COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1726 **Cir. Ct. No. 96-CF-559**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSIE N. PEARSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Jessie N. Pearson appeals pro se from an order denying his WIS. STAT. § 974.06 (2001-02),[1] motion for postconviction relief. He

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

argues he was denied the effective assistance of trial and postconviction counsel, that the prosecution failed to make a full and timely disclosure of discovery material, and that the trial court committed error during his arraignment and violated his right of confrontation and right to present a defense. We reject his claims and affirm the order denying postconviction relief.

¶2 In 1996, Pearson was convicted of armed robbery as a habitual offender. He appealed and argued that the trial court erred in refusing to admit certain evidence. Pearson's conviction was affirmed on appeal. ***State v. Pearson***, No. 97-1525-CR, unpublished slip op. (Wis. Ct. App. Mar. 25, 1998). Proceeding pro se, Pearson unsuccessfully petitioned the federal court for a writ of habeas corpus. On November 14, 2001, he filed a motion for postconviction relief under WIS. STAT. § 974.06. The trial court conducted an evidentiary hearing on the motion at which both trial and postconviction counsel testified. The motion was denied.

¶3 We draw from our earlier decision the facts surrounding Pearson's conviction:

> The conviction arises out of a robbery which occurred at the apartment of Ruby Olson and Angela Laycock. In the afternoon on the day of the robbery, Olson admitted into the apartment Laycock's boyfriend, Sonny, and a man introduced to her as Tony. The three sat around and drank beer. Sometime after 5:00 p.m. Laycock arrived home, went out and cashed her welfare check, and returned. She paid Olson $340 cash to cover the rent. Eventually Sonny and Tony were asked to leave. Tony returned later and was admitted into the apartment by Laycock. Tony asked to speak with Olson and the two went into the bathroom.
>
> Olson testified that after she refused Tony's request for money, Tony pulled a knife and held it to her throat. Olson yelled to Laycock to call the police. Tony grabbed the money from Olson's pocket and ran down the stairs after Laycock. After some time, the police were called from the

> downstairs apartment of Victoria Burnette. The next day Burnette told Olson and Laycock that Tony had used her phone earlier on the day of the robbery and that Tony was really Jesse Pearson. Burnette had learned of Tony's identity from her boyfriend's cousin, Tavares Martin. Olson, Laycock and Burnette identified Pearson from a photo array presented about a week after the robbery.

Pearson, unpublished slip op. at 2 (footnotes omitted).

¶4 Pearson first argues that he was denied the effective assistance of trial counsel.[2] "There are two components to a claim of ineffective trial counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted).

¶5 Pearson argues that trial counsel was ineffective for failing to call Sonny's father, Donald Harris, Vincent Carter and O.B. Glover as witnesses at trial. This claim is raised for the first time on appeal. It was not mentioned in Pearson's lengthy memorandum filed in support of his WIS. STAT. § 974.06 motion. Trial counsel was not asked a single question about failing to call Harris, Carter or Glover as witnesses. Postconviction counsel was not asked any question

[2] Pearson also argues that he was denied the effective assistance of postconviction counsel because postconviction counsel did not file a postconviction motion challenging trial counsel's performance or raising and preserving other issues for appellate review. We need only address postconviction counsel's performance if the omitted challenges are meritorious. "It is well established that an attorney's failure to pursue a meritless motion does not constitute deficient performance." ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). It appears that the claim that postconviction counsel was ineffective was raised to provide a sufficient reason why the ineffective assistance of counsel claim was not raised on direct appeal and to avoid the procedural bar embodied in WIS. STAT. § 974.06. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Since the procedural bar was not the reason for denying Pearson's motion, we need not address the claim of ineffective assistance of postconviction counsel.

about these potential witnesses. The record does not support Pearson's long explanation of what Harris would have said on the witness stand or that a conflict of interest prevented trial counsel from calling Harris.[3] Consequently, the claim that trial counsel was ineffective for not calling these witnesses is waived. *See* ***State v. Waites***, 158 Wis. 2d 376, 392-93, 462 N.W.2d 206 (1990) (a claim of ineffective assistance of counsel not preserved by raising it at a postconviction hearing before the trial court is deemed waived); ***State v. Krieger***, 163 Wis. 2d 241, 254, 471 N.W.2d 599 (Ct. App. 1991) (in the absence of a proper record, we have nothing to review).

