COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2045 **Cir. Ct. No. 2004CF6133**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY MENDRELL WELCH,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Cory Mendrell Welch, *pro se*, appeals from orders denying his postconviction motion, filed under WIS. STAT. § 974.06 and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136, 139 (Ct. App. 1996) (per curiam). Welch contends that his postconviction counsel was

ineffective for failing to bring a postconviction motion arguing that: there had been a speedy trial violation; trial counsel was ineffective for failing to adequately cross-examine a witness; and trial counsel was ineffective for failing to seek a mistrial following certain police testimony. The circuit court denied the first two claims outright and denied the third claim after briefing. We affirm the orders.

BACKGROUND

¶2 In November 2004, an Information charged Welch with ten counts of armed robbery, two counts of attempted armed robbery, conspiracy to commit armed robbery, fleeing an officer, and two counts of misdemeanor bail jumping. On November 10, 2004, Welch's attorney filed a speedy trial demand. At a scheduling conference, counsel advised the court he would be unavailable between January 25 and March 2, 2005. To accommodate Welch's speedy trial request, the court attempted to calendar the case so that the trial could be completed by January 24, setting the trial to begin January 18.

¶3 On January 13, 2005, the State moved to sever counts 13-16 from counts 1-12 (the ten armed and two attempted armed robberies) because of time constraints. Defense counsel objected, but the court granted the motion. The first trial proceeded on counts 13-16 only, and the jury convicted Welch on all four counts. The second trial began on November 28, 2005, taking nine days to complete. The State dismissed four counts, and the jury convicted Welch on the remaining eight counts.

¶4 Counsel filed a postconviction motion, seeking a new trial on the grounds that the trial court erroneously exercised its discretion in severing the charges. The court denied the motion, and Welch appealed. The issues on appeal were whether the court erroneously exercised its discretion in severing the charges

and whether the court erred in admitting other acts evidence in each trial. In our opinion, we specifically noted that Welch was not arguing that the delay in trying him on Counts 1 through 12 constituted a speedy trial violation. *See* ***State v. Welch***, No. 2007AP1688-CR, unpublished slip op. ¶12 (WI App June 17, 2008). Ultimately, we affirmed Welch's convictions.

¶5 In 2008, Welch filed the underlying, *pro se*, WIS. STAT. § 974.06 motion. As we have seen, he claimed that postconviction counsel should have argued a speedy trial violation and trial counsel's failure to adequately cross-examine a witness and to seek a mistrial.

¶6 The circuit court denied his speedy trial claim. It noted that the text of the motion indicated Welch was actually faulting *appellate* counsel's failure to include the speedy trial issue in the direct appeal. Thus, the court concluded, Welch should have brought a claim of ineffective assistance of appellate counsel to this court through a ***Knight*** petition. *See* ***State v. Knight***, 168 Wis. 2d 509, 519, 484 N.W.2d 540, 544 (1992). The circuit court also denied the claim relating to trial counsel's cross-examination of a witness, finding it was "conclusory at best and does not set forth a viable claim for relief." However, the court then ordered briefing on Welch's allegation that trial counsel should have sought a mistrial. Following briefing, the court denied that motion at a hearing on May 13, 2009. Welch appeals. Additional facts will be discussed as necessary below.

DISCUSSION

The Speedy Trial Issue

¶7 After the circuit court ruled that Welch's speedy trial complaint should be the subject of a ***Knight*** petition, but before briefing on the final issue

was completed, Welch filed a ***Knight*** petition with this court. We denied the petition, essentially because it was premature. *See* ***Welch v. Thurmer***, No. 2009AP508-W, unpublished order (WI App Apr. 27, 2009). We noted that the circuit court had not yet entered a final order on the WIS. STAT. § 974.06 motion. When a final order was eventually entered, Welch would have an opportunity to challenge, in his direct appeal of right, the circuit court's ruling that a ***Knight*** petition was the proper avenue for relief. In a footnote, we stated:

> Should Welch fail to obtain relief in the circuit court and pursue an appeal, and if he raises the question of the propriety of the circuit court's ruling on the ***Knight*** petition question, we invite Welch to address the merits of his ***Knight*** petition claim in the context of his brief.

¶8 On appeal, Welch argues that his speedy trial right was violated and that postconviction counsel was ineffective.[1] However, Welch does not address the substance of the circuit court's ruling—that Welch was challenging appellate counsel's performance and, therefore, the speedy trial issue was not properly before the circuit court because it was the subject of a ***Knight*** petition addressed to this court. We will not abandon our neutrality to develop an argument for Welch.

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[1] Again, Welch appears to mean *appellate* counsel was ineffective. Welch writes:

> The defendant Not receiving his trial at a hasty pace was clearly strong that the Issues raised on his direct appeal. Postconviction counsel did not raise This issue. Instead, raised the issue that, 1) The trial court erroneously Exercised his discretion by severing twelve of the counts in the case For later trial. 2) the trial court judge erroneously exercised his Discretion by allowing The state to use four of the severed counts as other acts evidence[.] [Formatting as in original.]

The two issues to which Welch refers as previously raised were the two issues counsel raised on appeal.

See ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139, 142–143 (Ct. App. 1987). We therefore affirm the portion of the circuit court's order concluding that the speedy trial issue was not properly before it and denying Welch relief.

The Cross-Examination Issue

¶9 In the first trial, a co-defendant named Marques Stephens testified against Welch.[2] Trial counsel evidently limited his cross-examination to the four charges at issue in that trial. Stephens then refused to testify at the second trial. The trial court declared him unavailable, and his testimony from the first trial was read to the jury in the second trial. Welch complains that postconviction counsel should have argued that trial counsel was ineffective for failing to better cross-examine Stephens in the first trial because the poor cross-examination meant that less information was available to the second jury.

¶10 Welch's postconviction motion alleged, in relevant part, that he:

> was prejudiced by counsel's failure to cross-examine Marques Stephens because, Stephens refused to testify at the defendants second trial. As a result of that failure to testify, the state was allowed to read to the jury, stephens prior testimony, as it related to the "other acts counts." … The jury heard only direct examination, and didn't hear any cross-examination from defense counsel, and as a result the defendant was denied his right to cross-examine the witness against him. … Had trial counsel cross-examined the witness on the "other act's counts at the first trial, the jury would've heard cross-examination from the defense in the reading of the hearsay transcript at the second trial. Therefore counsel was ineffective. … Postconviction counsel was also ineffective for failing to bring a postconviction motion before the trial court arguing that the defendant was denied his constitution right to effective

[2] It appears that Stephens implicated Welch to police during their initial investigation, then recanted.

> assistance of counsel. Because trial counsel failed to cross-examine the states key witness, therefore postconviction counsel was also ineffective. [Formatting as in original.]

The circuit court denied the motion because it was too conclusory—Welch had not shown "what Stephens would have said that would have probably altered the outcome of the trial."

¶11 Whether a postconviction motion alleges sufficient facts to entitle a defendant to a hearing is a mixed question of fact and law. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. Whether the motion alleges sufficient facts is a question of law. ***Ibid.*** If the motion is insufficient, the circuit court may grant or deny a hearing on the matter at its discretion. ***Ibid.*** We are deferential to the discretionary decision. ***Id.***, ¶9, 274 Wis. 2d at 577, 682 N.W.2d at 437.

¶12 Here, while Welch attempts to refine his argument in his appellate brief, and further still in his reply, we are limited to the four corners of the original motion. *See* ***State v. Love***, 2005 WI 116, ¶27, 284 Wis. 2d 111, 124, 700 N.W.2d 62, 68–69; *see also* ***Allen***, 2004 WI 106, ¶23, 274 Wis. 2d at 585, 682 N.W.2d at 441. Welch's motion does not explain what the substance of the unasked cross-examination would be. It is therefore impossible to evaluate whether there is any potential merit to the complaint that would warrant relief. In the absence of greater specificity, the circuit court properly denied this portion of the motion.

The Mistrial Issue

¶13 Welch also complained that postconviction counsel was ineffective for failing to assert that trial counsel should have moved for a mistrial "when the defendant was improperly exposed to unfairly prejudicial information." In

Welch's second trial, Officer Phillip Simmert gave testimony explaining why he approached Welch during his investigation and referred to "the things I know about [Welch], his character, the crimes I know that he committed[.]" Detective Willie Huerta made reference to "another proceeding with the defendant … where he was on trial for about 11, 12 other robberies[.]"

¶14 In October 2008, the circuit court entered an order partially denying the postconviction motion as to the other two issues and set a briefing schedule to address the mistrial issue. After briefing, the court orally denied the remainder of the postconviction motion at hearing on May 13, 2009. The written order memorializing the denial stated: "Pursuant to the oral ruling made by the court on May 13," the remainder of Welch's motion is denied. In a footnote, the court advised Welch that "[t]he court does not provide a written decision of its oral ruling. It is the defendant's responsibility to make payment arrangements for a transcript of the court's oral ruling to obtain a written version so that the appellate court will have a transcript of the record that was made."

¶15 Despite the court's admonition, Welch has not gotten the transcript containing the court's explanation of its ruling. As the appellant, it was his obligation to ensure that the transcript became a part of the Record. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26–27, 496 N.W.2d 226, 232 (Ct. App. 1993). While Welch, in his reply brief, asserts that the circuit court should be obligated to include its reasoning in a written order, he cites no authority for such

a proposition.[3] Further, we do not consider arguments raised for the first time in a reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502, 508 n.11 (Ct. App. 1995). In any event, in the absence of the transcript, we assume that it reveals reasoning supporting the circuit court's decision, *see* ***Fiumefreddo***, 174 Wis. 2d at 27, 496 N.W.2d at 232, and we therefore do not disturb that decision.

By the Court.—Orders affirmed.

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

[3] Compare, for example, WIS. STAT. § 973.017(10m)(a) (court shall state reasons for sentencing decision "in open court and on the record") with § 973.017(10m)(b) (if court determines not to state reasons in defendant's presence, "the court *shall state the reasons for its sentencing decision in writing and include the written statement in the record*") (emphasis added). *See also, e.g.*, WIS. STAT. § 757.19(5) and WIS. STAT. § 767.451(5).