the search. Now he is challenging one of the underlying facts: whether officers waited outside the front door while the first officer was getting permission from Tate's mother to search the home. We reject Tate's assertion that he is raising a different issue than he raised in his ***Knight*** petition. Instead, we agree with the State that "Tate's rephrasing is 'only a slight variation' of the claim" that we rejected in his ***Knight*** petition. *See* ***State v. Crockett***, 2001 WI App 235, ¶15, 248 Wis. 2d 120, 635 N.W.2d 673 ("Rephrasing the same issue in slightly different terms does not create a new issue."). Tate cannot relitigate that issue. *See* ***Witkowski***, 163 Wis. 2d at 990.

We turn to the second issue in Tate's postconviction motion: whether postconviction counsel provided constitutionally deficient representation by failing to allege that trial counsel was ineffective for not bringing a plea withdrawal motion alleging a ***Bangert*** violation. As noted, the trial court denied this claim on both procedural and substantive grounds. We choose

to address the merits of Tate's claim.[2] For reasons explained below, we conclude that the trial court did not erroneously exercise its discretion when it denied Tate's ***Bangert*** claim without holding an evidentiary hearing.

Our supreme court has summarized the legal standards that apply to postconviction motions:

> Whether a motion alleges sufficient facts that, if true, would entitle a defendant to relief is a question of law that this court reviews de novo. The [trial] court must hold an evidentiary hearing if the defendant's motion raises such facts. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing.

State v. Burton, 2013 WI 61, ¶38, 349 Wis. 2d 1, 832 N.W.2d 611 (citations and internal quotation marks omitted). Applying those standards here, we conclude that the record "conclusively demonstrates" that Tate is not entitled to relief. *See* ***id.*** (quoted source omitted).

The Wisconsin Supreme Court "has recognized that [trial] courts have a number of duties at a plea hearing to ensure that a defendant's guilty or no contest plea is knowing, intelligent, and voluntary," including ten enumerated duties. ***State v. Pegeese***, 2019 WI 60, ¶23, 387 Wis. 2d 119, 928 N.W.2d 590. If a trial court fails to fulfill one of the duties mandated in WIS. STAT. § 971.08 or under the ***Bangert*** line of cases (a "***Bangert*** violation"), the defendant may move to withdraw his plea. *See* ***Bangert***, 131 Wis. 2d at 274. ***Pegeese*** explained:

[2] Accordingly, we do not discuss the trial court's ruling concerning procedural waiver or the State's arguments in favor of affirming on procedural grounds.

> Defendants … who move to withdraw a plea based on a defective plea colloquy have the initial burden to meet a two-prong test: (1) the defendant must "make a prima facie showing of a violation of WIS. STAT. § 971.08 or other court-mandated duty"; and (2) the defendant must "allege that the defendant did not, in fact, know or understand the information that should have been provided during the plea colloquy." In order to make a prima facie showing, the defendant may not rely on conclusory allegations. The defendant "must point to deficiencies in the plea hearing transcript" to meet his initial burden. If the defendant fails to meet his initial burden, then the circuit court must deny the defendant's plea withdrawal motion.
>
> When a defendant successfully meets both prongs, then that defendant is entitled to an evidentiary hearing, also known as a "***Bangert*** hearing." If a ***Bangert*** hearing occurs, the burden of proof shifts to the State to show "by clear and convincing evidence that the defendant's plea, despite the inadequacy of the plea colloquy, was knowing, intelligent, and voluntary." In attempting to meet its burden, "[t]he State may use 'any evidence' to prove that the defendant's plea was knowing, intelligent, and voluntary, including any documents in the record and testimony of the defendant or defendant's counsel." If the State fails to meet its burden at the ***Bangert*** hearing, then the defendant is entitled to withdraw his guilty or no contest plea.

See ***Pegeese***, 387 Wis. 2d 119, ¶¶26-27 (citations omitted). We conclude that Tate has not met the first prong of the two-prong test with respect to each of the three plea colloquy deficiencies he alleged.

