COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP56 **Cir. Ct. No. 1995CF951175**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KWESI B. AMONOO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Kwesi B. Amonoo, *pro se*, appeals an order of the circuit court denying his postconviction motion without a hearing. We agree with

the circuit court that Amonoo's WIS. STAT. § 974.06 (2011-12)[1] motion is baseless and procedurally barred and that there is no newly discovered evidence to warrant a new trial. We therefore affirm the order.

BACKGROUND

¶2 In 1995, a jury convicted Amonoo on two counts of attempted first-degree intentional homicide and four counts of first-degree recklessly endangering safety while armed for a shooting in front of a Kohl's food store. Amonoo filed a postconviction motion seeking a new trial and alleging, among other things, ineffective assistance of trial counsel. Amonoo also sought sentence modification. The trial court denied the motion, we affirmed the conviction on appeal, and the supreme court denied a petition for review.

¶3 In 2010, with the aid of privately retained counsel, Amonoo filed a motion under WIS. STAT. § 974.06 (2009-10). This motion alleged that postconviction counsel had been ineffective because, although he had raised ineffective-assistance claims against trial counsel, they were not the strongest claims that could have been raised. The circuit court denied the motion, we affirmed the order on appeal, and the supreme court denied a petition for review.

¶4 In 2013, Amonoo filed a *pro se* motion under WIS. STAT. § 974.06. In this motion, he alleged that his privately retained counsel had been ineffective in the filing of the first § 974.06 motion because counsel had failed to sufficiently plead one argument and failed to raise four additional, stronger ineffective-

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

assistance claims against trial counsel. The circuit court rejected this motion because Amonoo had no constitutional right to counsel for the pursuit of relief by a § 974.06 motion. The circuit court also determined the underlying ineffective-trial-counsel issues Amonoo attempted to raise were procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994), because they had not been raised in his original postconviction motion or appeal.

¶5 Amonoo's motion also sought a new trial because of newly discovered evidence.[2] Specifically, Amonoo said he received a letter from Nakisha Sanders, describing the confession of David Walker to the shooting for which Amonoo is incarcerated. The motion includes an affidavit from Sanders, plus an affidavit from Marcus Johnson purporting to describe Walker's confession to a "crime" for which Amonoo is incarcerated. The circuit court rejected the motion, noting that Amonoo had been convicted of six crimes, so it was "unknown which crime these affidavits refer to" and, in any event, the affidavits contain only hearsay, meaning that Amonoo "has not met the requisite showing … to secure a hearing."

DISCUSSION

¶6 "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. The

[2] The motion actually refers to the existence of a "new factor," but new-factor motions relate to sentence modification. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. Based on the motion content, the circuit court properly treated it as a motion for a new trial based on newly discovered evidence rather than a motion for resentencing due to a new factor.

circuit court may deny a hearing if the facts, even assumed to be true, do not entitle the movant to relief. *See* ***id.***, ¶12.

¶7 Amonoo is not entitled to relief because of ineffective assistance from privately retained counsel in the filing of the WIS. STAT. § 974.06 motion. A defendant has the constitutional right to the effective assistance of counsel only where the right to counsel is constitutionally guaranteed. *See* ***Coleman v. Thompson***, 501 U.S. 722, 752 (1991). "There is no constitutional right to counsel on a § 974.06 motion." ***State v. Evans***, 2004 WI 84, ¶32, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900.[3] Accordingly, retained counsel's purported ineffectiveness on collateral postconviction proceedings does not warrant relief.

¶8 Several of Amonoo's claims against retained counsel are, ultimately, claims of ineffective trial counsel. However, all grounds for relief—like claims of ineffective trial counsel—must be raised in the original, supplemental, or amended postconviction motion or appeal. *See* WIS. STAT. § 974.06(4); ***Escalona***, 185 Wis. 2d at 184-85. "[A]ny claim that could have been raised on direct appeal" or in a prior postconviction motion is barred from being raised in a subsequent § 974.06 motion absent a sufficient reason for not raising it in an earlier proceeding. *See* ***State v. Lo***, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756; *see also* ***Escalona***, 185 Wis. 2d at 185. In some instances, ineffective assistance

