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DISTRICT IV

March 21, 2013

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

2011AP2866 State of Wisconsin v. Luis A. Estrada Jimenez (L.C. # 2005CF2616)

Before Higginbotham, Sherman, and Kloppenburg, JJ.

Luis Estrada Jimenez, *pro se*, appeals the circuit court's order denying his motion for postconviction relief. Estrada[1] contends that he is entitled to a new trial, notwithstanding the fact that his conviction was affirmed by this court in a previous opinion. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See*

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[1] The appellant refers to himself in his brief as "Estrada" and also stated on the record to the circuit court that that is what he prefers to be called.

WIS. STAT. RULE 809.21 (2011-12).[2] We summarily affirm on the basis that Estrada's claims are procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

Background

Estrada was convicted following a jury trial of one count of first-degree intentional homicide as a party to a crime. He filed a motion under WIS. STAT. § 974.02 with the aid of his postconviction and appellate counsel, Ralph Sczygelski. The circuit court held a hearing on the motion, at which Sczygelski elicited testimony from Estrada's trial counsel about what arguments he had pursued at trial. After briefing, the circuit court denied the motion and Estrada appealed. This court affirmed the conviction in a per curiam opinion. ***State v. Estrada-Jimenez***, No. 2008AP2768-CR, unpublished slip op. ¶1 (WI App Nov. 19, 2009). Estrada filed a *pro se* postconviction motion under WIS. STAT. § 974.06 alleging that Sczygelski rendered ineffective assistance of appellate and postconviction counsel because he failed to raise the issue of trial counsel's ineffectiveness.

The circuit court held an evidentiary hearing where Sczygelski testified that he reviewed the record, including trial counsel's testimony from the postconviction motion hearing. Sczygelski concluded that the only issue of arguable merit was the one he presented on direct appeal, which was highlighting the possible consideration given to the State's two chief witnesses, David Suarez and Pablo Lopez, in exchange for their testimony. Sczygelski also testified that he thought trial counsel did an exceptional job and did as much as any lawyer reasonably could be expected to do in representing Estrada. The circuit court denied Estrada's

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

motion, concluding that Sczygelski did not render ineffective assistance of counsel. Estrada now appeals.

Standard of review

The issue of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. Mayo***, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115. The circuit court's factual findings will be upheld unless clearly erroneous. ***Id.*** Whether counsel's performance was deficient and prejudicial to the defense is a question of law that we review de novo. ***Id.***

Discussion

The State argues on appeal that all of the issues raised in Estrada's brief are procedurally barred under ***Escalona-Naranjo***, 185 Wis. 2d at 185, which held that an issue which could have been raised on direct appeal or in a motion under WIS. STAT. § 974.02 cannot be the basis for a subsequent postconviction motion under WIS. STAT. § 974.06, unless there was a sufficient reason for failing to raise the issue earlier. Estrada argues that, by alleging that his postconviction and appellate counsel was ineffective based on a failure to assert claims of trial counsel's ineffectiveness, he has alleged a sufficient reason for failing to raise the claims earlier and should be permitted to raise them now.

In some circumstances, ineffective assistance of postconviction counsel can be a "sufficient reason" for failure to raise an issue earlier. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). When, as here, a defendant claims ineffective assistance of postconviction counsel based on a failure to assert trial counsel's ineffectiveness, a defendant bears the burden of proving that trial counsel's

performance was deficient and prejudicial. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Estrada has not met this burden, nor has he alleged other circumstances that would constitute a sufficient reason for not having raised his claims previously.

Estrada makes various arguments as to what his trial counsel should have done differently, none of which are meritorious. He asserts that the State failed to provide sufficient evidence at his trial to convict him, and that his trial counsel should have moved for dismissal at the close of the State's case-in-chief. However, a review of the record reveals sufficient evidence to support Estrada's conviction. The State's chief witnesses, Suarez and Lopez, each testified consistent with the State's theory of the case, which was that Estrada had participated in the homicide at issue, serving as one of the drivers when the crime took place. Viewing the evidence most favorably to the State and the conviction, there was sufficient evidence for a jury to find Estrada guilty, such that his trial counsel cannot be deemed ineffective for failing to make a meritless motion for dismissal. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990); ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

Estrada also argues that he was convicted on the basis of out-of-court inconsistent statements by witnesses Suarez and Lopez, citing ***Vogel v. State***, 96 Wis. 2d 372, 291 N.W.2d 838 (1980). In ***Vogel***, our supreme court held that an unsworn, inconsistent prior statement of a witness was properly admissible because the witness, who was available for cross-examination, claimed to have no memory of the prior statement and the prior statement was inconsistent with the testimony of the witness at trial. ***Id.*** at 386. However, Estrada was not convicted based on inconsistent statements made out of court. Suarez and Lopez both testified at Estrada's trial and implicated him in the murder in their testimony. Suarez and Lopez both testified at trial that they

lied to law enforcement because they had been instructed to do so by Estrada's boss, who had just orchestrated the murder of the victim and threatened any potential informants with the same fate. Estrada's trial counsel questioned Suarez and Lopez regarding the inconsistencies in their prior statements to law enforcement and the testimony they gave at trial, and argued in his closing statement that their testimony was not reliable. After hearing Suarez and Lopez testify, the jury found them to be credible, and we will not disturb that credibility determination on appeal. *See* ***State v. Turner***, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983).

Estrada also argues that Suarez and Lopez were coerced into testifying out of their own self-interest because of deals they were offered by the prosecution. This court already ruled on the issue of whether Suarez and Lopez were given preferential treatment by the prosecution. In our decision in case No. 2008AP2768-CR, we rejected Estrada's argument that Suarez and Lopez received any consideration from the prosecution in exchange for their testimony. Nothing in the materials presented now by Estrada persuades us to alter our decision on that issue.

Finally, Estrada asserts that he was wrongfully restrained during his trial, in violation of his rights under ***State v. Champlain***, 2008 WI App 5, ¶22, 307 Wis. 2d 232, 744 N.W.2d 889. The circuit court rejected this argument as untimely because it was not raised until Estrada filed a motion under WIS. STAT. § 974.06 after he had already had a direct appeal. However, in any event, nothing in the record supports Estrada's assertion that he was restrained during his trial and, even if he were restrained as he now claims, nothing in the record demonstrates that the jury saw him restrained in any meaningful way because Estrada did not testify at trial. Thus, the concern in ***Champlain***, 307 Wis. 2d 232, ¶¶6-7, where the defendant testified while wearing an armband security device, are not present in this case.

Estrada has not met his burden of proving that trial counsel's performance was deficient and, accordingly, cannot establish that his postconviction and appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15. Estrada has not alleged any other circumstances that would constitute a "sufficient reason" under ***Escalona-Naranjo***, 185 Wis. 2d at 185, for failing to raise previously the issues he has set forth in his brief on appeal. We agree with the State that Estrada is procedurally barred from raising those issues now.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals