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DISTRICT II

February 27, 2013

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

2012AP448 State of Wisconsin v. John David Ohlinger (L.C. # 2002CF224)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

John David Ohlinger appeals pro se from an order denying his motion for postconviction relief. He alleged that his trial, postconviction and appellate attorneys deprived him of his right to the effective assistance of counsel. We agree with the trial court that his motion is procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). We affirm. Based upon our review of the briefs and record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1]

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Thinking his pedophilic internet and telephone communications were with a woman and her twelve-year daughter, Ohlinger planned a tryst with them, only to be arrested by police at the appointed meeting spot. He was convicted of attempted first-degree sexual assault of a child and child enticement-sexual contact, both as a repeater. Assisted by counsel, Ohlinger moved for postconviction relief and pursued an appeal of the motion's denial. This court affirmed his judgment of conviction. ***State v. Ohlinger***, 2009 WI App 44, 317 Wis. 2d 445, 767 N.W.2d 336. Proceeding pro se, Ohlinger then sought state habeas relief, which this court denied. He next filed the WIS. STAT. § 974.06 motion that forms the predicate for this appeal. The trial court denied Ohlinger's motion without a ***Machner***[2] hearing because the motion failed to provide a sufficient reason for not raising his claim in a prior appeal. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. Ohlinger appeals.

Besides the charges of which he was convicted, Ohlinger also initially was charged with conspiracy to commit first-degree sexual assault of a child and conspiracy to commit child enticement-sexual contact. The trial court granted his pretrial motion to dismiss those charges. Apparently believing that the recorded communications were admitted as non-hearsay pursuant to WIS. STAT. § 908.01(4)(b)5., Ohlinger argues that his counsel ineffectively failed to seek exclusion of evidentiary statements made between him and the "mother" and "daughter." He gives no explanation for having failed to assert this claim before now. Absent a "sufficient reason," defendants may not raise issues that could have been raised in a previous motion or on direct appeal. ***Escalona-Naranjo***, 185 Wis. 2d at 185; *see also* WIS. STAT. § 974.06(4).

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Sufficiency of the motion is a question of law, which we review de novo. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

Furthermore, Ohlinger's claim does not establish ineffective assistance. To prevail on a claim of ineffective assistance, a defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Dismissal of the conspiracy counts did not render the statements inadmissible. The commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. ***Vogel v. State***, 87 Wis. 2d 541, 559, 275 N.W.2d 180 (Ct. App. 1979). Ohlinger's statements testified to by the officers, although relevant to the dismissed conspiracy counts, were non-hearsay as admissions under § 908.01(4)(b)1. and because they were relevant to the remaining counts. They were not used to prove the truth of the matter asserted, but to show intent and to prove enticement. To label counsel's performance deficient, there would have to be some reasonably meritorious basis on which to make an objection. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). We see none.

Further, even if the means of capturing the communications between Ohlinger and the "mother" and "daughter" were objectionable, Ohlinger has not demonstrated prejudice. The officers' testimony about the contents of the communications to which they were parties was admissible. *See* ***State v. Maloney***, 161 Wis. 2d 127, 129-32, 467 N.W.2d 215 (Ct. App. 1991). Having concluded that trial counsel was not ineffective, we reject Ohlinger's contention that postconviction and appellate counsel were ineffective for failing to make that argument.

We conclude Ohlinger's motion is insufficient on its face to entitle him to an evidentiary hearing on his ineffective assistance of counsel claim. Accordingly, it was within the trial court's discretion to deny the motion without one. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. The trial court's ***Escalona-Naranjo***-based decision reflects a proper exercise of discretion. Since a strong policy favors finality, "successive attempts at postconviction relief will not be tolerated in the absence of extraordinary circumstances." ***State ex rel. Washington v. State***, 2012 WI App 74, ¶26, 343 Wis. 2d 434, 819 N.W.2d 305.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals