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DISTRICT I

May 27, 2020

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

2019AP1056 State of Wisconsin v. Oscar Raymond Anderson, Jr.
(L.C. # 1995CF955552)

Before Brash, P.J., Dugan and Donald, 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).

Oscar Raymond Anderson, Jr., *pro se*, appeals from an order of the circuit court denying his WIS. STAT. § 974.06 (2017-18)[1] motion without a hearing. Based upon our review of the

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

briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Accordingly, the order is summarily affirmed.

On November 30, 1995, Anderson and his girlfriend, Mica Beckom, argued. *See* ***State v. Anderson*** (***Anderson I***), No. 1996AP3362-CR, unpublished slip op. at 2 (WI App Feb. 24, 1998). According to Anderson, Beckom threatened him with a butcher knife, so he tried to grab the knife. The two struggled, and when Anderson gained control of the knife, he stabbed Beckom more than twenty-five times. Before fleeing the scene, Anderson bathed, dressed, and called Beckom's employer to inform her that Beckom would not be at work that morning. Beckom's body was discovered on the bedroom floor of her apartment on December 4, 1995. Anderson was arrested on December 20, 1995, and charged with first-degree intentional homicide.

Anderson, represented by Attorney Jeffery Jensen, filed a pretrial motion in which he alleged that during an interrogation session, Milwaukee Police Detective Ricky Burems made a number of statements such as, "[I]f you don't tell us what happened the DA is going to charge you with first degree intentional.… Tell us how it happened and we can get you first[2] degree reckless." Anderson also alleged that Burems "discussed that even if [Anderson] got the maximum penalty of forty years [for first-degree reckless homicide], if he was a model prisoner

[2] The allegations against Burems were made in an affidavit in support of the motion. The word "first" was typed, then crossed out with the word "second" above it, but other references to the degree of reckless homicide were not similarly edited. We use the original typed text here; however, the actual degree of reckless homicide the detective allegedly promised is irrelevant to the issues in the instant appeal.

he would be out of prison in ten years." Based on these allegations, Anderson argued that his incriminating statement to police was involuntary and should be suppressed or, in the alternative, that he was entitled to "specific performance of the police officer's promise to charge the defendant with first degree reckless homicide, as opposed to first degree intentional homicide, if the defendant gave a statement to police."

The trial court[3] held a ***Miranda/Goodchild***[4] hearing at which Burems and Anderson both testified. The trial court made several specific findings of fact, including that "prior to making incriminating statements, [Anderson] was advised of certain rights as required by the ***Miranda*** decision. I find that [Anderson] understood those rights" and validly waived them. The trial court further found that the interview did not constitute improper police conduct or pressure and that "there were no specific promises made." In addition, the trial court expressly noted that "[f]or the most part I've resolved issues of credibility here in favor of the detective whose testimony I found more credible than the testimony of the defendant." Thus, it denied Anderson's motion to suppress. A jury subsequently convicted Anderson as charged, and the trial court sentenced him to life imprisonment with parole eligibility beginning in 2036.

[3] The pretrial motion hearing and trial proceedings were before the Honorable John A. Franke; we refer to him as the trial court.

[4] *See* ***Miranda v. Arizona***, 384 U.S. 436, 444-45 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 264, 133 N.W.2d 753 (1965). A ***Miranda*** hearing is used to determine whether a defendant properly waived his or her constitutional rights before giving a statement, *see* ***State v. Woods***, 117 Wis. 2d 701, 714-15, 345 N.W.2d 457 (1984), and a ***Goodchild*** hearing determines the voluntariness of such a statement, *see* ***id.***, 27 Wis. 2d at 264-65.

Attorney Jensen continued to represent Anderson in postconviction and appellate proceedings. A postconviction motion was not filed,[5] but Anderson pursued a direct appeal. He raised issues regarding his pretrial suppression motion, the trial court's refusal to give lesser-included jury instructions, and the trial court's refusal to instruct the jury on self-defense. This court affirmed. ***Anderson I***, No. 1996AP3362-CR at 1.

