COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP874 **Cir. Ct. No. 2001CF145**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM CHARLES RULEAU,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marinette County: MICHAEL T. JUDGE, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. William Ruleau appeals an order denying his WIS. STAT. § 974.06 motion for postconviction relief.[1] He contends he received

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

ineffective assistance of trial counsel and counsel's combined deficiencies violated his right to a fair trial. We conclude Ruleau is barred from raising these errors and we affirm.

Background

¶2 At approximately 12:45 a.m. on October 22, 2001, Helen's Edgewater tavern in Marinette was burglarized. The tavern's 920-pound safe was stolen and apparently dragged away by a vehicle. Police followed the safe's trail, locating it in a wooded area just outside the city. They staked out the scene and arrested Ruleau and James Dulak when the men appeared with gloves and tools and attempted to pry open the safe. Ruleau was charged as a repeater with burglary and theft, both as party to a crime, and criminal damage to property. Ruleau and Dulak were also charged with attempted burglary and criminal damage to property for an attempted break-in at the Brothers Three restaurant, where an alarm had sounded at 12:25 a.m. on October 22.

¶3 Dulak reached an immunity deal with the State and testified against Ruleau. Ruleau offered the testimony of his live-in girlfriend, Lisa Perket, who stated Ruleau was in bed with her at 12:30 a.m. on October 22. There was also evidence that, at 11:30 p.m. on October 21, Ruleau had reported to the Menomonee County Jail in Michigan for drug testing.

¶4 The jury convicted Ruleau of the three counts related to the break-in at Helen's and acquitted him on charges related to Brothers Three. He was sentenced to concurrent terms totaling eleven years' initial confinement and four

years' extended supervision. Ruleau moved for a new trial, alleging ineffective assistance of counsel. The court denied the motion after a ***Machner***[2] hearing.

¶5 Ruleau appealed. *See* ***State v. Ruleau***, No. 2003AP2117-CR, unpublished slip op. (WI App July 22, 2004). Although we held certain aspects of trial counsel's performance had been deficient, we concluded there was no prejudice and we affirmed the conviction. *See* ***id.***, ¶¶34, 50.

¶6 Ruleau then sought federal habeas corpus relief. That motion was stayed to permit Ruleau to pursue other available state remedies. New postconviction counsel filed a motion pursuant to WIS. STAT. § 974.06, asserting trial counsel was ineffective in three ways not originally discussed in his first ***Machner*** hearing. He claimed trial counsel failed to: pursue exculpatory footprint evidence, obtain evidence supporting his alibi, and investigate the possibility of jury tampering by a bailiff. The new postconviction motion also asserted ineffective assistance of postconviction/appellate counsel[3] for failing to address the three deficiencies.

¶7 After the new motion was filed, Ruleau submitted his own pro se, supplemental brief. He asserted trial counsel had lacked a legitimate strategy for his alibi defense because Perket's testimony, which brought out evidence relating to Ruleau's presence and purpose at the Menomonee jail, gave the State an opening to discuss Ruleau's past acts. Ruleau asserted that trial counsel should

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] Postconviction and appellate counsel perform two distinct roles. However, they are often the same person. In this case, Ruleau's first postconviction attorney and first appellate attorney were the same person.

have met with and better prepared Perket and, if counsel had met with her, it would have been unnecessary to introduce any evidence about Menomonee to establish his alibi. That is, Perket's testimony about Ruleau's whereabouts would have sufficed.

¶8 The court ultimately concluded there was some deficient performance because of trial counsel's failure to meet with Perket before questioning her on the stand. However, the court found no prejudice and denied the WIS. STAT. § 974.06 motion. Ruleau appeals.

Discussion

¶9 The State asserts Ruleau's claims are procedurally barred under WIS. STAT. § 974.06, which "compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental, or amended motion." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A motion brought under § 974.06 is typically barred, if filed after a direct appeal, unless the defendant shows a sufficient reason why he or she did not, or could not, raise the issues in the motion preceding the first appeal. *See* ***Escalona***, 185 Wis. 2d at 185.

