COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP69 **Cir. Ct. No. 2009CF234**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD CARLISLE HOLLENBECK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Richard Hollenbeck, pro se, appeals an order denying his WIS. STAT. § 974.06 motion for postconviction relief.[1] Hollenbeck

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

challenges the effectiveness of his postconviction counsel and intimates that the circuit court erroneously exercised its discretion when it denied his motion without a hearing. We reject Hollenbeck's arguments and affirm the order.

BACKGROUND

¶2 In October 2009, the State charged Hollenbeck with the armed robbery of a bar in Superior. Hollenbeck was convicted upon a jury's verdict and was sentenced to twenty-five years' initial confinement, followed by fifteen years' extended supervision. Following Hollenbeck's conviction, he moved for post-conviction relief, arguing that a showup identification had been suggestive, in violation of ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, and that his trial counsel was ineffective by failing to challenge the procedure. Hollenbeck also claimed his right to a fair trial was compromised when the circuit court declined to strike a witness's testimony as unresponsive, and he was entitled to a new trial in the interest of justice. Hollenbeck's motion for postconviction relief was denied after a hearing.

¶3 On direct appeal, Hollenbeck argued his trial counsel was ineffective by failing to seek suppression of a witness's testimony identifying Hollenbeck, claiming his identification was the product of a suggestive showup. Hollenbeck also argued he was entitled to a new trial in the interest of justice. We rejected Hollenbeck's arguments and affirmed the judgment and order. *See* ***State v. Hollenbeck***, No. 2012AP2254-CR, unpublished slip op. (WI App Sept. 24, 2013). There, we outlined the following trial evidence, noting that, even without the disputed identification, it was "more than sufficient for the jury to convict Hollenbeck." ***Id.***, ¶31.

> [Steven] Ecklund, who admitted being one of the two men involved in the robbery, identified Hollenbeck as the other perpetrator. Surveillance video showed Hollenbeck and Ecklund leaving the Black Bear Casino together at 8 a.m. on October 12—about one hour before the robbery. Surveillance video from Schultz's Bar showed Ecklund entering the bar at 8:36. At 8:56, the video showed a man in a blue sweatshirt robbing the bar. Based on the resemblance between Hollenbeck and the man in the blue sweatshirt, the jury could have reasonably inferred that Hollenbeck committed the robbery. Further, the State introduced evidence of the travel times between the Black Bear Casino and Schultz's Bar, and Schultz's Bar and the Grand Motel [the Duluth motel where Hollenbeck was staying], to establish that Hollenbeck could have committed the robbery between leaving the casino at 8 and purchasing breakfast at Arby's [across the street from the Grand Motel] at 9:29.
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> Additionally, Hollenbeck was apprehended while riding in the car used in the robbery. He admitted being a passenger in that car on the morning of the robbery. Police found a knife matching the one used in the robbery inside the car, along with a large amount of cash. They also found a sweatshirt similar to the one worn by the robber. In addition, Hollenbeck admitted purchasing two hand-held radios at Walmart, and police linked the radios to the robbery.
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> Further, while the evidence showed that the robber had a goatee, the video clips from Walmart and the Black Bear Casino showed that Hollenbeck also used to have a goatee. Hollenbeck conceded he shaved sometime between leaving the Black Bear Casino on the morning of October 12 and his arrest on October 13. Ecklund testified he purchased razors for Hollenbeck after the robbery, at Hollenbeck's request, so Hollenbeck could shave off his goatee.

Id., ¶¶31-33.

¶4 Hollenbeck subsequently filed the underlying WIS. STAT. § 974.06 motion for postconviction relief, alleging the ineffective assistance of both his trial and postconviction counsel. In a supplemental postconviction motion, Hollenbeck claimed there was another suspect, mentioned by police on a recording, whom the State failed to disclose. The circuit court denied Hollenbeck's motion and

subsequent request for reconsideration without a hearing, concluding Hollenbeck's claims were either procedurally barred or already litigated. This appeal follows.

