COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1060 **Cir. Ct. No. 2001CF2932**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NOEL DAVILA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Noel Davila, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2005-06)[1] motion seeking a new trial because of

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

ineffective assistance of trial counsel. Davila contends a change in law, which arose after his direct appeal, constitutes a sufficient reason for not raising certain ineffective-assistance arguments in that appeal. We reject this argument and affirm the order.

BACKGROUND

¶2 A jury convicted Davila of first-degree reckless homicide with a dangerous weapon for the stabbing death of Mark Palacios. Davila and Ricky Zielinski were traveling and stopped at an intersection to argue with occupants of another vehicle. Palacios and Rey Ruiz approached in a third vehicle and, upon finding the intersection blocked, got out of their car to see what was going on. A confrontation ensued, developed into two fights, and ended when Zielinski stabbed Ruiz and Davila stabbed Palacios.

¶3 In his first appeal, filed under WIS. STAT. RULE 809.30(2), Davila argued three instances of ineffective assistance of counsel. *See* ***State v. Davila***, No. 2002AP2568-CR, unpublished slip op. ¶¶8, 15, 18 (WI App June 17, 2003). The first two alleged errors involved failure to object to certain testimony, and we concluded counsel was not deficient because the testimony was relevant. ***Id.***, ¶¶14, 16. The third alleged error was counsel's failure to expose Ruiz's contemptuous conduct and perjury to the jury. We stated it was a fair argument that counsel was deficient, but concluded there was no prejudice. ***Id.***, ¶21. We therefore affirmed the judgment of conviction. ***Id.***, ¶1.

¶4 Shortly thereafter, the supreme court decided ***State v. Thiel***, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305. ***Thiel*** addressed "how to calculate prejudice arising from multiple deficiencies by trial counsel when the specific errors, evaluated individually, do not satisfy the prejudice standard" of

Strickland v. Washington, 466 U.S. 668 (1984), concluding "prejudice should be assessed based on the cumulative effect of counsel's deficiencies." ***Thiel***, 264 Wis. 2d 574, ¶59.

¶5 In 2008, Davila filed a WIS. STAT. § 974.06 motion based on ***Thiel***. He argued that trial counsel committed more errors than were addressed in his first direct appeal, but those issues had not been raised because they arguably showed no prejudice when considered individually. Davila asserted that under ***Thiel***, these additional errors could now be evaluated along with prior issues for their cumulative impact, even if there was no individual prejudice, and he should be given the opportunity to raise the errors and argue under the new standard. On April 3, 2008, the trial court denied the motion, stating that irrespective of ***Thiel***, there was no reason Davila could not have raised the additional issues in the first postconviction motion and appeal.[2]

DISCUSSION

¶6 WISCONSIN STAT. § 974.06 "compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157

[2] On April 22, 2008, the court denied a motion for reconsideration, which Davila brought to "clarify[] his position as to being unable to adequately raise ineffective assistance of counsel during his direct appeal." The court stated that the cumulative prejudice standard was not the applicable standard for a WIS. STAT. § 974.06 motion. The State points out that Davila did not appeal from the order denying reconsideration; his notice of appeal mentions only the April 3 order. We therefore confine our review to the order denying the § 974.06 motion, although Davila did not necessarily have the right or obligation to appeal from the April 22 order denying reconsideration. *See* ***Harris v. Reivitz***, 142 Wis. 2d 82, 86-90, 417 N.W.2d 50 (Ct. App. 1987) (Although we liberally apply a new issues test to determine whether a judgment or order arising from a motion for reconsideration is appealable, if the motion for reconsideration addresses only an issue raised and disposed of in the prior motion for relief, no right of appeal exists.).

(1994). A motion brought under § 974.06 is typically barred, if filed after a direct appeal, unless the defendant shows a sufficient reason why he or she did not, or could not, raise the issues in a motion preceding the first appeal. *See* ***Escalona***, 185 Wis. 2d at 185. Failure to anticipate the effect of a subsequent change in the law can be a sufficient reason for failing to raise an issue. ***Id.*** at 182 n.11. Whether claims brought under § 974.06 are barred is a question of law we review *de novo*. ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶7 The record[3] reveals Davila's new ineffective-assistance arguments would be that counsel: (1) pursued an inconsistent defense by arguing both self-defense and defense of others; (2) failed to involve Davila in crafting a defense and failed to warn Davila about the risks of an inconsistent defense; and (3) failed to adequately impeach a witness. Even with these new issues, Davila is not entitled to relief.