In 1998, Anderson filed a *pro se* WIS. STAT. § 974.06 motion, which was dismissed after the State Public Defender appointed Attorney Elizabeth Ewald-Herrick to represent Anderson. Attorney Ewald-Herrick then filed a § 974.06 motion on Anderson's behalf, alleging that Attorney Jensen had been ineffective as trial counsel for his failure to request lesser-included jury instructions. That motion was denied, and we summarily affirmed the denial. *See* ***State v. Anderson***, No. 1999AP2182, unpublished op. and order at 2 (WI App Aug. 28, 2000).

In May 2019, Anderson filed the WIS. STAT. § 974.06 motion underlying this appeal.[6] He alleged that postconviction counsel was ineffective for failing to argue that trial counsel was ineffective for failing to pursue three clearly stronger issues: that Anderson never received ***Miranda*** warnings at the outset of custodial interrogation; that trial counsel failed to remove a subjectively biased juror; and that counsel "failed to appeal to the court of appeals and ask for a remand for additional proceeding[s] on other-acts evidence of the detective's credibility."

[5] "An appellant is not required to file a postconviction motion in the trial court prior to an appeal if the grounds are sufficiency of the evidence or issues previously raised." WIS. STAT. § 974.02(2).

[6] In 2006 and 2017, Anderson pursued habeas corpus petitions in this court, pursuant to ***State v. Knight***, 168 Wis. 2d 509, 519-20, 484 N.W.2d 540 (1992), alleging ineffective appellate counsel. We denied the petitions. *See* ***State ex rel. Anderson v. Kingston***, No. 2006AP1833-W, unpublished op. and order at 3 (WI App Oct. 17, 2006); ***Anderson v. Richardson***, No. 2017AP1385-W, unpublished op. and order at 5 (WI App June 12, 2018).

The circuit court[7] denied the motion. It first noted that it was unclear which postconviction attorney's performance Anderson was challenging and that it was "questionable" whether Anderson could file successive WIS. STAT. § 974.06 motions without being subject to the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Nevertheless, the circuit court concluded that Anderson's three current claims were not clearly stronger than any issues previously raised. Regarding Anderson's claim that he never received ***Miranda*** warnings at the outset of his custodial interrogation, the circuit court noted that the trial court "heard from both the defendant and Detective Burems and found otherwise," so Anderson's current argument was "nothing more than a rehash of the record." Regarding the juror, the circuit court noted that "there is no showing other than conclusory assertions that the juror was biased in some way." Finally, the circuit court noted that Attorney Jensen had in fact moved this court for a remand; that the motion was denied by this court did not render counsel ineffective. Anderson appeals.

Any postconviction claim that could have been raised in a prior proceeding is barred in a subsequent proceeding, absent the defendant demonstrating a sufficient reason for the failure to raise the issue in the first appeal. ***Escalona***, 185 Wis. 2d at 181-82. Ineffective assistance of

[7] The current postconviction motion was reviewed and denied by the Honorable Janet A. Protasiewicz; we refer to her as the circuit court.

postconviction counsel can sometimes constitute that sufficient reason.[8] *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). When postconviction counsel is accused of ineffective assistance because of a failure to raise certain material issues before the circuit court, the defendant must show that the particular nonfrivolous issues were clearly stronger than issues that counsel did present. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668. Additionally, a defendant claiming postconviction counsel was ineffective for not challenging trial counsel's performance must show that trial counsel actually was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

[8] Historically, this analysis has typically applied where postconviction counsel fails to preserve a claim of ineffective assistance of trial counsel with a postconviction motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). However, in ***State v. Starks***, 2013 WI 69, ¶4, 349 Wis. 2d 274, 833 N.W.2d 146, our supreme court said that because the attorney who represented the defendant on appeal had not filed any postconviction motions, the attorney was never postconviction counsel, only appellate counsel, and, thus, the defendant should have pursued a petition for a writ of habeas corpus in this court pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). This presents a conflict with the observation in ***Rothering*** that, when claims of ineffective assistance of trial counsel are unpreserved, the defendant's complaint is typically that *postconviction* counsel failed to bring a *postconviction* motion in the circuit court. *See* ***id.***, 205 Wis. 2d at 679.

