COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP264 **Cir. Ct. No. 2002CF4284**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CESO SPREWELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Ceso Sprewell appeals from the order that denied his motion for postconviction relief brought pursuant to WIS. STAT. § 974.06 (2005–06). The circuit court concluded that Sprewell's motion was

procedurally barred. We affirm, but on the alternative ground that Sprewell's appellate brief is wholly inadequate to support his claims. *See* ***State v. Holt***, 128 Wis. 2d 110, 124–125, 382 N.W.2d 679, 687 (Ct. App. 1985) (appellate court may affirm on ground other than that relied upon by circuit court).

Background

¶2 The State alleged that Sprewell shot two men in the parking lot of a tavern on July 25, 2002. A jury found Sprewell guilty of attempted first-degree intentional homicide while armed, first-degree recklessly endangering safety while armed, and possessing a firearm as a felon as a second or subsequent offense, all as a habitual criminal. Sprewell filed a notice of intent to pursue postconviction relief, and the public defender's office appointed an attorney who subsequently filed a notice of no-merit appeal and a no-merit report on Sprewell's behalf.

¶3 Sprewell successfully moved this court to discharge his appellate attorney and dismiss his no-merit appeal. Sprewell then filed a *pro se* motion in the circuit court pursuant to WIS. STAT. RULE 809.30 (2001–02). He sought postconviction relief on several grounds, including an allegation that his trial attorney was ineffective. The circuit court denied the motion without a hearing in December 2004. Sprewell did not appeal.

¶4 In January 2008, Sprewell filed a second postconviction motion, again raising allegations that he received ineffective assistance from his trial attorney. The circuit court denied the motion on the ground that it was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). This appeal followed.

Discussion

¶5 In his instant appeal, Sprewell claims that his trial attorney was ineffective: (1) by failing to investigate the possibility of an alibi witness; (2) by failing to challenge the dangerous weapon penalty enhancer alleged in regard to the charges of attempted homicide and reckless endangerment; (3) by failing to object when the State's attorney told the jury during closing argument that Sprewell was guilty; and (4) by conceding Sprewell's guilt during sentencing. Sprewell asserts that his postconviction attorney was in turn ineffective by submitting a no-merit report instead of pursuing these issues on their merits.

¶6 Sprewell previously filed a postconviction motion. He may not bring a second or subsequent postconviction motion unless he shows a sufficient reason for failing to raise all available issues in the first proceeding. *See* ***id.***, 185 Wis. 2d at 181–182, 517 N.W.2d at 162. Sprewell asserts that his postconviction attorney's ineffective assistance constitutes such a reason. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 683, 556 N.W.2d 136, 140 (Ct. App. 1996) (postconviction attorney's ineffective assistance during direct appeal proceedings may constitute sufficient reason for bringing additional postconviction motion). As a further justification for serial litigation, Sprewell contends that he was "incompetent" to represent himself on direct appeal "without guidance." In support, he cites ***State v. Debra A.E.***, 188 Wis. 2d 111, 135–136, 523 N.W.2d 727, 736 (1994) (grounds for postconviction relief not raised due to defendant's mental incompetency may be raised in a subsequent postconviction motion).

¶7 We doubt that many circumstances arise in which a defendant who discharged his appellate attorney and litigated *pro se* may rely on ***Rothering*** and

Debra A.E., singly or in tandem, to justify a second or subsequent postconviction motion. We need not determine whether the instant case presents such circumstances. We reject Sprewell's claims for relief because Sprewell's appellate submission does not adequately brief the issues.

¶8 To prevail on the merits of his claims, Sprewell must show both that his trial attorney's performance was deficient and that the deficient performance prejudiced Sprewell's defense. *See* ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379, 385 (1997). To prove deficient performance, Sprewell must show that his attorney's specific "acts or omissions were outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To prove prejudice, Sprewell must show that his attorney's errors "had an actual, adverse effect on the defense." *See* ***State v. Pote***, 2003 WI App 31, ¶16, 260 Wis. 2d 426, 440, 659 N.W.2d 82, 89.

¶9 Sprewell has not met his burden. In his appellate brief, he cites the standard for ineffective assistance of counsel, but he fails to develop an argument addressing the merits of his substantive claims. Instead, Sprewell refers to "issues that are pointed out in the [WIS. STAT.] § 974.06 motion." Sprewell's attempt to incorporate circuit court submissions in his appellate brief by reference is unacceptable. *See* ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343, 354 (Ct. App. 1994). An appellate brief requires an argument that demonstrates why the litigant should prevail, accompanied by supporting legal authority. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).

¶10 Sprewell's first allegation, that his trial attorney failed to investigate and present a defense based on alibi, lacks an offer of proof. Sprewell's appellate submission fails to provide evidence of an alibi witness who would testify that

Sprewell could not have shot two men on July 25, 2002. Thus, Sprewell has not satisfied his burden to show how any investigation by his trial attorney would have changed the outcome of the trial. *See* ***Flynn***, 190 Wis. 2d at 48, 527 N.W.2d at 349–350. Speculative assertions that a witness would provide exonerating testimony are insufficient to support a claim of inadequate investigation. *See* ***id.***, 190 Wis. 2d at 48, 527 N.W.2d at 350.

¶11 Similarly, Sprewell provides no legal authority or factual support for the proposition that WIS. STAT. § 939.63(1) (1999–2000),[1] permitting an enhanced penalty for crimes committed with a dangerous weapon, was improperly invoked in this case. He merely observes that the statute contains an "exception" providing that the increased penalty "does not apply if possessing, using or threatening to use a dangerous weapon is an essential element of the crime charged." Sec. 939.63(1)(b).

¶12 A litigant may not rely on general statements to support an argument. ***Pettit***, 171 Wis. 2d at 646, 492 N.W.2d at 642. Here, Sprewell does not explain why WIS. STAT. § 939.63(1)(b) is applicable to the charges of attempted homicide and recklessly endangering safety.[2] Neither crime requires proof of possessing, using, or threatening to use a dangerous weapon. *See* WIS. STAT. §§ 940.01, 939.32(1), 941.30(1); *see also* WIS JI—CRIMINAL 1010, 1345, 580. Accordingly, Sprewell has not demonstrated that his trial attorney performed deficiently by failing to challenge the penalty enhancer.

[1] All subsequent references to the Wisconsin Statutes are to the 1999–2000 version unless otherwise noted.

[2] The State also charged Sprewell with being a felon in possession of a firearm, but it did not seek an increased penalty under WIS. STAT. § 939.63 as to this allegation.

¶13 As to Sprewell's contentions that his attorney failed to object when the prosecutor gave an opinion regarding Sprewell's guilt during closing argument and then "conceded guilt" at sentencing, these claims are unaccompanied by citations to the Record. This court will not independently search the Record to find facts supporting an argument. ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 411, 620 N.W.2d 463, 465–466. We make several brief observations, however. First, it is entirely proper for the prosecutor to argue "that the evidence convinces him or her and should convince the jurors." *See* ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695, 703 (Ct. App. 1998). Second, conceding guilt is not *per se* ineffective assistance of counsel. ***State v. Gordon***, 2003 WI 69, ¶30, 262 Wis. 2d 380, 397, 663 N.W.2d 765, 774. Third, to the extent, if any, that Sprewell's trial attorney made an improper sentencing argument, Sprewell must demonstrate that the error had an actual, adverse effect on his sentence in order to establish ineffective assistance of counsel. *See* ***Pote***, 2003 WI App 31, ¶16, 260 Wis. 2d at 440, 659 N.W.2d at 89. Sprewell has not offered such a demonstration.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005–06).