¶8 Davila explains he wants to raise these "additional issues that were not asserted in his direct appeal because they could not, standing alone, prove ineffective assistance of counsel." But he has not shown why his additional claims could not have been raised or would not have been individually successful in the first appeal. Davila is required to provide us more than conclusory allegations that

[3] Davila failed to identify his new ineffective assistance of counsel arguments in his brief, although the issues appear in his trial court motion, included in his appendix. We review *pro se* prisoners' submissions liberally. *See* ***State v. Love***, 2005 WI 116, ¶29 n.10, 284 Wis. 2d 111, 700 N.W.2d 62; ***State v. Wood***, 2007 WI App 190, ¶17 n.7, 305 Wis. 2d 133, 738 N.W.2d 81.

he would not have been successful in his initial appeal before he is entitled to relief.[4] *See* ***State v. Carter***, 131 Wis. 2d 69, 78, 389 N.W.2d 1 (1986).

¶9 In addition, when claiming ineffective assistance, the alleged errors must be deficient as a matter of law to be considered in the cumulative prejudice tally. ***Thiel***, 264 Wis. 2d 571, ¶61. Thus, even under a ***Thiel*** analysis, the first two errors from Davila's first appeal would not be considered, despite his statement to the contrary, because we concluded counsel was not deficient.

¶10 As to Davila's new claims of error, we are not convinced that counsel was deficient for pursuing both self-defense and defense of others. These defenses are not necessarily inconsistent[5] and Davila does nothing to show they were incompatible in this case. Counsel therefore could not be deficient for pursuing both defenses or for failing to warn Davila of a nonexistent inconsistency between them, and we would not consider counsel's actions in the cumulative prejudice analysis.

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[4] The latitude we extend to *pro se* prisoners is not infinite.

[5] For example, compare WIS JI—CRIMINAL 805 (self-defense) and WIS JI—CRIMINAL 830 (defense of others), both involving use of force intended or likely to cause death or bodily harm. Under Instruction 805, the defendant must show: (1) the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; (2) the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and (3) the defendant's beliefs were reasonable. Under Instruction 830, the defendant must show: (1) the defendant believed that there was an actual or imminent unlawful interference with the person of another; (2) the defendant believed that the amount of force used or threatened by the defendant was necessary for the protection of the third person; (3) the defendant believed that the third person was entitled to use or to threaten to use force in self-defense; and (4) the defendant's beliefs were reasonable.

Given the parallels among the two instructions, it is not inconceivable that one set of facts will permit the defendant to believe—or at least to argue—not only that he or she needed to use force for his or her own defense, but for the defense of another as well.

¶11 Part of Davila's second new ineffective-assistance argument is that counsel was deficient for not consulting him regarding crafting a defense. However, we discern no prejudice. Davila stated he still would have pursued a self-defense theory, and he does not elaborate on why defense of others hampered his own self-defense claim to such an extent that it was not worth pursuing.

¶12 Davila's third "new" argument on appeal, regarding failure to impeach a witness, is simply a recasting of an argument Davila raised in his first appeal. Previously litigated matters may not be relitigated no matter how artfully the defendant rephrases the issue. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). We have already held that counsel may have been deficient but was not prejudicial.

¶13 Thus, the only errors available for consideration in a cumulative prejudice analysis are counsel's failure to impeach a witness and failure to consult Davila about possible defenses. In most cases, though, "errors, even unreasonable errors, will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling." ***Thiel***, 264 Wis. 2d 571, ¶61. Neither counsel's failure to impeach a witness nor counsel's alleged failure to consult Davila about possible defenses undermines our confidence in the verdict. As we stated in Davila's first appeal, there was "overwhelming evidence" of his guilt. ***Davila***, No. 2002AP2568-CR, ¶17. This has not changed.

¶14 Davila cannot overcome the ***Escalona*** procedural bar because even if ***Thiel*** constitutes an unpredictable change in the law, Davila lacks a sufficient reason for omitting his new claims of ineffective assistance of counsel from his

first appeal.[6] Even under a cumulative prejudice standard, Davila is not entitled to relief. The trial court properly denied his WIS. STAT. § 974.06 motion.

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2007-08).

[6] Davila argues we should apply the waiver doctrine against the State because it was "sandbagging" him with arguments it failed to raise in postconviction proceedings. Generally, though, a respondent is allowed to advance any argument that allows this court to sustain the trial court's ruling. ***State v. Darcy N.K.***, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998).