¶6 Pearson next contends that trial counsel was not prepared for trial because counsel was not prepared to cross-examine witness Thomas Hopson. The record reflects that on the day the case was originally scheduled for a jury trial, the prosecution asked for an adjournment because it had learned just days before that Hopson had driven Pearson from the apartment earlier in the day and it had just located Hopson in prison and needed time to a get a writ to produce him as a witness. Defense counsel objected to the adjournment stating that the defense was ready to proceed to trial. The trial was adjourned to a date in compliance with Pearson's speedy trial demand. When the case was called for trial, defense

[3] Pearson explains in his appellant's brief that as a convicted drug dealer, Harris would have confirmed Olson's and Laycock's drug usage and impeached Olson's and Laycock's testimony that they did not know Harris. Pearson claims he told trial counsel that Harris told him that Olson and Laycock were going to concoct a story about the robbery because they had spent all the rent money on drugs. Pearson states that trial counsel had indicated she could not call Harris because she represented him in a drug case in a different court. Pearson does not indicate what Carter and Glover would have testified to. No offer of proof was made as to what the missing witnesses would have said and the suggestion of prejudice is mere speculation. *See* ***State v. Padilla***, 110 Wis. 2d 414, 430, 329 N.W.2d 263 (Ct. App. 1982) (must have offer of proof). *See also* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (a defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case).

counsel indicated that because of a change in investigators, she had not yet had an opportunity to have Hopson interviewed. She explained:

> I expressed my reluctance to proceed to trial to Mr. Pearson a couple of times last week. We discussed basically this person being an unknown and not having time to prepare for whatever it is that he may say at trial. Mr. Pearson, however, was very steadfast in his wish to proceed to trial today, and you know, obviously get this done under the terms of the speedy trial demand, and that was my anticipation as I came to court this morning; however, when I did come to court this morning, [the prosecutor] informed me of yet another piece of information that apparently this witness is going to provide which was not included in his original—I assume in his original statement to Investigator Chesen because it wasn't reflected in Investigator Chesen's report, and quite frankly, considering the seriousness of this case, I am concerned by the fact that I may not have—frankly I don't believe I will have adequate time to prepare to rebut this person's testimony as of this point in time.
>
> I don't even have—it may be that my investigator is doing that interview now, but I don't have that information. I discussed this with Mr. Pearson again this morning when he just came over from the jail. He is reluctant to acquiesce to an adjournment, but indicates that he would be willing to do so if we could still reschedule within the terms of the speedy trial demand.

¶7 The trial court immediately noted that no other date was available for trial in compliance with the speedy trial demand. It explored what new piece of information surrounded Hopson's testimony and what additional investigation defense counsel anticipated in light of that information. The trial court realized that Hopson was going to be offered as a rebuttal witness in response to Pearson's alibi defense. It found that the defense had adequate time to interview Hopson during the three-day trial. The defense request for an adjournment was denied with the trial court commenting, "[Y]ou can't have it both ways in terms of

demanding a speedy trial and asking the Court to comply with that and then ask for an adjournment."

¶8 The decision to go forward with the trial despite defense counsel's uncertainty about Hopson's testimony was Pearson's. He was not willing to withdraw his speedy trial demand to give counsel more time. He cannot now complain that counsel was inadequately prepared to cross-examine Hopson. "A defendant who insists on making a decision which is his or hers alone to make in a manner contrary to the advice given by the attorney cannot subsequently complain that the attorney was ineffective for complying with the ethical obligation to follow his or her undelegated decision." ***State v. Divanovic***, 200 Wis. 2d 210, 225, 546 N.W.2d 501 (Ct. App. 1996).