[3] In its brief, in the section that discusses this premise, the State has cited to "*State v. Eggenberger*, 2013 WI App 128, ¶10, 351 Wis. 2d 224, 838 N.W.2d 866." That case, however, is an unpublished *per curiam* case and should not have been cited. *See* ***State v. Eggenberger***, No. 2012AP2345, unpublished slip op. (WI App Sept. 24, 2013); WIS. STAT. § 809.23(3)(a)-(b).

of postconviction counsel may constitute a "sufficient reason" for not previously raising an issue. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

¶9 Here, Amonoo's underlying claims of ineffective trial counsel were not a part of his original postconviction motion, his direct appeal, or his first WIS. STAT. § 974.06 motion. Thus, those claims are procedurally barred absent sufficient reason. *See* ***Lo***, 264 Wis. 2d 1, ¶2. Amonoo, who cites ***Rothering***, is evidently attempting to claim ineffective assistance of retained counsel on the first § 974.06 motion as a sufficient reason. However, that excuse does not suffice. As noted above, there is no right to counsel for a § 974.06 motion, so that attorney's ineffectiveness does not provide an adequate reason for failing to raise the issues previously. *See* ***Coleman***, 501 U.S. at 753 (explaining that clients are bound by attorney's actions). Moreover, ineffective assistance of retained counsel would only explain Amonoo's failure to raise his current ineffective-trial-counsel issues in the first § 974.06 motion; it would not explain the failure to raise the issues in the original postconviction motion or appeal. Accordingly, the substantive issues in the current motion are procedurally barred.

¶10 When moving for a new trial based on newly discovered evidence, the defendant must show by clear and convincing evidence 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. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (quotation marks and citation omitted). "If the defendant is able to make this showing, then 'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.*** (citation omitted).

¶11 As noted, Amonoo's "newly discovered evidence" is the purported confession of David Walker, made to Nakisha Sanders and Marcus Johnson. Sanders and Johnson both provided Amonoo with affidavits. Sanders' affidavit, dated October 26, 2012, states, in pertinent part, "I have been trying to locate Kwesi Amonoo for years now to tell him that David Walker confessed to the shooting that Kwesi Amonoo was incarcerated for. David said he shot the 'Ricans' because they jumped him." Johnson's affidavit, signed on November 30, 2012, states:

> At Myrtle Pirant's house on the eastside of Milwaukee in April 1995, I met with David Walker. He confessed to me that Kwesi was in jail for a crime that he (David) committed. He said that he shot some "ricans" in retaliation for something they did to him. David confessed this to me, my fiancée, Myrtle, Sesi and Simeon. [H]e then went on to say that he robbed a store called Al's on Center street. He said that he stole Al's gun, a 38 and thats the gun he used to get at the rican with that jumped him at school. Immediately upon seeing Mr. Amonoo I relayed this information to him.

¶12 Walker's confessions are clearly hearsay, which is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," *see* WIS. STAT. § 908.01(3), and Walker is not available to testify himself, having committed suicide.[4] Hearsay evidence is generally inadmissible at trial. *See* WIS. STAT. § 908.02. There are, of course, exceptions to this rule, and Amonoo attempts to show four different ways in which the hearsay evidence of Walker's confession would be admissible.

[4] It is not wholly clear when Walker committed suicide; Amonoo indicates it was shortly after making his confessions, which seems to suggest some time after April 1995. However, Amonoo points to no documentation that confirms this date.

¶13 First, Amonoo asserts that in ***State v. Jensen***, 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482, the "court allowed the testimony of a dead person to a third party to be admitted." In ***Jensen***, we addressed the admissibility of certain statements made by a homicide victim, portending her death. Statements that had been deemed nontestimonial were held admissible against the defendant under the "forfeiture by wrongdoing exception to the general prohibition against hearsay" because it was the defendant who made the declarant unavailable. ***Id.***, ¶28. With respect to testimonial statements, we assumed that they had been erroneously admitted and instead engaged in a harmless-error analysis. ***Id.***, ¶35. Thus, ***Jensen*** does not apply here.[5]

¶14 Second, Amonoo asserts that Walker's confession is a dying declaration. *See* WIS. STAT. § 908.045(3). However, a dying declaration is "[a] statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death." ***Id.*** Amonoo offers no facts to show that Walker's statement fulfills this definition.

¶15 Third, Amonoo contends that under ***State v. Jackson***, No. 2009AP851-CR, unpublished slip op. (WI App Apr. 6, 2010),[6] "Walker's suicide makes his confession an exception to the hearsay rule." To Amonoo, the

[5] Jensen was subsequently granted a writ of *habeas corpus* by the federal court because of a confrontation clause violation in the admission of the testimonial statements that we had deemed harmless. *See* ***Jensen v. Schwochert***, 2013 WL 6708767 (E.D. Wis. Dec. 18, 2013). The federal grant of relief does not impact the inapplicability of the case here.

[6] Unlike the State's unpublished case, ***State v. Jackson***, No. 2009AP851-CR, unpublished slip op. (WI App Apr. 6, 2010), is an authored case and, thus, may be cited for persuasive value, although we note that Amonoo was required to "file and serve a copy of the opinion with the brief." *See* WIS. STAT. § 809.23(3)(b)-(c).

similarity is that the ***Jackson*** court "admitted [an] out of court statement that a child made to [three] people." ***Jackson***, however, discussed the admissibility, at a sexual assault trial, of a child's statement under the residual hearsay exception of WIS. STAT. § 908.03(24), which allows the admission of hearsay statements that do not fit any of the specifically numerated exceptions but which have "comparable circumstantial guarantees of trustworthiness." Amonoo does not explain how the residual exception allows admission of Walker's "confession," and we will not develop an argument for him. *See* ***Gardner v. Gardner***, 190 Wis. 2d 216, 239 n.3, 527 N.W.2d 701 (Ct. App. 1994).

¶16 Finally, Amonoo asserts that Walker's confession is corroborated by the reference to the stolen gun as described in Johnson's affidavit, because the robbery of Al's supposedly did happen.[7] The State appears to have inferred, by Amonoo's reference to corroboration, that Amonoo is claiming Walker's confession is admissible as a statement against interest. *See* WIS. STAT. § 908.045(4).

¶17 A statement against interest is

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability … that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. *A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.*

WIS. STAT. § 908.045(4) (emphasis added). The extent of corroboration required is "'corroboration sufficient to permit a reasonable person to conclude, in light of

[7] Amonoo does not point us to any evidence so confirming.

all the facts and circumstances, that the statement could be true.'" ***State v. Guerard***, 2004 WI 85, ¶23, 273 Wis. 2d 250, 682 N.W.2d 12 (citation omitted).

¶18 Here, it is evident that Walker's "confession" is insufficiently corroborated. Neither affidavit contains any description of Walker explaining when or where he committed the crime to which he was supposedly confessing. Both Sanders' and Johnson's descriptions of the confession are vague as to why Walker would have committed the shooting. Neither affidavit offers any details about the circumstances under which Walker confessed or why he might have done so. There is no explanation for why Sanders or Johnson waited seventeen years—from the apparent time of confession in April 1995 until swearing their affidavits in October and November 2012—before revealing Walker's confession. Sanders, for instance, claims to have tracked down Amonoo through the internet "in hopes of correcting this injustice," even though she might have accomplished the same objective by providing her information to police or the district attorney at the time she first acquired it. Johnson provided his information "[i]mmediately upon seeing Mr. Amonoo," but does not indicate when or where that encounter occurred. Accordingly, no reasonable person would believe Walker's supposed statements to be true, so those statements are insufficiently corroborated and inadmissible as statements against interest.

¶19 Inadmissible evidence cannot provide a basis for challenging a conviction. *See* ***State v. Bembenek***, 140 Wis. 2d 248, 253, 409 N.W.2d 432 (Ct. App. 1987). Consequently, assuming without deciding that Amonoo sufficiently alleged the first four factors of the newly discovered evidence test, *see* ***Avery***, 345 Wis. 2d 407, ¶25, he has not shown a reasonable probability of a different result in a new trial. The circuit court therefore properly denied the motion for a new trial based on newly discovered evidence.

By the Court.—Order affirmed.

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