¶10 Ineffective assistance of appellate counsel may constitute a "sufficient reason" for not previously raising an issue. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). When appellate counsel is allegedly ineffective for failing to pursue certain issues on appeal, a defendant must demonstrate that the ignored issues were stronger than those actually presented. *See* ***Smith v. Robbins***, 528 U.S. 259, 288 (2000) (citations omitted). Whether claims brought under WIS. STAT. § 974.06 are barred

is a question of law we review de novo. ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶11 On appeal, Ruleau claims trial counsel was ineffective for failing to meet with and adequately prepare alibi witness Perket, failing to examine footprint evidence, and failing to follow up on the possibility of jury tampering. Further, Ruleau claims, these errors cumulatively warrant a new trial.

¶12 What is immediately striking about Ruleau's appellate argument, however, is that he has completely failed to allege, much less demonstrate, any error on the part of postconviction/appellate counsel, despite the fact that such ineffectiveness was part of his WIS. STAT. § 974.06 motion. Because there is no discussion of ineffectiveness of postconviction/appellate counsel on appeal, Ruleau cannot use that alleged error to circumvent ***Escalona***'s bar on successive motions.

¶13 Thus, the question is whether Ruleau had a sufficient reason for failing to raise in his first motion the issues presented in his most recent motion. He offers no explanation for why his current claims of trial counsel's ineffectiveness could not have been previously pursued and at least one—problems relating to his alibi witness—is repetitive. Once litigated, a matter cannot be relitigated in a subsequent postconviction proceeding "no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Ruleau's current motion for relief

under WIS. STAT. § 974.06 is barred and we affirm.[4] *See* ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992) (we may affirm for reasons other than those used by trial court).

By the Court.—Order affirmed.

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

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[4] Regardless, Ruleau would not prevail on the merits. Despite the trial court's findings, Ruleau did not actually show that trial counsel failed to meet with Perket before trial, only that counsel did not recall meeting with her. Moreover, evidence about Ruleau's presence at the Menomonee jail was part of the alibi strategy and, in fact, the WIS. STAT. § 974.06 motion originally alleged counsel did not do enough to corroborate that part of the alibi. Although a failure to prepare Perket for testifying might have been deficient, no prejudice resulted from her testimony about Ruleau and the Menomonee jail.

The footprint evidence consisted of three envelopes with footprints on them, recovered from Helen's. The prints did not match the shoes Ruleau or Dulak wore when they were arrested. Ruleau asserts that if the prints matched other shoes Dulak owned, or matched to a third person, there would be doubt as to Ruleau's involvement. But counsel was able to use this evidence and the State conceded it had no physical evidence linking Ruleau to Helen's. Despite the State's indication that the print evidence has always been available, even now on appeal Ruleau has not attempted to demonstrate a print match. However, one of the prints belonged to the owner and there was no way to determine when the prints were made. Thus, even if the prints matched others, the evidence does not necessarily exclude Ruleau from suspicion, nor is a failure to match the prints to Ruleau particularly exculpatory. Because the print evidence benefitted Ruleau as used, there is neither deficient performance nor prejudice from counsel's performance.

Finally, as to alleged jury tampering, a bailiff purportedly told jurors to hurry their deliberations because people had other things to do, and Ruleau faults trial counsel for not following up on this information sooner. However, postconviction counsel contacted multiple jurors, although not the original complaining juror, and neither attorney was able to corroborate that the bailiff had said anything even remotely questionable. Thus, trial counsel cannot be considered deficient for failing to pursue a specious contention.

Prejudice should be evaluated based on the cumulative effect of counsel's deficiencies. ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305. However, the only actual deficiency here was trial counsel's failure to prepare Perket, and we have determined there was no prejudice from that error. There is therefore no cumulative prejudice requiring a new trial. Ruleau also has not shown that these issues were stronger than the issues postconviction/appellate counsel actually pursued. *See* ***Smith v. Robbins***, 528 U.S. 259, 288 (2000).