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DISTRICT IV

March 4, 2021

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

2019AP1667 State of Wisconsin v. William T. Hudson, III (L.C. # 2003CF216)

Before Fitzpatrick, P.J., Blanchard, and Nashold, 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).

William T. Hudson appeals an order denying his WIS. STAT. § 974.06 (2017-18)[1] postconviction motion for a new trial. Based upon our review of the briefs and record, we

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

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Because Hudson's claims are procedurally barred, we affirm.

Following a jury trial, Hudson was convicted of conspiracy to commit first-degree intentional homicide and conspiracy to commit arson. The charges alleged a murder-and-arson-for-hire scheme that began while Hudson was incarcerated with another inmate, Scott Seal who, unbeknownst to Hudson, was working as an informant for the State. Hudson told Seal that he would kill Lisa (Seal's ex-girlfriend) and commit arson in exchange for money. The testimony showed that an undercover officer posing as a defense attorney facilitated the scheme and, after Hudson's release from prison, gave Hudson an envelope containing $6,000 and the names and addresses of Seal's targets. Hudson accepted the envelope and was arrested.

There was a factual dispute about who initiated the idea of Hudson murdering Lisa for pay. Seal testified that it was Hudson's idea and Hudson testified that it was Seal's. Beyond that, much of the evidence was not disputed. Hudson did not deny telling Seal that he would kill Lisa for money or accepting cash from the undercover agent. Hudson's theory of defense was that he never intended to follow through with killing Lisa or committing arson. In support, Hudson testified at length about his sister Dana's financial difficulties, and his attempts to help her get back on her feet. He testified that he intended to keep the money and that he took the targets' addresses so that Seal would not be suspicious.

After judgment, Hudson, by appointed counsel, appealed on grounds that his conviction was the result of outrageous government conduct. We affirmed the judgment of conviction and order denying postconviction relief. ***State v. Hudson***, No. 2010AP1598-CR, unpublished slip

op. (WI App Sept. 13, 2012). The Wisconsin Supreme Court denied Hudson's petition for review.

Hudson then filed the WIS. STAT. § 974.06 postconviction motion that is the subject of this appeal. Hudson asserted that trial counsel was ineffective for failing to adequately investigate the "role or involvement" of his sister, Dana, and by failing to call her as a witness.[2] With regard to the former claim, Hudson argued that trial counsel briefly reviewed copies of Dana's correspondence with Hudson and Seal, rather than "conduct[ing] a meaningful interview with Dana prior to trial." As to the latter claim, Hudson argued that Dana's testimony would have corroborated his testimony that she needed money and that she would have been a strong character witness as to "Hudson's demeanor and activities when he was free, specifically that she had never seen or known Hudson to be violent or have physical altercations with others." Hudson further asserted that postconviction counsel provided ineffective assistance by failing to raise these claims as part of Hudson's direct appeal.

At evidentiary ***Machner***[3] hearings, the circuit court heard the testimony of trial counsel, postconviction counsel, Dana Hudson, and Hudson himself. The court found that trial counsel's challenged decisions were strategic and concluded that Hudson had not overcome the strong presumption that counsel's conduct was within the wide range of reasonable professional

[2] Hudson's WIS. STAT. § 974.06 postconviction motion also alleged that trial and postconviction counsel were ineffective for failing to take certain actions following Seal's testimony regarding a "proposition letter." On appeal, Hudson abandons his ineffective assistance claim and instead asserts the proposition letter issues as grounds for discretionary reversal under WIS. STAT. § 752.35. We address this claim later.

[3] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (when a defendant claims that he or she received the ineffective assistance of trial counsel, a postconviction hearing "is a prerequisite … on appeal to preserve the testimony of trial counsel").

assistance. Because there was no deficient performance by trial counsel, the court concluded that postconviction counsel had not performed deficiently. The court entered a written decision denying Hudson's postconviction motion.