¶9 Defense counsel testified at the postconviction hearing that her investigator interviewed witness Hopson in the morning on the first day of trial. Counsel had the investigator's report in advance of Hopson's testimony at the end of the second day of trial. Counsel confirmed that the interview produced enough information so that she was prepared for cross-examination. There is no evidentiary support for Pearson's claim that trial counsel was not prepared to cross-examine Hopson.

¶10 Pearson attacks the quality of trial counsel's cross-examination of Hopson. He suggests that counsel failed to cross-examine Hopson about possible deals he was offered in exchange for his testimony. Pearson did not make an offer of proof that Hopson was offered anything in exchange for his testimony. He asserts that counsel failed to attack Hopson's credibility on the basis that Hopson "was a felon whom at one time was deemed unfit to testify in his own trial." Hopson admitted that he had been convicted of a crime three times. No further

inquiry about the nature of the crimes was permissible. ***State v. Smith***, 203 Wis. 2d 288, 297, 553 N.W.2d 824 (Ct. App. 1996). Trial counsel acknowledged at the postconviction hearing that Hopson had some prior mental health issues but there was no suggestion that he was not competent to testify. Further, at trial the trial court explained that the 1991 mental health commitment was too remote in time to be the subject of cross-examination. Pearson also suggests that trial counsel failed to impeach Hopson by pointing out that he changed his story. Hopson's direct examination included the admission that he had changed his story and his explanation for that change. Defense counsel questioned Hopson about his first statement indicating he had not taken Pearson anywhere on the day of the robbery. Nothing more could have been done to demonstrate Hopson's conflicting statements. Pearson was not prejudiced by any alleged deficiencies in trial counsel's cross-examination of Hopson.

¶11 Pearson argues that trial counsel was ineffective because she did not request that all sidebar discussions be recorded. We summarily reject this contention because Pearson has not made a showing that he was prejudiced. When a sidebar discussion was held, the trial court summarized the discussion, agreement or ruling on the record and outside the presence of the jury. There is no suggestion that any summary was inadequate. Nor is there a claim that any unrecorded sidebar discussion was relevant to an issue with arguable merit for appeal.

¶12 We turn to Pearson's claim that the prosecution violated its obligation to provide discovery under WIS. STAT. § 971.23. His claim is based on the prosecutor's alleged failure to provide the defense with Hopson's statement prior to the original trial date. However, the original trial date was adjourned upon the prosecution's showing that just a few days earlier it learned that Hopson was

potentially a witness. The prosecution further explained that only a telephonic interview was conducted with Hopson after he was located in prison. The prosecution requested the adjournment for the purpose of being able to complete discovery and avoid surprise. Nearly three weeks passed after the prosecution's explanation of what Hopson's potential testimony would be. All that § 971.23 requires is that disclosure be made within a reasonable time. The prosecution complied with § 971.23.[4] Moreover, Hopson was called as a rebuttal witness. The prosecution had no duty to make disclosures with respect to rebuttal witnesses. ***State v. Konkol***, 2002 WI App 174, ¶11, 256 Wis. 2d 725, 649 N.W.2d 300, *review denied*, 2002 WI 121, 257 Wis. 2d 119, 653 N.W.2d 890 (Wis. Sept. 3, 2002) (No. 01-2126-CR).

¶13 Next Pearson argues that the arraignment failed to comply with WIS. STAT. § 971.05(3) and (4) because the prosecutor handed the information to trial counsel rather than Pearson and trial counsel entered Pearson's plea.[5] Pearson complains that he never saw the information and was not knowledgeable of its content. He believes the failure to comply with the personal service requirement creates a jurisdictional void that renders the jury's verdict a nullity.

¶14 We have held that furnishing an information to defense counsel and failing to read it are imperfections in form that are waived by silence. *See* ***State v. Martinez***, 198 Wis. 2d 222, 235, 542 N.W.2d 215 (Ct. App. 1995). Delivery to

[4] Pearson makes reference to Hopson's statement that Pearson made a jailhouse confession to him. Hopson did not testify about the purported jailhouse confession.

[5] At the conclusion of the preliminary hearing, the trial court noted that the information had been filed and asked if the defense acknowledged receipt of it. Trial counsel stated, "Yes, we do, your Honor. We waive reading of it, reserving jurisdictional objections, the right to challenge any defect in it, enter a not guilty plea, ask that the matter be set for pre-trial and jury trial."

the attorney was delivery to Pearson. *See* WIS. STAT. §§ 972.11(1) and 801.14(2) (civil rules of practice applicable to criminal proceedings; service made on a party represented by counsel may be made by delivery to the party's attorney). Counsel acts as agent for the defendant. ***Divanovic***, 200 Wis. 2d at 224. The same is true with respect to entry of the initial plea. Pearson was present and heard counsel accept service and enter a plea. He made no objection. He has not shown any actual prejudice from the way the arraignment was handled or why handing the information to him would have mattered since a not guilty plea was entered thereby preserving his right to a trial. "An information will not be invalid, nor will proceedings be affected, because of an imperfection in form which does not prejudice the defendant." ***Martinez***, 198 Wis. 2d at 235. We conclude, therefore, that Pearson waived his right to complain about the validity of the arraignment.

¶15 The final claim is that the trial court violated Pearson's right to confrontation and right to present a defense by limiting cross-examination of the victims regarding their drug use and limiting Pearson's own testimony about the victims' drug use and relationship to Tavares Martin, a known drug dealer and gang member.[6] We have already addressed the claim of error. We held:

> Pearson wanted the jury to infer that Martin framed Pearson for the robbery. His theory was based only on his own conjecture that Martin had made a deal with the

[6] Pearson's theory of defense was set forth in our opinion in the first appeal:

> Pearson used an alibi defense. He and three witnesses testified that he was at home with his wife and children between 8:30 p.m. and 12:30 a.m. on the day of the robbery. Pearson also wanted to present evidence suggesting that Martin framed Pearson for the robbery in order to get even with Pearson because of a bad drug deal.

State v. Pearson, No. 97-1525-CR, unpublished slip op. at 2-3 (Wis. Ct. App. Mar. 25, 1998).

> victims to identify him as the robber. There was no offer of proof of statements by Martin to the women by which he had actually offered the two women drugs in exchange for their allegations against Pearson. There was no evidentiary link between Martin's threat, the victims' drug use and the victims' motive to fabricate. In short, the proffered evidence did not prove Pearson's theory. We conclude that the trial court properly excluded it.

Pearson, unpublished slip op. at 5 (footnote omitted).

¶16 We need not revisit the issue simply because Pearson asserts it in constitutional terms. "A matter once litigated may not 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). There is no constitutional right to present irrelevant evidence. ***State v. Cardenas-Hernandez***, 219 Wis. 2d 516, 536, 579 N.W.2d 678 (1998). Finally, even if constitutional error occurred, the harmless error analysis can be applied. ***State v. Williams***, 2002 WI 118, ¶2, 256 Wis. 2d 56, 652 N.W.2d 391; ***State v. Lindell***, 2001 WI 108, ¶107 n.16, 245 Wis. 2d 689, 629 N.W.2d 223. We have already determined that the error was harmless.[7]

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[7] We held in ***Pearson***, unpublished slip op. at 6 (footnote omitted):

> Even if exclusion of the evidence was error, it was harmless error. Pearson testified that Martin had beaten him the month before the robbery. He explained that he owed Martin money "from when I was doing drugs" and that the fight occurred because there was a disagreement about whether the debt had been paid. He also stated that Martin was a gang member. There was the implication that Martin was a drug dealer. The jury was made aware of the bitterness between Martin and Pearson. Pearson also testified that he saw Olson, Laycock and Burnette at Martin's home on several occasions. He indicated that Burnette's boyfriend was Martin's cousin and also a gang member. The defense theory that Martin had a motive to frame Pearson was suggested to the jury by other evidence.

By the Court.—Order affirmed.

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