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DISTRICT II

March 6, 2013

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

2012AP44 State of Wisconsin v. Ronnie L. Ringold (L.C. # 2002CF79)

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

Ronnie L. Ringold appeals pro se from an order denying his WIS. STAT. § 974.06 postconviction motion without a hearing. Ringold argues that his sentence exceeds the statutory maximum penalty, that there is newly discovered evidence entitling him to a new trial, and that trial counsel was ineffective for failing to fully investigate the case. 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 (2009-10).[1] We reject Ringold's claims and affirm.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

In 2002, following a jury trial, Ringold was sentenced as a party to the crime of burglary as a habitual criminal contrary to WIS. STAT. §§ 943.10 (1)(a), 939.05, and 939.62(2) (2001-02). At sentencing, Ringold admitted that he was a repeater as alleged in the information due to a prior 1997 felony conviction for attempted burglary. The trial court clarified that the maximum sentence on the burglary without the repeater enhancer was fifteen years, and that with the enhancer, the ten-year term of initial confinement could be increased to twenty years. The trial court imposed an eighteen-year bifurcated sentence comprised of thirteen years of initial confinement and five years of extended supervision.

Ringold pursued a WIS. STAT. RULE 809.30 direct appeal and we affirmed his conviction. ***State v. Ringold***, No. 2004AP355-CR, unpublished slip op. (WI App November 24, 2004). In 2006, the trial court denied Ringold's WIS. STAT. § 974.06 postconviction motion, and on appeal we reversed the order and remanded with instructions to the trial court to determine the admissibility of allegedly exculpatory evidence. ***State v. Ringold***, No. 2006AP2239, unpublished op. and order (WI App November 7, 2007). On remand, the trial court determined that the evidence Ringold complained of was inadmissible and that he was not entitled to a new trial. Eventually, this court dismissed Ringold's appeal from that order due to his failure to file a brief. In 2011, Ringold filed another § 974.06 postconviction motion which the trial court summarily denied and which forms the basis for the present appeal.

Ringold first argues that his eighteen-year bifurcated sentence exceeds the statutory maximum by three years.[2] We agree that Ringold's 2001 burglary offense falls under the first phase of truth in sentencing (TIS-I), and was at the time a Class C felony with a fifteen-year maximum. What Ringold fails to mention is that he admitted his repeater status and was sentenced as a habitual offender pursuant to WIS. STAT. § 939.62. The ten-year penalty enhancement permitted under § 939.62 applies only to the confinement portion of a sentence. ***State v. Jackson***, 2004 WI 29, ¶¶17, 20, 270 Wis. 2d 113, 676 N.W.2d 872. As explicitly acknowledged by the court and parties at Ringold's sentencing, when considering the invocation of the applicable penalty enhancer, thirteen years of initial confinement is not excessive.[3]

We also reject Ringold's argument that he is entitled to an evidentiary hearing on the basis of newly discovered evidence. Ringold's postconviction motion attached an affidavit from a man named John Mattox who averred that he and Ringold were together for twelve hours on the date of the burglary. Ringold asserts that this constitutes an alibi. The following requirements apply to a claim for a new trial based on newly discovered evidence: (1) the evidence must have come to the defendant's knowledge after trial; (2) the defendant must not

[2] The State's brief addresses the original sentencing claim raised in Ringold's postconviction motion, namely, that his sentence was unconstitutionally cruel and unusual under ***Graham v. Florida***, 130 S. Ct. 2011 (2010). Ringold abandoned this claim on appeal and instead argues that his sentence exceeds the statutory maximum penalty.

[3] We note that Ringold failed to argue the illegality of his sentence in previous litigation. Given that the judgment of conviction omits reference to the repeater enhancer, perhaps Ringold has now forgotten the details of his 2002 sentencing hearing. The omission in the judgment is a mere defect of form which may be corrected in accordance with the actual determination by the trial court. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. Though the original judgment is not before the court in the present appeal, we suggest for clarity's sake that the circuit court either correct the clerical error in the sentence portion of the written judgment of conviction or direct the clerk's office to make such a correction. ***Id.***, ¶5.

have been negligent in seeking to discover it; (3) the evidence must be material; (4) the evidence must not be cumulative; and (5) it must be reasonably probable that a different result would be reached on a new trial. ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. We conclude that Ringold has failed to demonstrate the first requirement. Assuming he was with Mattox on the offense date, Ringold was certainly aware of this fact at the time of trial. Mattox's new "willing[ness] to testify" to the events of that evening is not new evidence.

Finally, we reject Ringold's claim that he was entitled to a ***Machner***[4] hearing on whether trial counsel was ineffective for failing to unearth Mattox as a potential trial witness. Ringold could have raised this claim on direct appeal or in his prior WIS. STAT. § 974.06 postconviction motion and has failed to offer a sufficient reason for failing to do so. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Remarkably, though both Ringold's direct appeal and his prior § 974.06 motion involved claims that trial counsel was ineffective for a variety of reasons, neither mentioned the existence of John Mattox. Ringold's contention that he never raised this argument in prior litigation misses the point. ***Escalona-Naranjo*** operates as a procedural bar to claims that could have been raised even if they were not actually raised.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals

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