

Background

In a complaint filed in March 1988, Burns was charged with numerous crimes for his role as one of three men who committed nine robberies within sixty to ninety minutes at six separate locations. Following a jury trial, he was convicted of one count of robbery as a party to the crime, eight counts of armed robbery as a party to the crimes, one count of operating a vehicle without owner's consent, and one count of felon in possession of a firearm. He was sentenced to sixty-five years' imprisonment.

Burns raised three issues on direct appeal: (1) the show-up procedure employed by the Milwaukee police was unconstitutional; (2) the circuit court erred when it denied trial counsel's motion to withdraw; and (3) the circuit court erroneously exercised its discretion when it sentenced him. *See State v. Burns*, No. 1990AP821-CR, unpublished slip op. at 2 (WI App Feb. 5, 1991). We affirmed and the Wisconsin Supreme Court denied review.

In July 1992, the circuit court denied Burns' *pro se* motion to modify his sentence and his request for the production of trial transcripts.

In January 2012, Burns filed the *pro se* motion seeking postconviction relief that underlies this appeal. He argued: (1) his trial counsel was ineffective for "fail[ing] to object, to properly investigate, and to move for a mistrial" and for "[f]ail[ing] to raise the clear violation of *Miranda* [*v. Arizona*, 384 U.S. 436 (1966),] which dictates the suppression of evidence"; (2) his postconviction counsel was ineffective for failing to argue trial counsel's ineffectiveness; (3) the circuit court erroneously exercised its discretion, apparently premised on its denial of his

motion to suppress the show-up identification; and (4) his appellate counsel was ineffective for not previously raising these claims.²

The postconviction court rejected Burns' arguments on a number of bases. It pointed out that Burns' claims that his arrest was unlawful and that the show-up was unconstitutional and/or impermissibly suggestive were the subject of a prior suppression motion and the circuit court's findings were upheld on appeal. Additionally, the postconviction court held that even if postconviction counsel had filed a motion addressing the issues Burns raised, the circuit court would have denied it based on its prior rulings and concluded that Burns could not establish prejudice. The postconviction court further noted that Burns did not offer any new information with his most recent filing and that WIS. STAT. § 974.06 could not be used to relitigate issues that had already been reviewed. The postconviction court also explained that Burns' claims of ineffective assistance of trial counsel did not establish either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Without such a showing, the postconviction court concluded that there was no basis for postconviction counsel to assert trial counsel's ineffectiveness.

This court agrees with the postconviction court's assessment and adopts its decision as our own. See WIS. CT. APP. IOP VI(5)(a) (Sept. 15, 2012) ("When the [circuit] court's decision was based upon a written opinion ... of its grounds for decision that adequately express the

² To the extent Burns challenges his appellate counsel's representation, such a claim is generally raised by filing a *habeas* petition with the appellate court that heard the appeal, see *State v. Knight*, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992), while a claim of ineffective assistance of postconviction counsel is raised in the circuit court either by filing a *habeas* petition or by WIS. STAT. § 974.06, see *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). Because Burns has pursued the latter option, we construe his claim as one of ineffective assistance of his postconviction counsel.

panel's view of the law, the panel may incorporate the [circuit] court's opinion or statement of grounds, or make reference thereto, and affirm on the basis of that opinion.”).

Upon the foregoing reasons,

IT IS ORDERED that the postconviction court's order is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals