COURT OF APPEALS DECISION DATED AND FILED

December 28, 2005

Cornelia G. Clark
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. 2004AP81

Cir. Ct. No. 1997CF974136

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIAN ESTEVE MCKINNIE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Julian Esteve McKinnie appeals *pro se* from orders denying his motions for postconviction relief and consequent reconsideration. The issues are: (1) whether appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for not seeking suppression of McKinnie's statement to

police; (2) whether the constitutional preclusion against double jeopardy was violated for charging McKinnie with and convicting him of felony murder: (a) as a party to the crime; and (b) for the predicate offense of attempted armed robbery; and (3) whether the trial court erred in refusing to appoint successor counsel. The ineffective assistance, party to a crime, and the refusal to appoint successor counsel issues have been decided in a prior appeal. We conclude that the mere reference to the predicate offense of attempted armed robbery does not violate McKinnie's double jeopardy rights because he was charged with, prosecuted once for, and convicted of only the single offense of felony murder. Therefore, we affirm.

¶2 McKinnie was charged with, pled guilty to, and convicted of felony murder, contrary to WIS. STAT. § 940.03 (1997-98).[1] The complaint, information, and judgment of conviction referenced the statutory sections relating to the predicate offense of attempted armed robbery as a party to the crime, contrary to WIS. STAT. §§ 943.32(2), 939.32, and 939.05, but did not charge or convict him of these offenses. The trial court imposed a twenty-five-year sentence, to run consecutive to any other sentence, for the single offense of felony murder.

¶3 This court affirmed the judgment of conviction in ***State v. McKinnie***, No. 02-0949-CRNM, unpublished slip op. at 3 (WI App Sep. 9, 2002). In that order, we expressly rejected McKinnie's ineffective assistance of trial counsel claim for failing to investigate the circumstances of his confession, and his challenge to being charged with and convicted of felony murder as a party to the

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

crime. *See* ***id.*** at 2-3. Rejection of the ineffective assistance of trial counsel claim obviates the prejudice necessary to prevail on the appellate ineffective assistance claim.[2] This court also rejected McKinnie's challenge to the trial court's order refusing to direct the state public defender to appoint a different successor counsel than the one previously appointed. *See* ***State v. McKinnie***, No. XX-15639-CR, unpublished slip op. at 2 (WI App Jan. 8, 2002). McKinnie may not use a successive postconviction motion to resurrect previously rejected issues. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶4 This court has not yet decided the issue of whether McKinnie's felony murder conviction, incident to an attempted armed robbery, violated the constitutional preclusion against double jeopardy. U.S. CONST. amend. V; WIS. CONST. art. I, § 8(1). The federal and state constitutions preclude the imposition of "multiple punishments for the same offense." ***State v. Gordon***, 111 Wis. 2d 133, 137, 330 N.W. 564 (1983) (citation omitted).

¶5 To convict McKinnie of felony murder, the State must prove the elements of the predicate felony (attempted armed robbery), plus the victim's resultant death. *See* ***id.*** at 135-36. The predicate felony of attempted armed robbery is a lesser-included offense of felony murder, and double jeopardy precludes convictions for both offenses. *See* ***id.*** at 146. However, McKinnie was not charged with nor convicted of attempted armed robbery. Attempted armed robbery was merely referenced as the predicate offense to felony murder. McKinnie was charged with and convicted of a single offense—felony murder—in

[2] *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990) (the necessity to prove both deficient performance and prejudice obviates the need to review proof of one if there is insufficient proof of the other).

a single prosecution. For the charges or convictions to be multiplicitous and violative of double jeopardy, the defendant must be charged with or convicted of "more than one count for a single offense." ***State v. Rabe***, 96 Wis. 2d 48, 61, 291 N.W.2d 809 (1980) (citations and footnote omitted). Consequently, McKinnie's constitutional rights against double jeopardy were not violated. Thus, we necessarily affirm the order denying reconsideration.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).