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DISTRICT II

June 5, 2013

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

2012AP1871 State of Wisconsin v. Courtney Leon Cobbs (L.C. #2003CF1018)

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

Courtney Leon Cobbs appeals pro se from an order denying his WIS. STAT. § 974.06 postconviction motion without an evidentiary hearing. 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 (2011-12).[1] Because Cobbs's postconviction motion presented allegations that are either procedurally barred or conclusory, we affirm the trial court's order.

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

In 2003, Cobbs was charged as one of three co-defendants in connection with a bank robbery. The criminal complaint alleged that two masked robbers entered and fired shots inside a bank, left with the bank's money, and, while outside, fired shots at a witness in a car.[2] Later that night, police stopped the rental car Cobbs was driving and discovered items connected to the robbery. A jury found Cobbs guilty of armed robbery, first-degree recklessly endangering safety, attempted first-degree intentional homicide, and felon in possession of a firearm. On direct appeal, we affirmed Cobbs's convictions. ***State v. Cobbs***, No. 2007AP501-CR, unpublished slip op. (WI App Jan. 23, 2008).

Cobbs filed a WIS. STAT. § 974.06 postconviction motion in the trial court alleging that postconviction counsel was ineffective because she should have challenged trial counsel's failure to: (1) have tested for DNA a pair of jeans found in Cobbs's car; and (2) investigate a March 29, 2004 police report indicating that only three bullets were recovered from the building behind the victim's car.[3] Cobbs also alleged that the March 2004 police report constituted newly discovered evidence and that in light of the report's contents, the prosecutor knowingly presented perjured testimony by permitting the victim to testify that between five and eight shots were fired. The trial court determined that Cobbs's allegations were conclusory and denied the motion without an evidentiary hearing. Cobbs appeals.

[2] The third codefendant drove the getaway car.

[3] At trial, the victim testified that between five and eight shots were fired in his direction. The March 2004 report indicates investigators "surveyed points where three of the bullets struck a building behind the witness and one bullet [] struck a tree."

Absent a sufficient reason, a defendant is procedurally barred from raising issues in a WIS. STAT. § 974.06 postconviction motion that could have been raised on direct appeal or in a prior § 974.06 motion. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). The ineffective assistance of postconviction counsel may constitute a sufficient reason where the defendant alleges particular material facts which, if proven, demonstrate he or she is entitled to relief. *See* ***State v. Balliette***, 2011 WI 79, ¶79, 336 Wis. 2d 358, 805 N.W.2d 334. In order to overcome the presumption that postconviction counsel acted reasonably, a § 974.06 motion must allege specific facts to show both that counsel's performance was deficient and that this deficiency was prejudicial. ***Id.***, ¶63. The trial court may deny a postconviction motion without an evidentiary hearing if a defendant fails to raise a question of fact, presents only conclusory allegations, or if the record demonstrates that the defendant is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Whether a postconviction motion is sufficient on its face to entitle a defendant to an evidentiary hearing is a question of law. ***Balliette***, 336 Wis. 2d 358, ¶18.

Among the items recovered from Cobbs's car on the night of the robbery were blue jeans, black jeans, and sweatpants. The trial testimony established that some of the witnesses saw a robber wearing sweatpants while others saw jeans. Cobbs's postconviction motion alleged that the sweatpants were indeed his and that he was not wearing jeans on the day of the robbery. Cobbs argues that trial counsel should have tested the jeans for DNA because this would have proved that the codefendants, not Cobbs, wore the jeans.

We conclude that Cobbs has failed to provide a sufficient reason for not raising the DNA claim in his direct appeal. Cobbs was aware of the jeans at the time of trial. Trial counsel argued that the lack of DNA testing was shoddy police work and constituted reasonable doubt as

to Cobbs's involvement. After this strategy failed, Cobbs informed postconviction counsel of this potential ineffectiveness claim, and postconviction counsel did not raise it. Cobbs's late allegations of ineffective assistance are conclusory and fail to set forth the "five 'w's' and one 'h'" necessary to demonstrate that either trial or postconviction counsel's performance was unsound strategy falling below an objective standard of reasonableness. ***Id.***, ¶¶58-59, 67 (given the importance of finality, a § 974.06 motion must allege within its four corners facts explaining the who, what, where, when, why, and how of a claim). In addition to the lack of a sufficient reason, Cobbs has not demonstrated any prejudice from the failure to test the jeans. He does not allege that the jeans were actually tested and yielded exculpatory evidence. Even if he had, several witnesses testified that one of the robbers inside the bank was wearing sweatpants, not jeans.

We also conclude that the trial court properly denied Cobbs's claims relating to the March 2004 police report. Assuming that trial counsel was unaware of the report at the time of trial, Cobbs has failed to demonstrate that its discovery would have made a difference. First, that an investigator located only three bullets physically lodged in the building behind the victim's car does not contradict the victim's testimony that he heard between five and eight shots whizzing by in his direction.[4] Second, the question of whether there were three or four versus five or eight bullets is a distinction without a difference. As stated in our earlier opinion rejecting Cobbs's claim that the evidence was insufficient to prove intent, "[a] natural and probable consequence of discharging a weapon several times in the direction of a person is that death may result.… The conduct is not reduced to mere recklessness just because the shooter

[4] For this reason, we reject Cobbs's claim that the prosecutor knowingly presented false testimony.

was a poor shot." ***Cobbs***, No. 2007AP501-CR, ¶11. Cobbs's allegation that a jury would have acquitted him had it know that only three or four shots came close to the victim is speculative and conclusory.

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