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DISTRICT II

May 25, 2022

To:

Hon. Scott C. Woldt
Circuit Court Judge
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

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Clerk of Circuit Court
Winnebago County Courthouse
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Anthony G. Meyers, #520337
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P.O. Box 3310
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Christian A. Gossett
Electronic Notice

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

2021AP667

State of Wisconsin v. Anthony G. Meyers (L.C. #2009CF205)

Before Gundrum, P.J., Grogan and Kornblum, 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).

Anthony Gage Meyers, pro se, appeals an order denying his petition for a writ of habeas corpus. In addition to challenging the circuit court's denial of his writ petition, he requests that we exercise our discretionary reversal authority under WIS. STAT. § 752.35 (2019-20),¹ asserting there was a miscarriage of justice because his statement to police—which he contends was obtained in violation of his state and federal constitutional rights—was submitted to the jury

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

during its deliberations. 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. We affirm.

Meyers was convicted at trial of first-degree reckless homicide in the stabbing death of his mother's boyfriend. *See State v. Meyers*, No. 2011AP2230-CR, unpublished slip op. ¶4 (WI App Dec. 19, 2013). He filed a direct appeal challenging the sufficiency of the evidence and alleging his trial attorney was constitutionally ineffective for "failing to request a second-degree reckless homicide instruction, failing to request an instruction on retreat, and waiving Meyers'[s] right to elicit testimony" about the victim's violent past. *Id.*, ¶¶7, 16. We rejected those arguments and affirmed.

As part of the postconviction proceedings, Meyers had challenged the constitutional effectiveness of his trial counsel in entering into a stipulation with the State under which Meyers agreed to suspend proceedings on his motion to suppress a statement he had given to police in the aftermath of the stabbing. In exchange, the State agreed that it would only attempt to introduce the statement if Meyers testified at trial. Meyers in fact testified at trial and was cross-examined with his statement by the State without objection from his trial counsel. The circuit court rejected Meyers's postconviction claim that his attorney failed to adequately advise him that his statement could be used at trial, finding "the testimony clearly shows he was at the motion hearing, he was present, he heard what was going to happen." This issue was abandoned in Meyers's direct appeal.

After the Wisconsin Supreme Court denied Meyers's petition for review, he filed a pro se WIS. STAT. § 974.06 motion for postconviction relief asserting that the self-defense instructions

given to the jury were inadequate. He argued his trial counsel was constitutionally ineffective for failing to object, and his postconviction counsel was constitutionally ineffective for failing to challenge his trial counsel's conduct. The circuit court denied his motion, concluding his substantive claim and his assertion of ineffective assistance of trial counsel were procedurally barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). The court noted that ineffective assistance of postconviction counsel could constitute a sufficient reason for having failed to raise an issue in a direct appeal, but it determined his motion had not presented sufficient material facts that would warrant postconviction relief. Meyers appealed, and we summarily affirmed after concluding that even if Meyers's postconviction counsel had raised the ineffective assistance of counsel claim, the issue would have been denied as meritless. See *State v. Meyers*, No. 2014AP2692, unpublished slip op. (WI App July 29, 2015). Of note, during his trial, Meyers did not raise any issue relating to the introduction of his statements to police.

Meyers then filed a pro se *Knigh*t petition² seeking to advance a claim that his trial attorney failed to thwart the State's attack on his credibility by anticipatorily eliciting his testimony regarding his statement to police on direct examination. Moreover, he asserted his appellate counsel was constitutionally ineffective for failing to raise this issue on direct review. Among other reasons, we denied the petition because Meyers failed to include essential supporting facts (such as what the "suppression stipulation" consisted of or how it was used for impeachment) and also failed to explain why the issue he sought to raise was clearly stronger than the claims raised by appellate counsel on appeal.

² See *State v. Knight*, 168 Wis. 2d 509, 519, 484 N.W.2d 540 (1992).

On March 26, 2021, Meyers filed the present petition for a writ of habeas corpus in the circuit court. He asserted that his statement to police used at trial was obtained in violation of his constitutional rights. He argued that his appellate counsel was constitutionally ineffective for failing to raise that claim on direct appeal, as it was clearly stronger than the issues he actually raised. He further argued that by presenting his claim as a petition for habeas corpus, rather than as a WIS. STAT. § 974.06 motion, he could evade the *Escalona* bar on successive filings. Finally, he requested that the circuit court “grant him relief in the interest of justice under WIS. STAT. § 752.35.”

The circuit court denied the petition. Without further elaboration, the court stated the denial was “[f]or the reasons stated in the Court of Appeals decision” addressing Meyers’s WIS. STAT. § 974.06 motion. Meyers now appeals.

We reject Meyers’s arguments for several reasons.³ First, Meyers has previously filed a direct appeal, a WIS. STAT. § 974.06 motion, and a *Knight* petition. Accordingly, any substantive issues he wishes to raise are subject to the prohibition on successive litigation. As with a § 974.06 motion, habeas relief is unavailable “where (1) the petitioner asserts a claim that he or she could have raised during a prior appeal, but failed to do so, and offers no valid reason to excuse such failure, or (2) the petitioner asserts a claim that was previously litigated in a prior appeal or motion after verdict.” *State v. Pozo*, 2002 WI App 279, ¶9, 258 Wis. 2d 796, 654 N.W.2d 12 (citation omitted).

³ Whether habeas relief is available to the party seeking it is a question of law that we review de novo. *State v. Pozo*, 2002 WI App 279, ¶6, 258 Wis. 2d 796, 654 N.W.2d 12.

Ineffective assistance of appellate counsel may constitute a sufficient reason for having failed to previously raise an issue on direct appeal. See *State v. Allen*, 2010 WI 89, ¶29, 328 Wis. 2d 1, 786 N.W.2d 124. However, such a motion must be filed in the forum in which the alleged ineffective assistance took place. *State ex rel. Warren v. Meisner*, 2020 WI 55, ¶36, 392 Wis. 2d 1, 944 N.W.2d 588. In the present petition, Meyers challenged the conduct of his appellate attorney. Accordingly, his petition was improperly directed to the circuit court. Moreover, to the extent Meyers anticipates filing another *Knight* petition, we note that “a defendant may file only one *habeas* petition under *Knight* unless that defendant can adequately explain why all issues relating to the representation of appellate counsel were not raised in the first petition.” See *State ex rel. Schmidt v. Cooke*, 180 Wis. 2d 187, 190, 509 N.W.2d 96 (Ct. App. 1993).

Finally, the circuit court properly denied Meyers’s request for WIS. STAT. § 752.35 relief. By its plain terms, the power of discretionary reversal conferred by that statute is limited to “an appeal to the court of appeals.” *Id.* The circuit court had no authority to grant relief under that statute. To the extent Meyers on appeal invites us to invoke our statutory authority, we decline. Our discretionary reversal power is exercised only in exceptional cases. *State v. Cameron*, 2016 WI App 54, ¶31, 370 Wis. 2d 661, 885 N.W.2d 611. We are not persuaded that Meyers has established a miscarriage of justice so as to warrant relief.

IT IS ORDERED that the order of the circuit court 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