COURT OF APPEALS DECISION DATED AND FILED

December 11, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP116

Cir. Ct. Nos. 1998CF5924
1999CF483

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERJUAN D. SPILLER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM W. BRASH III, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jerjuan Spiller appeals from the denial of his motion for postconviction relief brought pursuant to WIS. STAT. § 974.06 (2005-

06).[1] The circuit court held that: (1) Spiller's claim of ineffective assistance of trial counsel is procedurally barred; (2) Spiller's claim for a new trial grounded on an accomplice's recantation lacks the necessary corroboration; and (3) Spiller brought his claim of ineffective assistance of appellate counsel in the wrong forum. We affirm.

Background

¶2 A jury found Spiller guilty of two counts of kidnapping, two counts of first-degree sexual assault, two counts of armed robbery, and one count of child enticement (exposing a sex organ to a child), all as party to a crime. *See* WIS. STAT. §§ 940.31(1)(b), 940.225(1)(b), 943.32(2), 948.07(3), and 939.05 (1997-98). The circuit court imposed maximum consecutive sentences for each offense, specifically, a twenty-year term of imprisonment for child enticement and a forty-year term for each of the other six felonies.

¶3 The trial testimony reflected that on October 6, 1998, Spiller, accompanied by Toronto Conley and Larry Minnis, approached seventeen-year-old Kelly S. while she waited for a bus. The three men directed Kelly S. into an alley at gun point, forced her to engage in penis-to-vagina intercourse, robbed her, and fled the scene. On October 26, 1998, Spiller and Minnis approached Chenille E. near a bus stop. The two men led her at gunpoint into an alley, where Conley joined them. Spiller, with Minnis and Conley, forced Chenille E. to engage in penis-to-vagina and penis-to-mouth intercourse, robbed her, and fled.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 Conley testified at Spiller's trial as a key witness for the State pursuant to a plea agreement. His testimony provided substantial detail about the involvement of Spiller and Minnis in both the October 6, 1998 and the October 26, 1998 assaults.

¶5 Spiller appealed his convictions pursuant to WIS. STAT. RULE 809.30 and raised, among other matters, multiple claims of trial counsel's ineffective assistance. The circuit court denied his claims and this court affirmed. ***State v. Spiller***, No. 00-2897, unpublished slip op. (WI App Sept. 11, 2001).

¶6 Represented by a second appellate attorney, Spiller brought a postconviction motion in December 2006, pursuant to WIS. STAT. § 974.06. He sought a new trial, claiming that trial counsel provided ineffective assistance by failing to investigate a potential alibi witness, namely Minnis's girlfriend, Emilie Campbell. In support, Spiller submitted Campbell's statement that on October 26, 1998, Spiller made telephone calls from Campbell's home to Portland, Oregon. The motion included a copy of Campbell's telephone bill reflecting that the last call to Portland began at 8:40 p.m. and ended eight minutes later. Spiller further supported his motion for a new trial with Conley's unsworn statement retracting the allegation that Spiller participated in the October 26, 1998 assault.

¶7 As an alternative ground for relief, Spiller sought relief from the aggregate 260-year term of imprisonment imposed by the circuit court. He claimed that his first appellate attorney was ineffective by failing to argue that the penalty is disproportionate to the crimes committed and therefore violates the Eighth Amendment of the United States Constitution.

¶8 The circuit court denied Spiller's motion in its entirety. This appeal followed.

Analysis

¶9 We begin with Spiller's contention that trial counsel was ineffective in failing to investigate Campbell's potential as an alibi witness. The circuit court held that the claim is procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). We agree.

¶10 "[D]ue process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error …." ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). A defendant may not pursue claims in a subsequent appeal that could have been raised in an earlier postconviction motion or direct appeal unless the defendant provides a "sufficient reason" for not raising the claims previously. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

¶11 Spiller has not offered a sufficient reason why he could not have raised his current claim of trial counsel's ineffectiveness in his direct appeal. The only reason proffered is that Campbell's affidavit was previously unavailable due to trial counsel's poor performance. This reason is not sufficient; it begs the essential question of why Spiller did not challenge trial counsel's poor performance in this regard on direct appeal. Accordingly, the claim is barred.

¶12 We turn next to the contention that Conley's recantation exonerating Spiller in the October 26, 1998 incident is grounds for a new trial.[2] Motions for a

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[2] Spiller discusses Conley's recantation as an aspect of trial counsel's ineffective performance in failing to investigate Campbell as an alibi witness. As did the circuit court, we view the issue of Conley's recantation as a claim of newly discovered evidence. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 279 n.3, 592 N.W.2d 220 (1999).

new trial based on recantations are entertained with great caution and their resolution lies in the sound discretion of the circuit court. *See* ***State v. Terrance J.W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App 1996). "We will affirm the [circuit] court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record." ***Id.***

¶13 In order to secure a new trial based on newly discovered evidence, the defendant must show "that '(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (citations omitted). When the newly discovered evidence is a recantation, the defendant must also satisfy another requirement. "[R]ecantation testimony must be corroborated by other newly discovered evidence." ***State v. McCallum***, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997).

¶14 The only evidence that might serve as newly discovered corroboration of Conley's recantation is Campbell's telephone bill and her accompanying statement. Spiller concedes, however, that his trial attorney had Campbell's telephone records prior to trial but chose to ignore them. The evidence is thus not newly discovered. *See* ***Terrance J.W.***, 202 Wis. 2d at 500.

¶15 Moreover, the Campbell evidence does not corroborate Conley's recantation. At best, Campbell's telephone bill and explanatory statement show that Spiller was using the telephone until 8:48 p.m. on October 26, 1998. They do not show Spiller's location when the crime began, sometime between 9:35 p.m.

and 10:00 p.m.[3] Accordingly, Spiller has not proffered any evidence corroborating Conley's recantation, newly discovered or otherwise.

¶16 In circumstances where there is no physical evidence and there are no witnesses, the defendant faces unique difficulties in satisfying the mandate to corroborate a recantation with additional newly discovered evidence. *See* ***McCallum***, 208 Wis. 2d at 477. In such situations, the defendant may satisfy the corroboration requirement by showing that: "(1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation." ***Id.*** at 477-78.

¶17 The corroboration requirement presents no unique difficulties here. Spiller's case involves physical assaults, robberies, multiple actors, and sworn testimony at trial. Moreover, the recanting witness in this case is an accomplice, not a victim. These circumstances present many opportunities to discover new evidence corroborating the recantation, if such evidence exists. Assuming, however, that a defendant may corroborate a recanting accomplice's testimony using the alternative method of proof set forth in ***McCallum***, Spiller did not make the necessary showing.

¶18 The recanting statement does not reflect feasible motives for Conley's initial false testimony. The statement first provides that Conley accused Spiller because Conley "wanted to protect the identity of Larry Minnis." This

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[3] At trial, Chenille E. testified that she left work at 9:00 p.m. She then estimated the periods of time in which she waited for and rode Milwaukee County buses towards her home. Using the shortest of her estimates for each leg of her journey, she encountered the perpetrators at 9:35 p.m. According to the complaint, she encountered the perpetrators at approximately 10:00 p.m.

alleged motive is untenable because Conley's testimony did not protect Minnis; it squarely incriminated him.

¶19 The second motive Conley proffers in his statement is that he "did not know [Spiller] well and [] was upset at him for statements he made regarding [Conley's] involvement" in the October 6, 1998 robbery and assault. This motive is enfeebled by Conley's acknowledgment at trial that Spiller is a relative whom he has known for as long as he can remember. Thus, the professed motive is no substitute for external corroborating evidence because the recantation is internally inconsistent. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 300-01, 592 N.W.2d 220 (1999) (professed motives do not provide internal corroboration where internal inconsistency of the recantation leads to conclusion that recantation is incredible).

¶20 Similarly, Conley's recantation lacks circumstantial guarantees of trustworthiness. Such guarantees may be found where the statement is internally consistent and where it is given under oath. *See* ***McCallum***, 208 Wis. 2d at 478. Conley's recantation is neither sworn to nor internally consistent.

¶21 The recantation reflects no alternative indicia of trustworthiness. The statement is not a spontaneous declaration but rather a document signed some six months after Conley met with Spiller's private investigator to discuss the case. *Cf.* ***Kivioja***, 225 Wis. 2d at 296 (spontaneity of statement may provide an assurance of trustworthiness). The statement was not made to a close friend or family member. *Cf.* ***State v. Sharlow***, 110 Wis. 2d 226, 237, 327 N.W.2d 692 (1983) (statement to a close acquaintance may suggest trustworthiness). Finally, the statement is not against Conley's penal interest. *Cf.* ***Kivioja***, 225 Wis. 2d at 296-97 (extent to which statement is self-incriminatory and against penal interest may provide assurance of trustworthiness). It includes some admissions of

wrongdoing, but these admissions place Conley in no jeopardy because he is already convicted and sentenced for the offenses he admits. On this record, Conley had nothing to lose by making his recanting statement.[4]

¶22 The circuit court did not erroneously exercise its discretion in concluding that Spiller failed to corroborate Conley's recantation with the alternative method of proof permitted by ***McCallum***. Absent satisfaction of the corroboration requirement, the recantation does not entitle Spiller to a new trial. *See* ***Terrance J.W.***, 202 Wis. 2d at 500.

