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DISTRICT II

May 26, 2021

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

2020AP174

State of Wisconsin v. Jorge Dominguez (L.C. #2010CF491)

Before Reilly, P.J., Gundrum and Davis, 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).

Jorge Dominguez appeals pro se from the circuit court order denying his WIS. STAT. § 974.06 postconviction motion. Dominguez sought a new trial, arguing ineffective assistance of counsel. Based upon our review of the briefs and the record, we conclude that this case is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We summarily affirm the circuit court’s denial of Dominguez’s motion.

On May 31, 2010, Dominguez ran a stop sign and struck another vehicle, killing a woman and injuring her husband and son. Dominguez fled the scene of the accident on foot but was later arrested. When police arrived at the scene, officers noted a “strong odor” of alcohol coming from the car that Dominguez was driving and later from Dominguez himself. Dominguez’s blood was drawn four hours after the crash, showing a blood alcohol concentration of .09.

The State charged Dominguez with multiple counts related to the crash, including homicide by intoxicated use of a vehicle. The only issue at trial was whether Dominguez was the driver of the vehicle at the time of the crash. *See State v. Dominguez*, No. 2012AP654-CR, unpublished slip op. ¶¶2-4, 16 (WI App Apr. 24, 2013). The jury found Dominguez guilty on all counts, and he was sentenced to a lengthy term of imprisonment.

In his direct appeal, Dominguez argued that two of the State’s witnesses “inappropriately vouched for themselves by answering questions about a peer review process” and that he was denied the effective assistance of trial counsel. *Id.*, ¶5. We affirmed Dominguez’s conviction. *Id.*, ¶1.

¹ All references to the Wisconsin Statutes are to the 2019-20 version.

In January 2017, Dominguez filed a pro se motion for postconviction relief pursuant to WIS. STAT. § 974.06.² He was appointed counsel, and filed a supplement to his original motion, which argued that trial counsel was deficient for failing to move to preserve a baseball cap and a pair of glasses found in the vehicle and obtain DNA testing of the same. He also relatedly argued that the State’s failure to preserve the cap and glasses was a *Brady*³ violation. The circuit court denied Dominguez’s motion.

We conclude that the circuit court properly denied Dominguez’s WIS. STAT. § 974.06 postconviction motion as it was procedurally barred. Absent a “sufficient reason,” a defendant is procedurally barred from raising claims in a § 974.06 motion that could have been raised in a prior postconviction motion or appeal. *See* § 974.06(4); *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 184-86, 517 N.W.2d 157 (1994). We review whether a § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier as a question of law subject to de novo review. *State v. Romero-Georgana*, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668.

Dominguez argues that his “sufficient reason” for failing to bring his claims previously is that his postconviction counsel was ineffective. *See id.*, ¶36. A WIS. STAT. § 974.06 motion

² Dominguez argued that he was denied the effective assistance of trial and postconviction counsel, that the State committed prosecutorial misconduct, and that we should reverse under our WIS. STAT. § 752.35 discretionary authority as the real controversy had not been fully tried. He alleged several theories: (1) one of the victims in the accident saw “two Mexicans” fleeing the scene and one was speaking Spanish; (2) a “distinctive hat” belonging to Dominguez was found near the front right tire, “supporting the inference that Dominguez had been on the passenger side of the car at the time of the collision”; (3) trial counsel failed to obtain “fingerprint analysis” of a baseball cap, iPod, and ignition key; (4) trial counsel never reviewed phone records that would prove that Dominguez was “on the phone at the time of the accident and was not driving”; and (5) trial counsel failed to pursue inconsistencies in the testimony regarding where certain items were found.

³ *Brady v. Maryland*, 373 U.S. 83 (1963).

must do more than simply assert a failure of postconviction counsel to challenge trial counsel's acts or omissions; under the standard laid out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the motion must allege that postconviction counsel was deficient and that the deficient performance prejudiced the defendant. *State v. Balliette*, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. As part of the deficient performance prong, “a defendant who alleges in a § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he [or she] wishes to bring are clearly stronger than the claims postconviction counsel actually brought.” *Romero-Georgana*, 360 Wis. 2d 522, ¶¶4, 45-46.

Although Dominguez mentions the “clearly stronger” standard and claims that postconviction counsel's errors are “‘plain’ and clear and cannot be ignored,” he fails to address the merits of his current claims relative to his claims on direct appeal. The burden of proof falls squarely on Dominguez to meet the “clearly stronger” threshold, and he has not done so. *See State v. Aaron Allen*, 2010 WI 89, ¶83, 328 Wis. 2d 1, 786 N.W.2d 124. As Dominguez has not alleged sufficient facts to demonstrate that his current ineffective assistance of counsel claims are clearly stronger than the ineffective assistance of counsel claims his postconviction counsel actually raised, he has not demonstrated a sufficient reason for failing to raise those issues in his direct appeal.

Even if we were to accept that Dominguez's current claims are clearly stronger than the claims postconviction counsel actually brought, any alleged deficient performance was not prejudicial. All of counsel's alleged failures identified by Dominguez coalesce into one central idea: Dominguez was not driving the vehicle that caused the crash. As the State argues, and we agree, the evidence presented at trial that Dominguez was driving was overwhelming. *See Strickland*, 466 U.S. at 694 (“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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

We noted in Dominguez's direct appeal that

[t]he State presented compelling evidence that Dominguez was the driver of the vehicle. An officer testified that when he arrived at the scene, the driver's side of the car was heavily damaged with the door open, while the passenger door and window were closed. A wallet with Dominguez's driver's license was found in the driver's seat of the car. Blood was found on the driver's side air bag, which later tested positive for Dominguez's DNA. Not enough DNA was found on the passenger side airbag to be tested. No keys were found in the car, but keys matching the type of car were found on Dominguez later that evening.

Dominguez, No. 2012AP654-CR, ¶4. Further, we explained that “the jury learned that on the night of the accident, Dominguez first told police that he was the driver and then accused a person his counsel later acknowledged did not exist.” *Id.*, ¶16. At trial, Dominguez argued that a friend was the driver, but that friend had an alibi and testimony revealed that he “did not appear to be injured on the night of the accident.” *Id.* Additionally, “[t]he Milwaukee County medical examiner testified, based on Dominguez's medical records and photos from the accident scene, that Dominguez's injuries were consistent with him being in the driver's seat at the time of the collision.” *Id.*, ¶17. None of the errors claimed by Dominguez in his WIS. STAT. § 974.06

motion would have overcome the inference or the jury's conclusion that Dominguez was the driver.⁴

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

⁴ Dominguez also addresses the State's alleged *Brady* violation on appeal; however, his arguments are conclusory. The *Brady* violation appears to be a stand-alone claim from Dominguez's ineffective assistance of counsel claim. He fails, however, to develop an argument either that a *Brady* violation actually occurred, *see State v. Harris*, 2004 WI 64, ¶15, 272 Wis. 2d 80, 680 N.W.2d 737, or that he had a sufficient reason for his failure to raise the *Brady* violation in his direct appeal. We conclude that it is procedurally barred.

Finally, Dominguez argues that we should grant him a new trial in the interest of justice. Pursuant to WIS. STAT. § 752.35, we may grant a new trial in the interest of justice if our review of the record reveals that the real controversy was not fully tried. However, “[o]ur power of discretionary reversal under [§] 752.35 may be exercised only in direct appeals from judgments or orders.... Section 752.35 does not permit us to go behind a [WIS. STAT. §] 974.06 order to reach the judgment of conviction.” *State v. Gilbert Allen*, 159 Wis. 2d 53, 55-56, 464 N.W.2d 426 (Ct. App. 1990). We decline Dominguez's request for a new trial.