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DISTRICT I

January 8, 2020

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

2018AP1927

State of Wisconsin v. Sakajust K. Scott (L.C. # 2012CF5540)

Before Brash, P.J., Kessler 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).

Sakajust K. Scott appeals from a trial court order denying the motion for postconviction relief that he filed pursuant to WIS. STAT. § 974.06 (2017-18).¹ Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary

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

disposition. *See* WIS. STAT. RULE 809.21. We conclude that Scott is barred from relitigating the merits of the claim underlying his allegations of ineffective assistance, specifically his claim that he was denied the right to counsel guaranteed by the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966). Therefore, he is not entitled to relief. We summarily affirm the order.

A jury found Scott guilty of one count of first-degree intentional homicide by use of a dangerous weapon. *See* WIS. STAT. §§ 940.01(1)(a) and 939.63(1)(b) (2011-12). The evidence that was presented to the jury included a video recording of Scott’s interrogation by the police during which he admitted shooting the victim. Scott was not represented by a lawyer during the interrogation. Prior to the jury trial, Scott filed a motion to suppress his confession on grounds “that he was extremely intoxicated” on alcohol and drugs at the time he was interrogated. The trial court denied the motion after holding an evidentiary hearing, and the State was allowed to introduce Scott’s confession in its case-in-chief.

In March 2015, after sentencing and the appointment of postconviction counsel, Scott filed a motion seeking a new trial based on the alleged ineffective assistance of trial counsel. Scott asserted that trial counsel performed deficiently by failing to seek suppression of Scott’s confession on grounds that he had invoked his Fifth Amendment right to counsel prior to being interrogated. The trial court denied the motion without holding an evidentiary hearing.²

We affirmed. *See State v. Scott*, No. 2015AP1154-CR, unpublished slip op. (WI App Aug. 23, 2016). First, we concluded that the “postconviction motion failed to allege sufficient

² The Honorable Stephanie Rothstein presided over the jury trial, sentenced Scott, and denied the March 2015 postconviction motion.

material facts that, if true, would warrant relief.” *See id.*, ¶13. Specifically, we concluded that the motion failed to “show that Scott ever told his trial counsel that he requested an attorney while being arrested.” *See id.*, ¶12. We also concluded that Scott had “fail[ed] to reveal who among his four [successive] trial lawyers was the person he attempted to inform about his claim.” *See id.*

After concluding that the postconviction motion was properly denied based on Scott’s failure to allege sufficient facts, we identified “an additional and independent reason” to affirm. *See id.*, ¶14. We explained:

The law is currently unclear as to whether a defendant may effectively invoke the Fifth Amendment right to counsel at a time when custodial interrogation is not imminent or impending. *See State v. Hambly*, 2008 WI 10, ¶¶2, 4-5, 307 Wis. 2d 98, 745 N.W.2d 48. Because a defendant’s lawyer in a criminal case “is not required to object and argue a point of law that is unsettled,” *see State v. McMahan*, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994), Scott’s trial lawyers had no obligation to pursue the claim Scott raises now.

To explain our conclusion, we briefly review the current state of the law on the issue Scott presents. In *Hambly*, our supreme court recognized that a suspect in custody may invoke the right to counsel when interrogation is actually impending. *See id.*, 307 Wis. 2d 98, ¶24. The court then advised it was “divided on the question whether to adopt a temporal standard ... that a suspect may effectively invoke the Fifth Amendment *Miranda* right to counsel when a suspect is in custody and has made an unequivocal request to speak with an attorney even before interrogation is imminent or impending.” *Hambly*, 307 Wis. 2d 98, ¶4 (quotation marks and footnote omitted). The *Hambly* court ultimately did not resolve the question. *See id.*, ¶¶100-01. Neither the parties to this appeal nor our own research reveal Wisconsin decisions after *Hambly* that further develop the issue. Accordingly, our law currently provides that a suspect in custody may successfully invoke the Fifth Amendment right to counsel only when interrogation is imminent or impending.

Scott did not allege in his postconviction motion that an interrogation was imminent or impending when he allegedly requested counsel during his arrest. The record shows that an

interrogation was not, in fact, imminent or impending; nearly four hours passed before police began to question him. Moreover, although Scott asserts in his appellate brief that he spent those four hours waiting in an “interview room,” he asserted in his postconviction motion only that he was in a “room,” and he testified in pretrial proceedings that he was in the “bullpen,” which is a holding area for prisoners. *See bull pen*, BLACK’S LAW DICTIONARY (10th ed. 2014); *see also State v. Reed*, 2002 WI App 209, ¶8, 256 Wis. 2d 1019, 650 N.W.2d 885.