First, Tate's motion asserted that the trial court failed to "[d]etermine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing." *See* ***id.***, ¶23 (citations omitted). The record contradicts Tate's assertion. The trial court reviewed with Tate the signed guilty plea questionnaire, which indicated that Tate had ten years of education and had not taken medication or drugs in the last twenty-four hours. The trial court also asked Tate questions about his understanding of the criminal complaint and whether he was "confused about anything." Further, the trial court asked

whether Tate had used alcohol or illegal drugs in the last twenty-four hours, whether he was taking prescription medications, and whether a doctor had advised him to take any medications.

Tate's motion suggested that the trial court's colloquy was deficient because Tate "did not in fact know that … the extent of his education and general comprehension was in any way relevant to the plea colloquy proceeding." We reject this argument. The trial court was required to determine Tate's education and understanding, but it was not required to ensure that Tate knew everything the trial court was evaluating to determine if Tate's plea was knowing, intelligent, and voluntary. We conclude that Tate has failed to make a prima facie case that the trial court failed to adequately evaluate his education and comprehension.

The second allegation in Tate's motion was that the trial court failed to "[a]scertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney." *See* ***id.***, ¶23 (citations omitted). It is undisputed that the trial court explicitly asked Tate about threats and promises when it had this colloquy with Tate:

> THE COURT: Has anyone including your lawyer made any threats or in any way forced you to plead no contest to the charges?
>
> [Tate]: No.
>
> THE COURT: Other than the plea negotiations in this matter, has anyone made any promises to you?
>
> [Tate]: No.
>
> THE COURT: To get you to plead no contest to the charges?
>
> [Tate]: No.

Tate's motion argued that the trial court's colloquy was deficient because the trial court asked about promises and threats in the context of pleading no contest and about promises "in general,"

but did not explicitly ask about agreements or threats "in connection with … his appearance at the hearing, or any decision to forgo an attorney." *See* ***id.*** We reject Tate's suggestion that the trial court was required to read any particular language as it ascertained whether Tate had been threatened or promised anything. *See* ***id.***, ¶41 n.8 (holding that trial court is not required "to recite any particular magic words when conducting a plea colloquy"). The trial court's questions during the plea colloquy, as well as its reference to the guilty plea questionnaire that indicates the defendant was not threatened, were sufficient to allow the trial court to ascertain whether promises and threats were made.[3] Accordingly, we conclude that Tate failed to make a prima facie case that the trial court's colloquy was deficient.

Finally, Tate's motion alleged that the trial court failed to "[e]nsure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him." *See* ***id.***, ¶23. Tate—who was represented by an appointed lawyer throughout the trial court proceedings because he was indigent—offered no legal authority for the proposition that the trial court was required to explicitly discuss with Tate his right to appointed counsel when he was, in fact, already represented by appointed counsel. We conclude that Tate did not establish a prima facie case that the trial court failed to meet its obligations with respect to ensuring Tate was aware of his right to appointed counsel.

In summary, we conclude that Tate's motion did not make a prima facie case that the trial court committed a ***Bangert*** violation. It follows that neither trial counsel nor postconviction counsel were deficient for not raising this issue. Because the record conclusively demonstrates

[3] We also note that the record does not indicate that Tate ever alleged there were promises or threats that he did not disclose to the trial court during the plea hearing.

that Tate was not entitled to relief, he was not entitled to an evidentiary hearing on his WIS. STAT. § 974.06 motion. *See* ***Burton***, 349 Wis. 2d 1, ¶38. It was within the trial court's discretion to deny the motion without a hearing, and we discern no erroneous exercise of that discretion. *See* ***id.*** We summarily affirm the denial of Tate's § 974.06 motion and his motion for reconsideration.

Upon the foregoing,

IT IS ORDERED that the orders appealed from 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