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DISTRICT IV

September 21, 2023

To:

Hon. Michael A. Haakenson
Circuit Court Judge
Electronic Notice

Sara Lynn Shaeffer
Electronic Notice

Amanda Nelson
Clerk of Circuit Court
Rock County Courthouse
Electronic Notice

Brandon Lee Russell 568595
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You are hereby notified that the Court has entered the following opinion and order:

2022AP281

State of Wisconsin v. Brandon Lee Russell (L.C. # 2015CF869)

Before Kloppenburg, P.J., Blanchard, and Nashold, 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).

Brandon Lee Russell, pro se, appeals a circuit court order that denied Russell's motion for postconviction relief under WIS. STAT. § 974.06 (2021-22).¹ Russell argues that the circuit court erred by denying his 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. We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In April 2015, Russell was driving a car that collided with another car driven by J.S. At the time of the collision, J.S. was eight months pregnant. J.S. was injured and her unborn child did not survive the trauma of the collision. A minor passenger in J.S.'s car and two minor passengers in Russell's car were also injured.

The State charged Russell with multiple counts based on the collision. Pursuant to a plea agreement, Russell pled guilty to homicide of an unborn child by intoxicated use of a vehicle and three counts of operating while intoxicated, causing injury, as a second or subsequent offense and with a minor child in the vehicle. The circuit court sentenced Russell to eighteen years of initial confinement and ten years of extended supervision. Russell was appointed postconviction counsel, but did not pursue a direct postconviction motion or appeal.²

In August 2021, Russell filed a pro se postconviction motion under WIS. STAT. § 974.06. Russell sought to withdraw his plea on grounds that he was denied the effective assistance of counsel in connection with his plea and the restitution hearing. The circuit court denied the motion without a hearing, concluding that Russell's claims are procedurally barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 176, 517 N.W.2d 157 (1994).

The issue in this appeal is whether the circuit court erred when it denied Russell's WIS. STAT. § 974.06 motion without an evidentiary hearing. A circuit court is required to hold an

² In this appeal, Russell asserts that his appointed postconviction counsel failed to file a postconviction motion on his behalf and that his direct appeal rights should be reinstated. However, the issue in this appeal is limited to whether the circuit court erred by denying Russell's WIS. STAT. § 974.06 motion without a hearing. If Russell wishes to seek to reinstate his direct appeal rights based on a claim of ineffective assistance of appellate counsel for failing to pursue a postconviction motion or appeal, his available remedy, if any, would be by filing an original habeas action in this court. See *State ex rel. Santana v. Endicott*, 2006 WI App 13, ¶4, 288 Wis. 2d 707, 709 N.W.2d 515.

evidentiary hearing on a postconviction motion only if the defendant has alleged “sufficient material facts that, if true, would entitle the defendant to relief.” *State v. Ruffin*, 2022 WI 34, ¶35, 401 Wis. 2d 619, 974 N.W.2d 432. This is a question of law that we review de novo. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the postconviction motion does not raise facts sufficient to entitle the defendant to relief, if it 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. *Ruffin*, 401 Wis. 2d 619, ¶35. We review a discretionary decision under the erroneous exercise of discretion standard, *id.*, ¶28, that is, whether the court relied on the relevant facts, applied the proper legal standard, and demonstrated a rational process to reach a reasonable conclusion, *State v. Dorsey*, 2018 WI 10, ¶37, 379 Wis. 2d 386, 906 N.W.2d 158.

At the outset, the parties agree that the circuit court erred by relying on *Escalona* because Russell did not pursue either a postconviction motion or a direct appeal. *See Escalona-Naranjo*, 185 Wis. 2d at 185 (“Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. *Successive* motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.”) (emphasis added). However, we may affirm a circuit court for reasons other than those relied on by the court, *see State v. Earl*, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755, and we will search the record for reasons to support a circuit court’s exercise of discretion, *see Hoekstra v. Guardian Pipeline, LLC*, 2006 WI App 245, ¶33, 298 Wis. 2d 165, 726 N.W.2d 648.

We turn, then, to the allegations in Russell’s postconviction motion to determine whether the circuit court properly denied the motion without a hearing. Our review is limited to the

allegations in the four corners of Russell's postconviction motion. See *Allen*, 274 Wis. 2d 568, ¶27. To the extent that Russell raises new issues in his brief on appeal that were not presented to the circuit court, we decline to address them. See *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (we do not address issues raised for the first time on appeal).

Russell alleged in his postconviction motion that his trial counsel was ineffective by failing to move to suppress the following: (1) evidence obtained during the search of Russell's car, on the grounds that police lacked a warrant, probable cause, or consent for the search; (2) statements Russell made during police questioning, on the grounds that his statements were obtained in violation of his *Miranda*³ rights and that the statements were coerced; (3) evidence obtained during a blood draw, on the grounds that police lacked a warrant and improperly relied on Russell's illegally obtained statement that he had consumed marijuana before the collision as providing probable cause for the search; (4) evidence obtained following Russell's arrest, on the grounds that police improperly relied on Russell's illegally obtained statement as providing probable cause for the arrest; and (5) all evidence against Russell on the grounds that the circuit court failed to hold a *Riverside*⁴ hearing for a judicial determination of probable cause within forty-eight hours of Russell's arrest. Russell also alleged that his trial counsel was ineffective by failing to move to dismiss the charges against him, on the grounds that the court lost jurisdiction over Russell by adjourning the initial appearance, failing to make a timely judicial determination as to probable cause for Russell's arrest, and failing to hold a timely preliminary hearing to determine probable cause to believe a felony was committed by Russell.

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴ *Riverside v. McLaughlin*, 500 U.S. 44 (1991).

Russell also alleged that his counsel was ineffective by: (1) failing to seek to compel the State to provide requested discovery related to J.S.'s pregnancy, so that Russell could prove that he did not cause the death of an unborn child; (2) allowing Russell to plead guilty without making the State prove the elements of the crime of homicide of an unborn child; and (3) failing to challenge the restitution determination made at a hearing at which Russell was not present.

A defendant seeking to withdraw a plea after sentencing must establish that plea withdrawal is necessary to correct a manifest injustice, such as the ineffective assistance of counsel. See *State v. Washington*, 176 Wis. 2d 205, 213-14, 500 N.W.2d 331 (Ct. App. 1993). A claim of ineffective assistance of counsel must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.* at 687-88. When a defendant seeks plea withdrawal based on ineffective assistance of counsel, the prejudice prong requires the defendant to show that, but for counsel's deficient performance, the defendant would not have entered the plea and would have insisted on going to trial. See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). A claim of ineffective assistance of counsel fails if either prong of the test is not met. *Strickland*, 466 U.S. at 697.

We conclude that Russell's postconviction motion fails to allege sufficient material facts that, if true, would entitle Russell to relief. See *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Each of Russell's claims of ineffective assistance of counsel is set forth in conclusory fashion, without factual context that would allow a court to meaningfully assess the claim. See *Allen*, 274 Wis. 2d 568, ¶21. As to deficient performance, the facts in the postconviction motion do not establish a likelihood that any of the pretrial motions that Russell believes his trial counsel should have pursued would have been successful. See *State v. Toliver*,

187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (“[T]rial counsel was not ineffective for failing or refusing to pursue feckless arguments.”). As to prejudice, the postconviction motion does not allege that Russell would not have pled guilty and would have insisted on going to trial but for his trial counsel’s alleged errors, much less explain why Russell would have chosen to forgo the plea agreement and proceed to trial absent those alleged errors. Russell also does not explain how trial counsel’s conduct at the restitution hearing—which occurred after sentencing—could have affected Russell’s decision to enter a plea. Accordingly, we conclude that the circuit court properly exercised its discretion by denying the postconviction motion without a hearing. *See Allen*, 274 Wis. 2d 568, ¶9 (“[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, ... the circuit court has the discretion to grant or deny a hearing.”).

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to 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