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DISTRICT I

October 19, 2021

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

2019AP1299 State of Wisconsin v. Kentonyo Morgan (L.C. # 2013CF2459)

Before Dugan, Graham and White, 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).

Kentonyo Morgan, *pro se*, appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 (2019-20)[1] postconviction motion without a hearing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. The order is summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In May 2013, Morgan was charged with first-degree intentional homicide while armed with a dangerous weapon and one count of possession of a firearm by a felon in the shooting death of Daniel Gardner. Following a jury trial, Morgan was convicted of first-degree reckless homicide—a lesser-included offense of first-degree intentional homicide—and possession of a firearm by a felon. The trial court imposed sentences totaling sixty-five years of imprisonment.

Morgan filed a postconviction motion raising five issues. The trial court denied the motion, as well as a subsequent reconsideration motion. Morgan appealed. This court affirmed. *See* ***State v. Morgan***, No. 2016AP118-CR, unpublished slip op. (WI App Dec. 5, 2017).

In June 2019, Morgan filed the postconviction motion underlying this appeal. He asserted that his trial attorneys had been ineffective in two ways: (1) failing to move to suppress a jailhouse informant's testimony on Sixth Amendment grounds and (2) allowing him to enter a stipulation that, according to Morgan, excluded his identical twin brother as a possible source of DNA evidence found on a cell phone and a sweatshirt recovered from the crime scene. Morgan also alleged that his postconviction attorney was ineffective for failing to raise these claims in the original postconviction motion and that these new issues were clearly stronger than the issues that were previously raised. The circuit court denied the motion without a hearing. Morgan appeals.

Absent a sufficient reason, a defendant may not bring claims in a WIS. STAT. § 974.06 motion if the claims could have been raised in a prior motion or direct appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); ***State v. Romero-Georgana***, 2014 WI 83, ¶34, 360 Wis. 2d 522, 849 N.W.2d 668. Certain claims, like claims of ineffective trial counsel, must be preserved by a postconviction motion. *See* ***State ex rel. Rothering v.***

McCaughtry, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). Thus, ineffective assistance of postconviction counsel may sometimes constitute a sufficient reason for not raising a claim in an earlier proceeding. *See* ***id.*** at 682. For a court to conclude an attorney rendered ineffective assistance, the defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433.

"An allegation that postconviction counsel failed to bring a claim that should have been brought is an allegation that counsel's performance was constitutionally deficient[.]" ***Romero-Georgana***, 360 Wis. 2d 522, ¶43. To prove the deficiency, the defendant must show the unraised issue was clearly stronger than the issues actually pursued by postconviction/appellate counsel. ***Id.***, ¶¶44-45; *see also* ***State v. Starks***, 2013 WI 69, ¶66, 349 Wis. 2d 274, 833 N.W.2d 146. When a claim of ineffective postconviction counsel is based on the failure to raise ineffective assistance of trial counsel, the defendant must also show that trial counsel actually was ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

However, "[a] hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***Allen***, 274 Wis. 2d 568, ¶14. Whether the motion alleges such facts is a question of law. *See* ***id.***, ¶9. If the motion raises sufficient material facts, the circuit court must hold a hearing. *See* ***id.*** If the motion does not raise sufficient material facts, if the motion presents only conclusory allegations, or if the record conclusively shows the defendant is not entitled to relief, then the decision to grant or deny a hearing is left to the circuit court's discretion. *See* ***id.*** A circuit court's discretionary decisions are reviewed for an erroneous exercise of that discretion, a deferential standard. *See* ***id.***.

Morgan first argues that his trial attorneys, who sought to suppress the jailhouse informant's testimony as "inherently dangerous" and prejudicial, should also have argued that the police knew the informant was a "State and Federal Agent" such that placing him near Morgan "circumvented and violated Morgan's rights to deal with the state, prosecutor, and the police, only with the assistance of counsel."

In the absence of counsel or a valid waiver thereof, police may not use a "surreptitious government agent," such as a fellow inmate, to obtain incriminating statements through techniques equivalent to direct police interrogation. *See* ***State v. Lewis***, 2010 WI App 52, ¶1, 324 Wis. 2d 536, 781 N.W.2d 730. To prove that a police informant is a government agent, Morgan must provide "evidence of some prior formal agreement—which may or may not be evidenced by a promise of consideration—plus evidence of control or instructions by law enforcement." ***Id.*** The determination of whether a person is a government agent for Sixth Amendment purposes is a question of fact. ***Id.***, ¶16.

