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DISTRICT I

November 30, 2021

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Electronic Notice

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

2020AP1443	State of Wisconsin v. Lamonte Alton Ealy (L.C. # 2013CF5263)
2020AP1444	State of Wisconsin v. Lamonte Alton Ealy (L.C. # 2013CF5567)
2020AP1445	State of Wisconsin v. Lamonte Alton Ealy (L.C. # 2014CF2242)

Before Brash, C.J., Dugan 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).

Lamont Alton Ealy, *pro se*, appeals an order denying his postconviction motion. The circuit court rejected his claims as meritless and procedurally barred. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. § 809.21 (2019-20).[1] We summarily affirm.

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

These appeals involve three Milwaukee County circuit court cases. In case No. 2013CF5263, the State charged Ealy with two counts of first-degree sexual assault of a child, one count of attempted child enticement, and one count of exposing genitals to a child. A few weeks after the State filed the complaint in that case, the police executed a search warrant at Ealy's home and found a gun. The State charged him in case No. 2013CF5567, with possessing a firearm as a felon. While Ealy was in jail awaiting trial on those two cases, the State received a report that he was attempting to dissuade B.G.—the child victim of the sex crime charges—and her mother, T.G., from coming to court to testify. The State charged Ealy in case No. 2014CF2242, with two counts of attempted intimidation of a witness. Ealy proceeded to a joint jury trial in case Nos. 2013CF5263 and 2014CF2242. In case No. 2013CF5263, the jury found him guilty of one count of first-degree sexual assault of a child and of exposing genitals to a child; the jury acquitted him of one count of first-degree sexual assault of a child and of attempted child enticement. In case No. 2014CF2242, the jury found him guilty of both counts of attempted intimidation of a witness. Ealy then pled guilty in case No. 2013CF5567 to possessing a firearm as a felon.

Ealy pursued a postconviction motion under WIS. STAT. RULE 809.30. Represented by counsel, he alleged that: the evidence presented to the jury was insufficient to convict him of attempted intimidation of witnesses; the joinder of cases for trial was improper; and the trial court erroneously exercised its sentencing discretion. The trial court rejected his contentions and he appealed, raising the same three issues. We affirmed. *See* ***State v. Ealy***, Nos. 2016AP1893-CR, 2016AP1894-CR, 2016AP1895-CR, unpublished slip op. (WI App Sept. 6, 2017).

Pursuant to WIS. STAT. § 974.06, Ealy next filed the postconviction motion underlying the instant appeals. He alleged that numerous errors and omissions before and during his trial warranted relief from all of his convictions and that his postconviction counsel was ineffective for failing to raise his current claims in his original postconviction motion and appeal. The circuit court denied the claims.[2] Ealy appeals.

After the time for a direct appeal has passed, WIS. STAT. § 974.06 permits defendants to mount collateral attacks on their convictions based on alleged jurisdictional or constitutional errors. *See* ***State v. Henley***, 2010 WI 97, ¶¶50, 52, 328 Wis. 2d 544, 787 N.W.2d 350. There is, however, a limitation. A defendant who has pursued a postconviction motion or a direct appeal may not seek collateral review of an issue that was or could have been raised in the earlier proceeding unless the defendant can show a sufficient reason for failing to raise the issue earlier. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

Ineffective assistance of postconviction counsel for failing to raise issues may constitute a sufficient reason for a second or subsequent postconviction motion. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. To overcome the procedural bar imposed by ***Escalona-Naranjo***, however, the convicted person may not merely assert that postconviction counsel was ineffective but must allege sufficient facts to demonstrate that counsel was in fact ineffective. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶36-38.

[2] The Honorable Janet C. Protasiewicz presided over the WIS. STAT. § 974.06 motion underlying these appeals. We refer to Judge Protasiewicz as the circuit court. Several different judges presided over the pretrial and trial proceedings and the WIS. STAT. RULE 809.30 postconviction motion. We refer to each of those judges as the trial court.

We assess claims of ineffective assistance of counsel by applying the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***State v. Balliette***, 2011 WI 79, ¶28, 336 Wis. 2d 358, 805 N.W.2d 334. The test requires that the defendant prove both a deficiency in counsel's performance and prejudice as a result. *See* ***Strickland***, 466 U.S. at 687. To satisfy the deficiency prong, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To satisfy the prejudice prong, 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." ***Id.*** at 694. Whether counsel's performance was deficient and whether any deficiency was prejudicial are both questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If the defendant fails to make an adequate showing as to one prong of the analysis, however, we need not address the other. *See* ***Strickland***, 466 U.S. at 697.

A circuit court is not required to grant a hearing on a claim of ineffective assistance of counsel unless the defendant's postconviction motion contains allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This determination is another question of law for our independent review. *See* ***id.*** To entitle the defendant to a hearing, the postconviction motion must satisfy "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how" as to the defendant's claims. *See* ***id.***, ¶23. If the motion does not set forth sufficient facts to entitle the defendant 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." *See* ***id.***, ¶9. We review the circuit court's discretionary decisions with deference. *See* ***id.*** With the foregoing standards in mind, we turn to Ealy's claims.

Ealy first claimed that the State did not present sufficient evidence at trial to support his convictions for sexual assault of a child and for exposing genitals to a child. In support, he argued that the guilty verdicts on those two counts were inconsistent with the not guilty verdicts that the jury delivered on two other sex crime charges. He asserted that his postconviction counsel was ineffective for failing to raise this challenge to the sufficiency of the evidence motion.[3] The circuit court properly rejected this claim.

"[S]ufficiency of the evidence review [is] 'independent of the jury's determination that evidence on another count was insufficient[.]'" ***State v. Rice***, 2008 WI App 10, ¶26, 307 Wis. 2d 335, 743 N.W.2d 517 (citation omitted). Therefore, when a defendant challenges the sufficiency of the evidence to sustain a guilty verdict, the existence of inconsistent verdicts is irrelevant. "The only question is whether there was sufficient evidence on which a jury could find all the elements of" the crime of conviction. *See* ***id.***, ¶27. Ealy thus failed to show how or why his postconviction counsel performed deficiently by forgoing an allegation that inconsistent verdicts here gave rise to a claim of insufficient evidence. *Cf.* ***State v. Sandoval***, 2009 WI App 61, ¶34, 318 Wis. 2d 126, 767 N.W.2d 291 (counsel does not perform deficiently by forgoing a meritless argument). Accordingly, he failed to present a sufficient reason to pursue this claim, and it is barred. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶35-36.

[3] Although a postconviction motion is not required in order to preserve a challenge to the sufficiency of the evidence, a convicted person is permitted to raise the claim first in the circuit court. *See* ***State v. Dukes,*** 2007 WI App 175, ¶¶11-12, 303 Wis. 2d 208, 736 N.W.2d 515. Ealy raised such a claim in his WIS. STAT. RULE 809.30 challenge to his convictions for attempted witness intimidation. Accordingly, we conclude that Ealy could properly allege that his postconviction counsel rather than his appellate counsel was ineffective for failing to raise additional challenges to the sufficiency of the evidence. *Cf.* ***State ex rel. Kyles v. Pollard***, 2014 WI 38, ¶25, 354 Wis. 2d 626, 847 N.W.2d 805 (explaining that, normally, the appellate court is the forum to determine whether appellate counsel was ineffective, and the trial court is the forum to determine whether postconviction counsel was ineffective).

Ealy next claimed that his postconviction counsel was ineffective for failing to argue that the two allegations of sexual assault of a child charged in case No. 2013CF5263, were multiplicitous because they were "identical in fact and law" and therefore violated his constitutional right to be free from double jeopardy. The jury, however, acquitted Ealy of one of the two counts, rendering moot any multiplicity claim stemming from the two charges. *See* ***State v. Parr***, 182 Wis. 2d 349, 363, 513 N.W.2d 647 (Ct. App. 1994) (explaining that the remedy for multiplicitous charging is reversal of one, not both, of two multiplicitous convictions). Ealy failed to explain how or why he suffered any prejudice when postconviction counsel ignored a moot claim. *See* ***id.*** (declining to address a moot multiplicity claim where the jury has already afforded the defendant the relief he might obtain on appeal). Because Ealy failed to satisfy the prejudice prong of the ***Strickland*** analysis, he failed to demonstrate that his postconviction counsel was ineffective for not raising a double jeopardy claim. Accordingly, the claim is barred. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶35-36.

Ealy next claimed that his postconviction counsel was ineffective for failing to challenge the effectiveness of his trial counsel on the basis that trial counsel did not seek to suppress certain evidence. When a claim of ineffective assistance of postconviction counsel is premised on a failure to allege ineffective assistance of trial counsel, the defendant must establish that trial counsel was actually ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Ealy did not do so.

Ealy first claimed that his trial counsel was ineffective for not seeking to suppress evidence on the grounds that: (1) Ealy was unlawfully arrested without probable cause in connection with the sex crimes charged in case No. 2013CF5263; and (2) the evidence that

police developed after his arrest in that case, including a forensic interview with B.G., was tainted by his unlawful arrest. "Probable cause refers to the quantum of evidence which would lead a reasonable police officer to believe that defendant committed a crime." ***State v. Mitchell***, 167 Wis. 2d 672, 681, 482 N.W.2d 364 (1992). Ealy's postconviction motion, however, did not describe the information known to the officers when they arrested Ealy or why the information known to the officers was insufficient to lead a reasonable police officer to believe that he committed a crime.[4] Ealy thus failed to demonstrate how or why his trial counsel performed deficiently by forgoing a motion to suppress evidence on the ground that the evidence at issue was tainted by an unlawful arrest. *See* ***Sandoval***, 318 Wis. 2d 126, ¶34.

Because Ealy failed to show that his trial counsel was ineffective for failing to pursue a suppression motion based on an unlawful arrest, he necessarily failed to show that his postconviction counsel was ineffective for not challenging trial counsel's effectiveness on this basis. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15. He therefore lacks a sufficient reason to pursue such a challenge, and the claim is barred. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶35-36.

Ealy also alleged that his trial counsel was ineffective for failing to seek suppression of the evidence that police discovered when they executed a "search and seizure warrant" that he

[4] Ealy's postconviction motion suggested that, in his view, police cited the wrong criminal statute in the probable cause statement—Form CR-215—that police prepared after his arrest. However, any reference to an incorrect statute that police may have included on the form is immaterial to the lawfulness of the arrest: an arrest is lawful if probable cause existed to arrest the suspect for a crime, regardless of whether the police correctly identified the crime at issue. *See* ***State v. Repenshek***, 2004 WI App 229, ¶11, 277 Wis. 2d 780, 691 N.W.2d 369. The probable cause statement on the form used here set forth that B.G. was ten years old, that she disclosed to police that Ealy "sexually assaulted her on numerous occasions between 7/01/13 and 09/02/13," and that "on at least five separate occasions, Ealy intentionally fondled her breasts and vaginal area over the clothes." The statement thus set forth a basis to conclude that Ealy committed a crime. *See, e.g.*, WIS. STAT. § 948.02 (2013-14).

asserts was invalid. Ealy, however, did not include a copy of a warrant with his postconviction motion. On appeal, he has not directed this court's attention to any place in any of the three records where a warrant could be found.[5] *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (explaining that parties have an obligation to point to the place in the record that supports their contentions and stating that this court will not consider an argument where the party has failed to comply with this duty). Ealy thus has failed to satisfy his burden to identify the warrant at issue and to demonstrate that it was defective.[6] *See* ***Allen***, 274 Wis. 2d 568, ¶23. Ealy therefore has not demonstrated that his trial counsel performed deficiently by failing to seek suppression of evidence found when police executed the warrant. He necessarily also has failed to show that his postconviction counsel was ineffective for failing to challenge trial counsel's actions. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15. Accordingly, he lacks a sufficient reason to pursue such a challenge, and the claim is barred. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶35-36.

