COURT OF APPEALS DECISION DATED AND FILED

April 17, 2012

Diane M. Fremgen
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. 2011AP741

Cir. Ct. No. 2002CF5598

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARLIN A. DIXON,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Marlin A. Dixon, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2009-10) motion for postconviction relief and

from an order denying his motion for reconsideration.[1] He argues that his postconviction counsel provided ineffective assistance when he did not allege that trial counsel and the trial court erred when they did not raise the issue of Dixon's competency during the proceedings. Dixon also contends that he is entitled to a new trial in the interest of justice because he was incompetent when he was tried. We reject his arguments and affirm.

BACKGROUND

¶2 Charles Young, Jr., was beaten to death by approximately twenty individuals. The State charged Dixon, then age fourteen, with first-degree reckless homicide by use of a dangerous weapon, as a party to a crime, for his role in Young's death. Dixon sought a reverse waiver to juvenile court and presented evidence from Dr. Christopher Morano, a psychologist, concerning the suitability of reverse waiver in Dixon's case. Dr. Morano's written report and testimony at the reverse-waiver hearing included his findings that Dixon suffers from mild mental retardation and adjustment disorder.

¶3 The trial court denied the reverse-waiver motion. Dixon subsequently elected to have his case tried to the trial court and was found guilty. He appealed.

[1] The Honorable Jeffrey A. Conen denied the motions. The Honorable Kevin E. Martens presided over the reverse-waiver hearing and the Honorable John Franke presided over Dixon's trial and sentencing.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Postconviction counsel filed a no-merit report on Dixon's behalf, to which Dixon responded. This court rejected the no-merit report. New postconviction counsel filed a postconviction motion seeking sentence modification on grounds that Dixon's transfer to an adult prison and his alleged rape in prison constituted new factors warranting sentence modification. *See* ***State v. Dixon***, No. 2007AP86-CR, unpublished slip op. ¶1 (WI App June 17, 2008). The trial court denied the motion and Dixon appealed. We affirmed his conviction, *see* ***id.***, and the supreme court denied review.

¶5 In January 2010, Dixon filed a *pro se* motion in the trial court seeking to vacate the DNA surcharge that was imposed. The trial court granted the motion.

¶6 In January 2011, Dixon filed the *pro se* WIS. STAT. § 974.06 motion that is before this court. He argued that postconviction counsel had provided ineffective assistance by not alleging that trial counsel and the trial court had erred by not raising the issue of Dixon's competency. The trial court denied Dixon's motion without a hearing on grounds that it was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The trial court explained that Dixon had opportunities to raise the issue of his competency in his response to the no-merit report and when he filed his *pro se* postconviction motion concerning the DNA surcharge. The trial court also denied Dixon's motion for reconsideration, citing the same reasons. This appeal follows.

DISCUSSION

¶7 Although the trial court denied Dixon's postconviction motion based on ***Escalona-Naranjo***'s procedural bar, the State urges this court to consider the merits of Dixon's allegations concerning the ineffectiveness of postconviction

counsel. We agree with this approach, and we affirm the trial court's orders, albeit on different grounds.

¶8 We begin by reviewing the applicable legal standards. A defendant cannot raise an argument in a subsequent postconviction motion that was not raised in a prior postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. ***Id.*** at 181-82; *see also* WIS. STAT. § 974.06(4). A defendant can attempt to overcome the ***Escalona-Naranjo*** bar by arguing that an issue was not raised due to postconviction counsel's ineffectiveness. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) ("It may be in some circumstances that ineffective postconviction counsel constitutes a sufficient reason as to why an issue which could have been raised on direct appeal was not."). Where a defendant alleges that his postconviction lawyer provided ineffective assistance by failing to allege that the defendant's trial lawyer performed deficiently, the defendant must first establish that the trial lawyer's representation was constitutionally deficient. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. A defendant alleging ineffective assistance of counsel must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not discuss both prongs "if the defendant makes an insufficient showing on one." ***Id.*** at 697.

¶9 Consistent with these legal standards, Dixon's postconviction motion alleged that his postconviction counsel provided ineffective assistance by failing to assert that both trial counsel and the trial court erred when they did not question Dixon's competency to proceed. For reasons detailed below, we conclude that Dixon has not shown that he was prejudiced by postconviction counsel's allegedly deficient performance.

¶10 “No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.” WIS. STAT. § 971.13(1). A person is competent to proceed if the person possesses both “sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and ... a rational as well as factual understanding of a proceeding against him or her.” ***State v. Garfoot***, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997).

¶11 Competency to proceed is “a judicial inquiry, not a medical determination.... Although a defendant may have a history of psychiatric illness, a medical condition does not necessarily render the defendant incompetent to [proceed].” ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477. Similarly, “mental retardation in and of itself is generally insufficient to give rise to a finding of incompetence to stand trial,” although “a defendant may be incompetent based on retardation alone if the condition is so severe as to render him incapable of functioning in critical areas.” ***Garfoot***, 207 Wis. 2d at 226-27.

¶12 When trial counsel doubts the defendant’s competency to proceed, counsel must raise the issue with the trial court and failure to do so constitutes deficient performance. ***State v. Johnson***, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986). Additionally, the trial court has a duty to initiate competency proceedings pursuant to WIS. STAT. § 971.14(1), “whenever there is reason to doubt a defendant’s competency.” ***State v. Weber***, 146 Wis. 2d 817, 823, 433 N.W.2d 583 (Ct. App. 1988). “A reason to doubt competency can arise from the defendant’s demeanor in the courtroom, colloquies with the court, or by a motion from either party.” ***Byrge***, 237 Wis. 2d 197, ¶29.

¶13 In his postconviction motion, Dixon asserted that Dr. Morano's findings concerning Dixon's "mental and educational deficiencies" should have induced trial counsel and the trial court to question Dixon's competency.[2] For instance, Dr. Morano said that Dixon suffered from "a mild form of mental retardation, as well as profound academic retardation."[3] Dr. Morano said Dixon's I.Q. was 56 and further testified: "[A]s with any youth who has cognitive deficit[s], [Dixon] struggles to communicate his needs and ideas accurately. That is part and parcel of someone with a [mental retardation] diagnosis or learning disability." Dr. Morano also said that although Dixon "does not seem to manifest prominent signs of major depression, there is an underlying contribution of dysphoria, and anxiety, based on his past trauma, losses, and what may be an inarticulated sense of futility and hopelessness."[4]

¶14 Dixon's postconviction motion argued that as a result of those conditions, he "lacked the capacity to understand the nature and object of the proceedings against him to a reasonable degree, thus [he] could not have been able and was not able to adequately assist in his defense." *See* WIS. STAT. § 971.13(1). Thus, he asserted, his trial counsel provided ineffective assistance, and the trial

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[2] We agree with the State's observation that Dixon does not assert that there was "any other basis aside from the information provided by [Dr.] Morano that created a reason to doubt Dixon's competency."

[3] While Dixon was placed in learning disabled classes in fifth grade, Dr. Morano's report indicated that Dixon was "reinstated in regular education classes at some point."

[4] Although Dixon may have shown signs of depression, there is no indication that he was prescribed any medication for his symptoms, and Dr. Morano's report stated that according to the information provided, Dixon "has never experienced any psychological or psychiatric inpatient or outpatient care."

court erred, by not raising the issue of Dixon's competency. He repeats those same arguments on appeal.

¶15 The State argues that Dr. Morano's report and testimony did not create reason to doubt Dixon's competency to stand trial. It emphasizes that at no time did Dr. Morano, who also testified at a suppression hearing and at Dixon's trial, "ever express any opinion that Dixon was incompetent to stand trial." Further, the State asserts, Dr. Morano did not suggest that any of the symptoms of depression or post-traumatic stress disorder that Dixon was suffering "would contribute to a lack of capacity to understand the nature and object of the proceedings or the capacity to consult and assist in preparing his own defense."[5] *See* WIS. STAT. § 971.13(1). Likewise, the State explains, Dr. Morano did not opine that Dixon's academic delay would render him incapable "of understanding the nature and object of the proceedings, consulting with counsel or assisting in preparing his defense." *See* ***id.***

¶16 We agree with the State that Dr. Morano's findings did not create reason to doubt Dixon's competency. In addition, we agree with the State's assertion that other aspects of the record demonstrated Dixon's competency, such as Dixon's testimony at the suppression hearing, which the State said revealed "his

[5] While Dr. Morano observed some symptoms associated with post-traumatic stress disorder, he ultimately concluded that Dixon did not suffer from post-traumatic stress disorder as defined by the American Psychiatric Association.

ability to comprehend questions, answer them, provide a chronological account of past events and provide specific testimony helpful to his own defense."[6]

¶17 Dixon has not shown that there was reason to doubt his competency to proceed, so he has failed to show that his trial counsel performed deficiently or that the trial court erred by not *sua sponte* questioning Dixon's competency. It follows that Dixon was not prejudiced by postconviction counsel's alleged failure to assert that trial counsel was ineffective and that the trial court erred. We affirm the denial of Dixon's postconviction motions.

¶18 Finally, Dixon asserts, apparently for the first time on appeal, that he is entitled to a new trial in the interest of justice based on his trial counsel's and the trial court's alleged errors concerning his competency. Because we conclude they did not err, we conclude that Dixon is not entitled to a new trial in the interest of justice on those grounds.

By the Court.—Orders affirmed.

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

[6] The trial court observed the following about Dixon's testimony at the suppression hearing: "It was certainly my impression of his demeanor on the stand that he was someone who—whatever limitations he might have—is alert enough to understand what's going on here and to be searching for the answers that would help his cause rather than searching for what actually happened."