¶23 We turn to Spiller's claim that his appellate counsel was ineffective by failing to challenge Spiller's sentences on Eighth Amendment grounds. Spiller contends that his sentences are disproportionate to the offenses of kidnapping, first-degree sexual assault, armed robbery, and child enticement. He therefore asserts that his sentences are barred by the Eighth Amendment's prohibition against excessive sanctions and that appellate counsel's performance was prejudicially deficient in failing to press this claim on appeal.

¶24 Spiller may not raise a challenge to the effectiveness of his appellate counsel in a motion brought pursuant to WIS. STAT. § 974.06. The exclusive avenue for addressing appellate counsel's ineffectiveness is a writ of *habeas corpus* in the court of appeals. ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). Spiller offers several reasons why equity and judicial economy favor

[4] By contrast, Conley testified at trial pursuant to a plea agreement in which he promised to cooperate in exchange for a reduction in his prison exposure from 700 years to 285 years. As other courts have noted, "[t]he co-defendant who has admitted his guilt and who is awaiting sentencing is concerned with what the sentencing court will do. That very concern is a potent guarantee of trustworthiness." ***State v. Jackson***, 188 Wis. 2d 187, 200 n.5, 525 N.W.2d 739 (Ct. App. 1994).

dispensing with this rule. These arguments are unavailing. Spiller elected to frame his claim for relief as one of ineffective assistance of appellate counsel. He must abide by the rules governing such claims.

¶25 Moreover, Spiller's Eighth Amendment claim would fail on its merits. The two-prong test for proving ineffective assistance of counsel requires the defendant to show both that the attorney's performance was deficient and that the defendant was prejudiced as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). There is a strong presumption that counsel rendered effective assistance. ***Id.*** at 690.

¶26 A defendant does not have the right to insist that his appellate counsel raise particular issues. ***State v. Evans***, 2004 WI 84, ¶30, 273 Wis. 2d 192, 682 N.W.2d 784, *criticized on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. Counsel has the duty to determine the issues that have merit for appeal. ***Id.*** "Only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of [appellate] counsel be overcome." ***Smith v. Robbins***, 528 U.S. 259, 288 (2000) (citation omitted). We therefore examine the strength of Spiller's Eighth Amendment claim.

¶27 "In addressing [an] Eighth Amendment claim, we look to whether the sentence was 'so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Davis***, 2005 WI App 98, ¶21, 281 Wis. 2d 118, 698 N.W.2d 823 (citation omitted). Spiller has not satisfied this standard.

¶28 Spiller was a party to seven aggravated crimes. He and his two accomplices forced a seventeen-year-old girl into an alley, raped her at gun point, and robbed her of her winter coat. Apparently remorseless, he repeated the sequence again twenty days later, forcing a second young woman off the street to rape her at gun point and steal her jewelry and her jacket.

¶29 In imposing sentence, the circuit court considered the primary factors of gravity of the offense, character of the defendant, and need for protection of the public. *See* ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The court observed that sexual assault is a particularly dreaded offense, and that Spiller's victims were particularly blameless. It assessed Spiller's character, acknowledging his lack of a significant prior record but noting that he treated the victims in a particularly degrading way. The court addressed the need to protect the public, stressing the importance ascribed by the community to safeguarding young women from sexual assault. It discussed Spiller's responsibility for participating in two distinct incidents and stated its intent to ensure that Spiller pose no further risk to the public.

¶30 Spiller asserts that had he been convicted of a reckless homicide pursuant to WIS. STAT. § 940.06, he would have faced only twenty-five years of imprisonment and therefore "something [is] strangely amiss" in the harshness of his penalty because his victims lived rather than died. Spiller does not identify what is "amiss" in his receipt of a more onerous sentence for seven intentional crimes than he might have faced for a single reckless offense. To the extent that he challenges the statutory maximum penalties for his crimes, we note that "judgments about appropriate punishment require subjective line-drawing, which is 'properly within the province of legislatures, not courts.'" ***State v. Hahn***, 2000 WI 118, ¶33, 238 Wis. 2d 889, 618 N.W.2d 528 (citation omitted).

¶31 Spiller's crimes were dangerous, violent, and cruel. The circuit court imposed a penalty to exact a proportionate punishment after considering the appropriate factors. Spiller has not demonstrated that a maximum sentence for each offense he committed in the course of his crime spree is shocking or offensive to the judgment of reasonable people. Therefore, he has failed to show that his Eighth Amendment claim was "clearly stronger" than the claims raised by appellate counsel in Spiller's direct appeal. *See* ***Smith***, 528 U.S. at 288. Accordingly, appellate counsel was not ineffective for failing to bring such a claim.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.