DISCUSSION

¶5 We conclude Hollenbeck's claims are barred by WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). In ***Escalona-Naranjo***, our supreme court held that "a motion under [WIS. STAT. §] 974.06 could not be used to review issues which were or could have been litigated on direct appeal." ***Escalona-Naranjo***, 185 Wis. 2d at 172. Successive motions and appeals are procedurally barred unless the defendant can show a sufficient reason why the newly alleged errors were not previously raised. ***Id.*** at 185. Ineffective assistance of counsel may constitute a sufficient reason. ***State v. Romero-Georgana***, 2014 WI 83, ¶48, 360 Wis. 2d 522, 849 N.W.2d 668.

¶6 To establish ineffective assistance of counsel, Hollenbeck must show both that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance affected the outcome of the trial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Id.*** at 690. Relevant to this appeal, "a defendant who alleges in a [WIS. STAT.] § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate

that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought." ***Romero-Georgana***, 360 Wis. 2d 522, ¶4.

¶7 The prejudice prong of the ***Strickland*** test is satisfied when the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** We may address the two prongs in the order we choose. If Hollenbeck fails to show prejudice, we need not address whether counsel's performance was deficient. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶8 This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶9 While Hollenbeck's appellate arguments focus mostly on his trial counsel's alleged ineffectiveness, we construe his argument to be that his postconviction counsel was ineffective by failing to raise additional challenges to the effectiveness of Hollenbeck's trial counsel. Hollenbeck contends his trial counsel should have challenged the State's failure to disclose another suspect allegedly mentioned by police during a break in their recorded interview of Hollenbeck. In his supplemental WIS. STAT. § 974.06 motion, Hollenbeck stated:

> You can plainly hear detectives and police officers talking back and forth about different issues involving Mr. Hollenbeck and the armed robbery. At one point the detectives mention "the guy who ran from the tracks." This is shortly after they mention Arby's. A few sentences later, the detective says: "Armed robber down the tracks. I just want the video tape for 9 o'clock."

The subject recording is not in the record on appeal.[2] From Hollenbeck's own description, however, no suspect is named. Further, without the context of the missing sentences from the recording, it is not clear this discussion constituted "evidence" requiring disclosure. We are not persuaded Hollenbeck's trial counsel was deficient with respect to failing to use the referenced recording to argue the State did not disclose a witness. Thus, Hollenbeck has failed to establish this claim of ineffectiveness is clearly stronger than that raised during his direct postconviction proceedings (i.e., the suggestive lineup argument, *see supra* ¶3).

¶10 Hollenbeck also contends that his trial counsel was ineffective by failing to pursue claims of prosecutorial misconduct, including allegations that the State failed to allow Hollenbeck access to information on his cell phone; failed to disclose that witnesses were unable to identify Hollenbeck from a photo array; failed to pursue additional surveillance video from Schultz's Bar and a nearby gas

[2] In his supplemental WIS. STAT. § 974.06 motion, Hollenbeck informed the circuit court that he sent his only copies of the CDs to his family, as the prison did not permit long-term storage. Hollenbeck thus proposed that the circuit court "move the State to supply unedited copies of the CDs to the court so they can be listened to at the motion hearing." As noted above, Hollenbeck's § 974.06 motion as a whole was denied without a hearing. In its order, the circuit court acknowledged that Hollenbeck wanted the court to make a finding regarding the recording. The court determined, however, that Hollenbeck's argument was not developed and did not implicate Hollenbeck's constitutional rights. The court further noted the State had provided Hollenbeck the recording, and Hollenbeck's attorney had the ability to use it. Hollenbeck subsequently moved this court to supplement the record with the CDs. That motion was denied because Hollenbeck failed to establish the CDs were before the circuit court when it made the decision now on appeal.

station on the day of the robbery; and failed to correct "false testimony" regarding the burglary of a different bar. Hollenbeck, however, has neither alleged nor demonstrated how these proffered claims are "clearly stronger" than the claims postconviction counsel pursued. That counsel's arguments actually raised ultimately failed does not alone establish deficient performance by counsel. *See* ***State v. Koller***, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979) (fact that strategy fails does not make attorney's representation deficient).