In October 2019, the supreme court granted review in ***State ex rel. Warren v. Meisner***, appeal No. 2019AP567-W, which the State describes as "a case that confronts paragraph four" of ***Starks***. On February 13, 2020, we received a motion from Anderson seeking to stay this court's decision in this matter pending the supreme court's decision in ***Warren***.

We are not persuaded that a stay is warranted. In ***Starks***, the supreme court noted that the "incorrect" filing of a WIS. STAT. § 974.06 motion instead of a ***Knight*** petition deprived the circuit court of competence, but not jurisdiction. *See* ***Starks***, 349 Wis. 2d 274, ¶¶34-37. Because the substantive issues were fully briefed and the State had not challenged the circuit court's competency when the § 974.06 motion was filed, and in the interests of judicial economy, the supreme court proceeded to a decision on the merits. *See* ***Starks***, 349 Wis. 2d 274, ¶¶36-39. We are in a similar position here—even if the supreme court eventually reaffirms its pronouncement in ***Starks***, Anderson's claims have been briefed and the State apparently did not challenge the circuit court's competency. The motion to stay proceedings is hereby denied.

Whether a WIS. STAT. § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier is a question of law subject to *de novo* review. *See* ***State v. Kletzien***, 2011 WI App 22, ¶¶9, 16, 331 Wis. 2d 640, 794 N.W.2d 920. Similarly, whether a § 974.06 motion alleges sufficient facts to require a hearing is a question of law that this court reviews *de novo*. ***See State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. "[I]f 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 circuit court has the discretion to grant or deny a hearing." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

Anderson's first argument on appeal relates to his statement to Detective Burems. While Anderson acknowledges that the trial court found that the detective had advised him of his ***Miranda*** rights, he complains that trial counsel should have further challenged that factual determination because "the record clearly shows that Anderson wasn't advised of any warnings" and the detective "admitted that he did not read any ***Miranda*** warnings upon sitting down with Anderson."

This issue is procedurally barred, not only because of WIS. STAT. § 974.06 but because admission of Anderson's statement has already been litigated, and "[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). Though Anderson posits a new legal theory—lack of immediate ***Miranda*** warnings—for why his statement should have been suppressed, the admissibility of that statement has already been litigated and resolved against Anderson. *See* ***Witkowski***, 163 Wis. 2d

at 990 ("matter decided on direct appeal may not be relitigated in postconviction relief proceedings even if movant offers a different theory").

Even if this issue were not procedurally barred, it is not clearly stronger than any previously raised. Anderson appears to contend that the first words the detective spoke to him before anything else should have been the ***Miranda*** warnings; instead, the detective "had some preliminary conversation" with Anderson in an attempt to "develop a rapport" with him. But ***Miranda*** warnings need not be provided before every police contact with a suspect; if the information sought through questioning "has no potential to incriminate the suspect, the question requires no ***Miranda*** warnings." *See* ***State v. Harris***, 2017 WI 31, ¶17, 374 Wis. 2d 271, 892 N.W.2d 663. Anderson identifies no improper interrogation conditions or questions prior to being advised of his rights; the record reflects that the rapport-building questions were about the time Anderson lived out of state, where he had gone to school, and "things of that nature." A further challenge to the timing of ***Miranda*** warnings would not have succeeded, so trial counsel was not ineffective for not pursuing the matter. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. If trial counsel was not ineffective, postconviction counsel was not ineffective for failing to challenge trial counsel's performance. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