Ealy next alleged that he suffered a violation of his rights under ***Brady v. Maryland***, 373 U.S. 83 (1963), and that his postconviction counsel was ineffective for not raising this claim. Pursuant to ***Brady***, the State is required to disclose exculpatory evidence to the defendant. *See*

[5] Ealy included a search warrant and affidavit in the appendix that he filed in this court. We have not considered that document. An appendix may not be used to supplement the record. *See* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989).

[6] For the sake of completeness, we note Ealy's suggestion that the search warrant was defective because it referenced an incorrect subsection of the statute Ealy was alleged to have violated. Ealy failed to explain how or why this alleged error required suppression of the evidence found during the search. *See* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433; *see also* ***State v. Steadman***, 152 Wis. 2d 293, 306 n.11, 448 N.W.2d 267 (Ct. App. 1989) (explaining that an erroneous statutory citation does not invalidate a search warrant).

State v. Harris, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. Ealy failed to clearly identify the evidence that he believes was not disclosed. The postconviction motion hinted, however, that in Ealy's view the State had an obligation to disclose the "exculpatory value" of the State's decision to charge him with sexual assault of a child rather than with repeated sexual assault of a child. If that is indeed Ealy's theory, he failed to carry his burden to demonstrate how and why his postconviction counsel performed deficiently. *See* ***Allen***, 274 Wis. 2d 568, ¶23. Specifically, he did not cite the authority that requires the State to disclose the "exculpatory value" of a charging decision, or explain why the State has such an obligation, or how the State must fulfill its alleged duty. Accordingly, the ***Brady*** claim is barred.

Ealy next alleged that postconviction counsel was ineffective for failing to claim that "the circuit court erred in admitting hearsay testimony," and for failing to claim that certain lay witnesses testified outside the scope of their personal knowledge. The State responds that, even assuming postconviction counsel's ineffectiveness for failing to raise these claims, Ealy cannot pursue them now under WIS. STAT. § 974.06, because that statute permits a convicted defendant to raise only constitutional and jurisdictional claims, not claims of evidentiary error. *See* ***Henley***, 328 Wis. 2d 544, ¶52. Ealy filed a reply brief that does not address the State's assertions regarding his evidentiary claims, thus conceding the State's responsive arguments. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578. Accordingly, we conclude that his evidentiary claims are barred.

Last, Ealy alleged that his postconviction counsel was ineffective for failing to raise a claim that he did not receive "notice of intimidation statutes" at the time that the trial court imposed a no-contact order in case No. 2013CF5263. As the trial court explained to Ealy when

he raised this issue at a pretrial hearing, however, "nobody has to be told [he or she] can't commit crimes." Indeed, "every person is presumed to know the law and cannot claim ignorance of it as a defense." ***State v. Neumann***, 2013 WI 58, ¶50 n.29, 348 Wis. 2d 455, 832 N.W.2d 560. Thus, a claim that Ealy was entitled to advance "notice" from the court about the law he later violated would have been patently meritless. Postconviction counsel therefore did not perform deficiently by ignoring such a claim. *See* ***Sandoval***, 318 Wis. 2d 126, ¶34. Accordingly, the claim is barred.

In sum, all of the claims that Ealy raised in his postconviction motion are procedurally barred. The circuit court therefore properly denied the motion without a hearing. Moreover, we reject Ealy's suggestion that this court should nonetheless grant him a new trial in the interest of justice pursuant to WIS. STAT. § 752.35. Our power of discretionary reversal under that statute is reserved for use in only the most exceptional of cases. *See* ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469. Ealy fails to show that this is such a case. For all the foregoing reasons, we affirm.

IT IS ORDERED that the postconviction 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