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DISTRICT I

September 6, 2023

To:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
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Ivan Boyd 253567
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1121 State of Wisconsin v. Ivan Boyd (L.C. # 2013CF615)

Before White, C.J., Donald, P.J., and Dugan, J.

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).

Ivan Boyd, *pro se*, appeals from an order of the circuit court that denied his December 2020 "motion requesting a new trial and demand for exculpatory evidence" without a hearing.[1] Based upon our review of the briefs and record, we conclude at conference that this case is

[1] In his appellant's brief, Boyd also says that he is appealing from an August 3, 2021 order denying reconsideration. However, that order is beyond the scope of this appeal: Boyd's notice of appeal is dated June 23, 2021, and the record on appeal was transmitted to this court on July 19, 2021.

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[2] The order is summarily affirmed.

Boyd was charged with one count of armed robbery as a party to a crime. According to the criminal complaint, Boyd made arrangements to view an apartment for rent. When the woman showing the apartment arrived, Boyd told her he had a gun and would shoot her if she did not cooperate. Boyd said he needed money and made the victim drive to various locations. They stopped at an automated teller machine, where she withdrew $400. Boyd then made the victim pick up his accomplice, Shonda Martin, who took the victim into a bank and made her cash out a certificate of deposit valued at over $8,000. A jury convicted Boyd as charged in 2015, and he was sentenced to twenty-five years of imprisonment.

With the assistance of postconviction counsel, Boyd sought postconviction relief in December 2016, seeking a new trial based on claims of ineffective assistance of trial counsel and newly discovered evidence. The circuit court denied the motion, and we affirmed on appeal in May 2018. In July 2018, Boyd filed a *pro se* postconviction motion seeking to reinstate the State's plea offers and alleging ineffective assistance of postconviction counsel. The circuit court ultimately denied Boyd's motion, as well as a motion for reconsideration. Boyd did not appeal. In June 2020, Boyd filed a third postconviction motion, which the circuit court denied as procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Boyd appealed, and we affirmed in April 2021.

[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In December 2020, Boyd filed the motion underlying this appeal, a fourth substantive motion. He alleged that the State failed to turn over a "favorable" phone call between accomplice Martin and Boyd's mother, "which was exculpatory in nature" as to Boyd. He demanded that the State provide him with the phone call and asked to have his judgment of conviction vacated due to the "suppression" of the evidence. Boyd further alleged that postconviction counsel was ineffective for not investigating a September 2015 email between trial counsel and the assistant district attorney about the phone call, which trial counsel had forwarded to postconviction counsel in November 2015. The circuit court denied the motion without a hearing in May 2021, concluding the claims were barred by ***Escalona*** because they could have been raised previously. Boyd appeals.

A hearing on a postconviction motion is required only when the movant alleges sufficient material facts that, if true, would entitle him or her to relief. *See* ***State v. Sulla***, 2016 WI 46, ¶26, 369 Wis. 2d 225, 880 N.W.2d 659. Whether the motion alleges such facts is a question of law. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Issues that could have been raised on direct appeal or in a previous motion are barred absent a sufficient reason for not raising them in the earlier proceedings. *See* WIS. STAT. § 974.06; *see also* ***Escalona***, 185 Wis. 2d at 181-82. Whether a motion is procedurally barred is a question of law we review de novo. *See* ***State v. Tillman***, 2005 WI App 71, ¶14, 281 Wis. 2d 157, 696 N.W.2d 574.

In his reply brief, Boyd points out that he alleged in his postconviction motion that he "just recently came into possession" of material supporting his latest claims, including a copy of the September 2015 email. That allegation, however, is conclusory and insufficient.

The supporting material to which Boyd refers is the September 2015 email between the assistant district attorney on the case and Boyd's third trial attorney. In the email, the district attorney notes that "during some of [Martin's] hundreds of calls she made statements about Ivan Boyd which were favorable to him[.]" The district attorney then describes one specific phone call between Martin and Boyd's mother.

Boyd does not specify until his reply brief that he discovered the email in November 2020, when he discovered it "deep in a massive digital file forwarded to him" by appellate counsel. However, a sufficient reason must be pled within the four corners of the motion itself. *See* ***Allen***, 274 Wis. 2d 568, ¶27. Further, it appears from the record that the digital material was sent to Boyd in May 2018, shortly after our decision in his direct appeal. Even discounting Boyd's first *pro se* postconviction motion in July 2018, he filed a second *pro se* motion in June 2020. Boyd should not have filed a postconviction motion until he was certain he had reviewed all of the material.[3] This is the precise kind of piecemeal litigation that ***Escalona*** is intended to prevent. *See* ***id.***, 185 Wis. 2d at 185.

Boyd additionally claims postconviction counsel's "failure to investigate the September 22, 2015 email" is a sufficient reason for not raising the issue earlier. However, Boyd's claims of ineffective assistance are also conclusory.

To succeed on a claim of ineffective assistance, a defendant must show both that counsel performed deficiently and that said deficiency was prejudicial. *See* ***State v. McDougle***, 2013 WI

[3] We also note that exhibits attached to Boyd's postconviction motion suggest he was aware that some potentially exculpatory phone calls existed as early as July 2014, when an attorney wrote to him and informed him he had "listened to several calls" made by Martin, including one "where she explains that [Boyd] had nothing to do with … the incident."

App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. To establish prejudice, 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.'" *See* ***id.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

Boyd contends that postconviction counsel's failure to investigate the State's "suppression" of the phone call caused him prejudice because: (1) the evidence "was consistent [with] and squarely corroborated the trial defense he put forth" and (2) "there can be absolutely no doubt that had he been able to present to the jury a recorded telephone call [where] Martin removes him from having any participation in a robbery … would have greatly benefitted his case." However, Boyd does not explain how the result of the proceeding would have been any different, particularly considering other information contained in the same email. The district attorney told Boyd's attorney that she "did not believe [Martin] was a truthful person" because Martin gave "many versions of things" and "appeared to have several possible motives for downplaying Mr. Boyd's culpability." In the phone call in question, for instance, the district attorney said that Martin was "trying to win [Boyd's] mother over to taking custody of their child." The district attorney also noted that during her own sentencing, both Martin and her attorney "put the blame for this Armed Robbery … squarely on Ivan Boyd's shoulders[.]"

Based on the foregoing, we agree with the circuit court that Boyd's latest motion is procedurally barred by ***Escalona*** because it fails to allege a sufficient reason for not raising the current issues in prior litigation. The circuit court did not err in denying the motion.

Therefore,

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.

Samuel A. Christensen
Clerk of Court of Appeals