Anderson's second argument is that trial counsel should have moved to strike a biased juror from the panel. This juror informed the parties during voir dire that he had met a friend of his on the way in; this friend was a prosecutor whom the juror thought might be involved in the case. The prosecutor confirmed that the juror's friend was not assigned to this case and would not be participating in it, confirmed that the juror and his friend had not discussed the facts of the case, and inquired whether "[t]he fact that you know [the other prosecutor], would that affect

your ability to be impartial in this case?" The juror responded, "I don't think so." Anderson contends that this answer demonstrates the juror's subjective bias and that trial counsel failed to move for the juror's removal or to ask further questions about his impartiality.

A criminal defendant is guaranteed the right to an impartial jury. *See* ***State v. Tobatto***, 2016 WI App 28, ¶16, 368 Wis. 2d 300, 878 N.W.2d 701. A juror who is aware of any bias should be removed from the panel. *See* ***id.*** Subjective bias is bias "revealed through the words and demeanor of the prospective juror." *See* ***State v. Faucher***, 227 Wis. 2d 700, 717, 596 N.W.2d 770 (1999). "A failure to object or to further question a juror may be raised as a claim of ineffective assistance of counsel." ***State v. Carter***, 2002 WI App 55, ¶14, 250 Wis. 2d 851, 641 N.W.2d 517.

Anderson does not show how this issue is clearly stronger. First, he has not articulated a theory on how the juror displayed subjective bias beyond his "I don't believe so" answer to the question of whether knowing the other prosecutor would affect his ability to be impartial. Conclusory allegations do not suffice. Moreover, this case is not like ***Carter***, on which Anderson relies. There, the prospective juror unambiguously stated that his personal experiences would affect his ability to be impartial. *See* ***id.***, ¶8. The juror's statement in the instant case is, at worst, unclear. However, "a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality." ***State v. Erickson***, 227 Wis. 2d 758, 776, 596 N.W.2d 749 (1999). Indeed, we "fully expect a juror's honest answers at times to be less than unequivocal." *See* ***id.*** But that does not automatically create bias.

Instead, this case is more like ***Tobatto***, where nothing about the juror's answers suggested prejudgment or an unwillingness to set aside preconceived notions or prior knowledge. *See* ***id.***,

368 Wis. 2d 300, ¶22. Like the juror in ***Tobatto***, *see* ***id.***, the juror here provided additional information when asked whether, if he believed Anderson should be acquitted, he would be worried about what his prosecutor friend would say. The juror plainly answered, "No." Anderson has not shown that any of the juror's answers reveal subjective bias, *see* ***id.***, so he cannot show that a challenge to the juror would have been successful. Thus, trial counsel was not ineffective for not seeking to strike the juror. *See* ***Wheat***, 256 Wis. 2d 270, ¶14.

Finally, Anderson complains that Attorney Jensen failed "to petition the appellate court for a remand proceeding on other-acts character evidence of the detective's credibility" after Anderson had learned of another inmate claiming that Detective Burems "had made improper promises to induce him into giving a statement." Anderson alleges that Attorney Jensen "informed Anderson that he had filed a motion to stay appellate proceeding[s]" for the purpose of filing another motion in circuit court, but that Anderson later learned "that Jensen did not file the motion for remand back to the circuit court."

The record reflects that Jensen did in fact move this court to stay appellate proceedings so he could seek reconsideration in the circuit court. However, we denied the motion, stating we could not conclude there was a sufficient basis for remand set forth. *See* ***State v. Anderson***, No. 1996AP3362-CR, unpublished order (WI App May 13, 1997). Accordingly, any claim of ineffective assistance premised on the belief that Attorney Jensen failed to seek remand simply fails and, thus, is not a clearly stronger issue.

As the record here clearly demonstrates that Anderson is not entitled to relief, the circuit court did not err in denying his WIS. STAT. § 974.06 motion without a hearing.

Upon the foregoing, 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