Because Scott did not demonstrate that an interrogation was imminent at the time he allegedly requested counsel, his postconviction motion necessarily failed to show that any of his attorneys performed deficiently by forgoing an argument that police violated his right to counsel when they questioned him after he allegedly made that request. His trial attorneys had no obligation to pursue the unsettled theory that a request for counsel at the time of arrest when interrogation was not imminent bars police from questioning a suspect later without a lawyer present. “[I]neffective assistance of counsel cases should be limited to situations where the law or duty is clear.” *McMahon*, 186 Wis. 2d at 85.

Scott, No. 2015AP1154-CR, ¶¶14-17 (footnotes omitted).

Scott filed a petition for review with the Wisconsin Supreme Court that urged the court to grant the petition so that it could address four issues, including: (1) “the pleading requirements for a *Machner* hearing;³ (2) “whether a request for counsel before interrogation is imminent or impending effectively invokes a defendant’s Fifth Amendment right to counsel”; (3) “what it means for an interrogation to be imminent or impending”; and (4) “whether the law is so unsettled in this area that [trial] counsel cannot be held to be ineffective for not investigating, raising and litigating the issue.” (Bolding and some capitalization omitted.) The Wisconsin Supreme Court denied the petition for review on December 13, 2016.

³ *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Subsequently, Scott retained new counsel and filed the WIS. STAT. § 974.06 motion that is at issue in this appeal. Scott alleged that he was entitled to postconviction relief because his first *postconviction counsel* provided ineffective assistance by failing to adequately allege that *trial counsel* was ineffective for not moving to suppress Scott's confession on grounds that he invoked his Fifth Amendment right to counsel before his interrogation. Although the § 974.06 motion addressed the ineffective assistance claims, it candidly recognized that Scott's claim for relief was dependent on him being able to demonstrate that he was entitled to suppression of the statements that he made after he allegedly invoked his right to counsel. Scott argued that he had validly invoked his right to counsel because "he reasonably believed that interrogation was impending or imminent."

The trial court denied the WIS. STAT. § 974.06 motion without a hearing.⁴ In doing so, the trial court recognized that our decision affirming Scott's conviction had specifically determined that Scott's interrogation was not imminent and impending when he requested counsel. This appeal follows.

On appeal, Scott once again acknowledges that the success of his WIS. STAT. § 974.06 motion is dependent on his Fifth Amendment claim. We agree, and we turn to his claim that he invoked his right to counsel before his interrogation.

Scott discusses the *Hambly* case and argues: "The facts of the record clearly show that Scott told officers during his arrest that he did not want to talk, that he wanted a lawyer, and that

⁴ The Honorable Mark A. Sanders denied the postconviction motion.

he reasonably believed that interrogation was impending or imminent.” In response, the State asserts that Scott is barred from relitigating this issue.

We agree with the State. It is well-established that “[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). In our decision affirming Scott’s conviction, we analyzed *Hambly* and concluded that the current state of the law was “that a suspect in custody may successfully invoke the Fifth Amendment right to counsel only when interrogation is imminent or impending.” *See Scott*, No. 2015AP1154-CR, ¶15. Applying that law, we determined that the record in Scott’s case showed “that an interrogation was not, in fact, imminent or impending.” *See id.*, ¶16.

Scott disagreed with these determinations and asked the Wisconsin Supreme Court to address the issues unresolved by *Hambly* and determine what was required to demonstrate that an interrogation was imminent or impending. The court denied Scott’s petition for review. Scott cannot relitigate these issues. *See Witkowski*, 163 Wis. 2d at 990.

Because Scott is barred from relitigating this court’s interpretation of *Hambly* and our determination that he did not invoke his right to counsel while his interrogation was imminent or impending, he cannot prove that his Fifth Amendment rights were violated. It follows that he cannot demonstrate that his trial counsel and his first postconviction counsel provided ineffective assistance. Therefore, we summarily affirm the trial court order denying Scott’s WIS. STAT. § 974.06 motion.

Upon the foregoing,

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

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

Sheila T. Reiff
Clerk of Court of Appeals