The circuit court determined that the informant "was not acting as a government agent." There was no evidence that the informant had received specific instructions from the government or that he was being controlled by the government "to do something specific in return for a specific reward." Morgan argues that the circuit court "made an arbitrary decision" because it "did not have a copy of the confidential agreement" that the informant had with State and Federal authorities, but Morgan did not have a copy of any such agreement either. Although Morgan believes that such a document exists, an evidentiary hearing "is not a fishing expedition to discover ineffective assistance." *See* ***State v. Balliette***, 2011 WI 79, ¶68, 336 Wis. 2d 358, 805 N.W.2d 334.

Morgan simply has not offered any evidence beyond supposition to demonstrate that the informant was operating under any instructions from or agreement with the authorities, much less that the informant was operating under the terms of any agreement.[2] Indeed, during the trial, the informant testified that he never approached Morgan; rather, Morgan had approached him, sat down, and started talking to the informant about the situation. While the informant may have hoped to get something from the government in return for sharing what he knew, that mere hope is insufficient to transform the informant into a government agent. ***Lewis***, 324 Wis. 2d 536, ¶23.

Because there is no evidence that the jailhouse informant was acting as a government agent, a motion to suppress on that ground would have been unsuccessful. "Counsel does not render deficient performance for failing to bring a suppression motion that would have been denied." ***State v. Maloney***, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583. This also means that postconviction counsel was not ineffective for failing to raise an issue with trial counsel's performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

Morgan also argues that his trial attorneys were ineffective for having him enter a stipulation that his twin brother was not a suspect in this case. The stipulation stated, in operative part, that:

> the twin brother of the defendant … is not a suspect in this case. He was interviewed and cleared by the Milwaukee Police Department. His name may come up in this trial but all parties

[2] While Morgan appears to believe that evidence of such an agreement between the informant and the government would be found in confidential discovery materials that defense counsel was not permitted to show to Morgan, the circuit court determined that these materials dealt with then-pending homicide investigations and, thus, would not have included details regarding Morgan's case.

> agree that he is not to be considered as a suspect in the death of Daniel Gardner.

The stipulation was signed by all attorneys and by Morgan personally. Morgan does not dispute that he agreed to enter this stipulation, nor does he dispute the accuracy of the expressed facts.

Instead, Morgan claims that he was "not informed … that the stipulation excluded Morgan's identical twin as being a possible source of the DNA found on the cell-phone and on the hooded sweat-shirt." He further argues that "once it became obvious to defense counsel, that the [State] was using the stipulation to exclude Morgan's identical twin as a possible source of the DNA, defense counsel … should have motioned the court, to withdraw from the stipulation[.]"

The stipulation itself makes no mention of DNA, and it does not purport to exclude Morgan's twin as a potential source of DNA found on the items from the crime scene. Indeed, the DNA analyst who testified at trial told the jury that "[a]ny conclusions which would include or exclude one [twin] would be the same for the other individuals." When Morgan testified about the phone and the sweatshirt, he suggested that his twin had access to both. On cross-examination, the State did not suggest that the DNA did not match Morgan's twin, nor that the twin was excluded by the DNA evidence. Instead, it simply attempted to challenge Morgan's credibility by inquiring how his twin could have been the source when Morgan agreed his twin was not a suspect. The State's line of questioning may have been a non-sequitur—the fact that Morgan agreed that his twin was not a suspect does not mean that items bearing the twin's DNA could not have been recovered from the crime scene. Nevertheless, the State's decision to pursue this line of questioning at trial does not render Morgan's trial attorney ineffective for having Morgan enter the stipulation.

Morgan has not alleged any facts to justify withdrawal from the stipulation, so there is no basis for claiming trial counsel performed deficiently for failing to so move.[3] *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12 ("Trial counsel's failure to bring a meritless motion does not constitute deficient performance."). This also means, again, that postconviction counsel was not ineffective for failing to raise an issue with trial counsel's performance. *See* ***Wheat***, 256 Wis. 2d 270, ¶14.

Based on the foregoing, the circuit court properly denied the motion without a hearing. Morgan's claims are procedurally barred.

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

[3] Morgan has also failed to allege sufficient facts to demonstrate prejudice. In the absence of the stipulation, the State could have simply called the officers who "interviewed and cleared" Morgan's twin to testify about their exclusion of him as a suspect.