On appeal, Hudson acknowledges that, absent a sufficient reason, a defendant is procedurally barred from using a WIS. STAT. § 974.06 postconviction motion to bring a claim that could have been raised earlier. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994); *see also* § 974.06(4). Hudson's proffered reason is the ineffective assistance of postconviction counsel. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682-83, 556 N.W.2d 136 (Ct. App. 1996).

To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel performed deficiently and that this deficiency prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697. Thus, a claim that postconviction counsel was ineffective lacks merit if trial counsel's performance was not deficient under these standards. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

Hudson's claims fail because he has not shown that trial counsel performed deficiently. In rejecting Hudson's claim that trial counsel failed to adequately investigate what Dana "knew and could contribute to the defense at trial," the circuit court found that trial counsel: "learned all he needed to evaluate" Dana's potential testimony; "obtained from Dana all of her correspondence with Mr. Hudson and Mr. Seal"; and learned that "during 2002 and 2003 [Dana]

did not know that Mr. Hudson was scamming Mr. Seal or what Mr. Hudson's plans were with respect to Mr. Seal." Hudson fails to show that the court's findings were clearly erroneous or to show that the findings do not support its determination that trial counsel's investigation into Dana's potential value as a witness fell within the wide range of reasonable professional assistance.

As for trial counsel's failure to call Dana as a witness, the circuit court determined that trial counsel's decision was based on an evaluation of "the benefits and risks" and was "the type of judgment call that attorneys are regularly called upon to make." The circuit court determined that trial counsel's strategy was influenced by his recognition of "the dangers of a defendant introducing character evidence," and his "belief that Dana's testimony would not have improved upon Mr. Hudson's testimony." Here again, the court's determinations were not clearly erroneous and support a conclusion that counsel's performance was not constitutionally deficient.

In sum, we conclude that Hudson has not overcome ***Escalona***'s procedural bar because he has failed to establish that trial counsel performed deficiently. As such, postconviction counsel's failure to raise these claims cannot be ineffective assistance.

Finally, Hudson seeks a new trial in the interest of justice on the basis of an alleged "proposition letter" that was testified about during trial but that was not introduced. According to Hudson, this prevented the real controversy from being fully tried. *See* WIS. STAT. § 752.35 (authorizing discretionary reversal in the interest of justice "if it appears from the record that the real controversy has not been fully tried").

During Seal's direct testimony, he was presented with three letters from Hudson to Seal about the scheme to kill Lisa. Seal testified that there was, in addition, a "proposition letter," which preceded the three letters. Seal described it as a letter in which Hudson "offered to do this[,]" meaning that Hudson offered to "[t]ake out Lisa for so much." The proposition letter was never produced and neither party mentioned it again. According to Hudson, trial counsel's failure to cross-examine Seal or law enforcement about "the existence or content of this letter" "was tantamount to an admission of its existence," and served to undermine Hudson's contrary testimony that Seal initiated the conspiracy.

Hudson has not shown that he is entitled to the extraordinary relief of reversal in the interest of justice. Unlike his other claims, he offers no reason for failing to raise this claim earlier, as part of his direct appeal. The claim is procedurally barred. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 184-85.

We observe that, beyond the procedural bar, Hudson's arguments are not persuasive. The issue for the jury was whether Hudson entered into the charged conspiracy, not whether he initiated it. The conspiracy issue was fully tried. Additionally, the jury heard other evidence that Hudson in fact initiated the plan. For example, evidence included Hudson's statement in his letter to Seal, "As I told you when I introduced the Lisa idea to you." Finally, Hudson's claim is based on errors by trial counsel and when that is the case, "the ***Strickland*** test is the proper test to apply." *See* ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. Here, the circuit court determined that trial counsel's actions concerning the proposition letter did not constitute deficient performance. Hudson essentially attempts to circumvent the court's adverse ruling, which we conclude is a sound ruling, by relabeling his claims as proper for discretionary reversal.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to 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