¶11 Hollenbeck also appears to challenge his trial counsel's failure to pursue arguments regarding surveillance video from Acme Tools, a business in Duluth, Minnesota, located near the motel where Hollenbeck was staying at the time of the robbery. Hollenbeck contends that video from that business's parking lot "may have exonerated" him, as it could have proved he was in Duluth at the time of the 9 a.m. robbery in Superior. According to Hollenbeck, he walked "through the lot and back" when looking for a job that morning, and also met an individual there who owed Hollenbeck money.

¶12 Hollenbeck's claims regarding his trial counsel's performance in this regard are belied by the record. Trial counsel moved to dismiss the case based on the State's failure to preserve the videotape. A defendant's due process rights are violated if the police: (1) failed to preserve evidence that is "apparently" exculpatory; or (2) acted in bad faith by failing to preserve evidence that is "potentially" exculpatory. *See* ***State v. Greenwold***, 189 Wis. 2d 59, 67-68, 525 N.W.2d 294 (Ct. App. 1994). After an evidentiary hearing, the circuit court concluded the State had created an expectation of preservation with respect to the Acme Tools video. The court determined, however, that the video was, at most, only "potentially" exculpatory and Hollenbeck had not established that the State acted in bad faith in failing to ensure the video's preservation.

¶13 It appears, therefore, that Hollenbeck may actually be claiming appellate counsel was ineffective by failing to challenge the denial of his motion to dismiss relating to the video on direct appeal.[3] Appellate counsel is not required to raise on direct appeal every nonfrivolous issue the defendant requests. *See* ***Jones v. Barnes***, 463 U.S. 745, 751 (1983). Counsel is free to strategically select the strongest from among all the nonfrivolous claims available in order to maximize the likelihood of success on direct review. *See* ***Smith v. Robbins***, 528 U.S. 259, 288 (2000). Thus, "only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." ***Id.*** (quoting ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986)). Hollenbeck has again failed to either explain or establish that this claim was clearly stronger than those presented on direct appeal.

¶14 Even assuming deficiency on the part of Hollenbeck's attorneys, Hollenbeck fails to establish prejudice. As outlined above, there was overwhelming evidence of Hollenbeck's guilt, against which Hollenbeck fails to relate his alleged exculpatory evidence. In particular, Hollenbeck failed in his burden of proof to identify the content of the Acme Tools videos. He provided nothing more than speculation. Therefore, even if his counsel had raised the claims that Hollenbeck now offers, there is no reasonable probability of a different

[3] We note that although postconviction and appellate counsel are often the same person, their functions differ. *See* ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 797, 565 N.W.2d 805 (Ct. App. 1997), *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900. While "postconviction representation involves proceedings in the trial court where such are a prerequisite to filing a notice of appeal," appellate counsel's work "involves briefing and oral argument in this court." ***Smalley***, 211 Wis. 2d at 797. A challenge to the effectiveness of appellate counsel is properly raised by a petition for a writ of habeas corpus pursuant to ***State v. Knight***, 168 Wis. 2d 509, 512–13, 484 N.W.2d 540 (1992). Although Hollenbeck already pursued a ***Knight*** petition that was denied by this court, we will nevertheless address his present challenge to the effectiveness of appellate counsel.

result. Hollenbeck's assertion of cumulative prejudice likewise fails as counsel's alleged deficiencies, either separately or cumulatively, do not undermine our confidence in the outcome.

¶15 Finally, to the extent Hollenbeck claims the circuit court erred by denying his WIS. STAT. § 974.06 motion without a hearing, the circuit court has the discretion to deny a postconviction motion without an evidentiary hearing if a defendant fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record demonstrates the defendant is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Hollenbeck's motion was properly rejected without a hearing because the record demonstrates that Hollenbeck is not entitled to relief.

By the Court.—Order affirmed.

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