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March 4, 2013

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

2012AP1293 State of Wisconsin v. Kelvin L. Crenshaw
(L.C. #2008CF2860)

Before Curley, P.J., Fine and Kessler, JJ.

Kelvin L. Crenshaw, *pro se*, appeals an order denying his postconviction motion filed pursuant to WIS. STAT. § 974.06 (2011-12) and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996).[1] Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition and affirm. *See* WIS. STAT. RULE 809.21(1).

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

Background

In this court's prior opinion resolving Crenshaw's direct appeal, we set forth the facts and procedural history, so we will not restate them here. *See* ***State v. Crenshaw***, No. 2010AP1960-CR, unpublished slip op. ¶¶2-9 (WI App Aug. 2, 2011). Suffice it to say that a jury found Crenshaw guilty of first-degree reckless injury by use of a dangerous weapon, as a habitual criminal; felon in possession of a firearm, as a habitual criminal; and possession of a short-barreled rifle, as a habitual criminal. In his direct appeal, Crenshaw argued, among other things, that he received ineffective assistance of trial counsel. ***Id.***, ¶1. One of his bases for making this argument was that his trial counsel failed to argue that Karl Peterson was the aggressor and that Crenshaw was acting in self-defense during the altercation underlying Crenshaw's conviction. ***Id.***, ¶¶2, 11. In our opinion, we explained:

> Several of Crenshaw's ineffective-assistance-of-counsel claims center around the idea that his trial counsel failed to raise a defense that Crenshaw believes should have been raised, to wit, that Peterson and another individual attacked and robbed Crenshaw and that Crenshaw was acting in self-defense….
>
> First, Crenshaw waived his right to testify at trial. Crenshaw submits that he "was unaware that his failure to testify would result [sic] his theory being nullified." However, Crenshaw does not claim that he would have testified had he known that he could not otherwise raise his theory that Peterson was the aggressor, nor could he logically make that argument. Crenshaw waived his right to testify at the end of the defense's case. It should have been obvious to Crenshaw at that point in the trial that if he did not testify, the jury would not hear any more about his version of events than had already been presented.
>
> Furthermore, if this is Crenshaw's attempt to argue that he did not knowingly, intelligently, and voluntarily waive his right to testify, not only is his argument conclusory, it is not supported by the record. Our review of the record revealed that the trial court conducted the standard colloquy with Crenshaw to assure that he was knowingly, intelligently, and voluntarily waiving his rights. *See* ***State v. Weed***, 2003 WI 85, ¶¶42-43, 263 Wis. 2d 434, 666

> N.W.2d 485. Following the colloquy, and after conferring with his counsel, Crenshaw expressly waived his right to testify. Crenshaw also signed a form entitled "Waiver of Right to Testify" (some capitalization omitted), stating that he "knowingly, understandingly, intelligently and voluntarily waived his right to testify in the above matter" and that "the decision not to testify has been arrived at independently … after consulting with and advising counsel … of said decision."
>
> Without Crenshaw's testimony, his trial counsel was limited in her ability to raise a theory of self-defense. The evidence that Crenshaw argues his trial counsel should have admitted in support of the defense—namely, Crenshaw's medical records detailing a head hematoma he sustained the day of the attack and evidence that the bicycle he was allegedly riding was not recovered at the scene—without more, is hardly enough to permit an inference that Peterson was the aggressor. The medical records, without Crenshaw's explanation, merely demonstrate that Crenshaw suffered a head injury, which is consistent with the State's theory that Crenshaw and Peterson struggled….
>
> Second, Crenshaw's trial counsel was not ineffective for failing to introduce sufficient evidence throughout the trial to argue during closing argument that Peterson was the aggressor. When Crenshaw chose not to testify, he gave up his ability to tell the jury, in his own words, what he claims happened on the day of the attack, and, as set forth above, other than the medical records and allegedly missing bicycle, he does not specify any other evidence that his trial counsel could have submitted to support Crenshaw's story that Peterson attacked him. Without such evidence, his argument that his trial counsel acted deficiently is conclusory. Conclusory arguments are not enough on which to determine that trial counsel was ineffective. *See* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433 (requiring specificity in postconviction motions).

Crenshaw, No. 2010AP1960-CR, unpublished slip op. ¶¶16-20 (brackets in ***Crenshaw***).

Following his direct appeal, Crenshaw, *pro se*, filed the postconviction motion at issue now. He argued that his postconviction counsel was ineffective for failing to argue that trial counsel was ineffective for not having Crenshaw testify at trial. In his brief, Crenshaw wrote that his postconviction counsel "never use[d] this vital and imperative factor as a main issue. Rather [postconviction counsel] simply only inse[r]ts this factor with the other factors that he

brought forth under the issue of Trial Counsel Ineffectiveness." (Record citations omitted.) He then directed the postconviction court's attention to the portion of the brief filed by postconviction counsel in support of a prior postconviction motion on Crenshaw's behalf where this issue was raised.[2] The postconviction court denied Crenshaw's motion.

Discussion

In this appeal, Crenshaw faults postconviction counsel for not developing what he contends was the most important part of trial counsel's ineffective assistance: counsel's failure to present his testimony at trial. Crenshaw seemingly concedes that this issue was raised before but nevertheless argues that his postconviction counsel was deficient for not *adequately* raising it. According to Crenshaw, if his testimony that he was the victim in the robbery had been presented to the jury in conjunction with medical records related to the injuries he suffered and evidence of the shotgun that was used to force him to comply, there is a strong possibility that the outcome of the proceeding would have been different. Crenshaw claims his trial counsel advised him not to testify, informed him that his testimony would not be needed, and claimed that she could still present his self-defense theory to the jury. While acknowledging that he

[2] In the brief supporting the prior postconviction motion, on this point, postconviction counsel argued:

> [T]he defense theory was not found on rationality of fact or law, since the theory could not be argued by how counsel presented it. Counsel failed to put into evidence necessary facts that would have allowed counsel to argue the defense theory in closing. This could have been done with Crenshaw's testimony. Since Crenshaw did not testify, there was no way this theory could have worked as there was no evidence present that Crenshaw was robbed. Crenshaw was unaware that his failure to testify would result [in] his theory being nullified.

(Citations to Crenshaw's affidavit omitted.)

waived his right to testify, he nevertheless claims that he did so based "solely on the unreasonabl[e] and ineffective advice of [his trial counsel]." As such, he argues his waiver was not knowing and voluntary.

In response, the State argues that this appeal is an attempt by Crenshaw to re-raise issues this court already decided. The State points out that issues already decided on a previous appeal have been finally adjudicated and cannot be relitigated in a WIS. STAT. § 974.06 motion, no matter how artfully the defendant may attempt to rephrase them. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). We agree with the State.

To the extent Crenshaw's argument hinges on his contention that the waiver of his right to testify was not knowing and voluntary, it is barred by ***Witkowski***. As set forth above, we already concluded that such an argument is not supported by the record, which revealed that the trial court conducted the standard colloquy with Crenshaw to assure that he was knowingly, intelligently, and voluntarily waiving his rights and that Crenshaw expressly waived his right after conferring with his attorney. *See* ***Crenshaw***, No. 2010AP1960-CR, unpublished slip op. ¶18. Likewise, to the extent he now claims his trial counsel was ineffective for advising him not to testify/failing to present his testimony, Crenshaw is merely "attempt[ing] to rephrase or re-theorize his previously-litigated" claim. *See* ***Witkowski***, 163 Wis. 2d at 992. We are satisfied that our opinion resolving Crenshaw's direct appeal precludes Crenshaw's current claims.

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