

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 18, 2010**

A. John Voelker  
Acting 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. 2010AP167**

**Cir. Ct. No. 2004CF691**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GERALD L. POLZIN,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Outagamie County:  
MICHAEL W. GAGE, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Gerald L. Polzin appeals a circuit court order denying his WIS. STAT. § 974.06 (2007-08)<sup>1</sup> postconviction motion. Polzin argues

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

that (1) he is entitled to the court reporter notes of his sentencing hearing to support his claim of transcript errors; (2) the circuit court was required to appoint a special prosecutor for the postconviction proceedings; (3) the judge for the postconviction proceedings was biased, violating Polzin's right to due process; (4) Polzin's claims are not procedurally barred by a prior no-merit appeal; and (5) his First, Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated during the trial proceedings. We conclude that Polzin's claims of transcript errors and trial constitutional violations were decided on his no-merit appeal, and therefore are procedurally barred. We also conclude that we have no basis to disturb the circuit court's decision not to appoint a special prosecutor, and our review of the record reveals no actual or apparent bias on the part of the circuit court judge. Accordingly, we affirm.

### *Background*

¶2 In August 2005, Polzin was convicted of multiple counts of sexual assault of a child and one count of sexual exploitation of a child, after pleading guilty to those charges. Polzin's appellate counsel filed a no-merit report, determining that there were no meritorious grounds to challenge Polzin's convictions. Polzin filed a response. By order dated October 30, 2007, we summarily affirmed Polzin's judgment of conviction, concluding that there were no arguably meritorious issues for an appeal.

¶3 In December 2008, Polzin filed a WIS. STAT. § 974.06 postconviction motion, claiming various constitutional violations. He then filed motions for access to court reporter notes from his sentencing hearing, for the circuit court to appoint a special prosecutor for the § 974.06 proceedings, and for

the circuit court judge to disqualify himself based on actual and apparent bias. In January 2010, the court denied all of Polzin’s motions. Polzin appeals.

### *Standard of Review*

¶4 Whether claims raised in a WIS. STAT. § 974.06 postconviction motion are barred by a previous direct appeal is a question of law that we review de novo. See *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). We review a court’s decision to appoint a special prosecutor for an erroneous exercise of discretion. See WIS. STAT. § 978.045(1r)(h) (“The judge may appoint an attorney as a special prosecutor if ... [t]he district attorney determines that a conflict of interest exists regarding the district attorney or the district attorney staff.”); *Smiljanic v. Niedermeyer*, 2007 WI App 182, ¶12, 304 Wis. 2d 197, 737 N.W.2d 436 (word “may” in a statute connotes that court is to exercise its discretion). Whether bias prevented a circuit court judge from acting as a “neutral and detached magistrate” is a question of constitutional fact, which we determine independently of the circuit court. *State v. Neuaone*, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298 (citation omitted).

### *Discussion*

¶5 Polzin argues first that the trial court erred in denying him access to court reporter notes of his sentencing hearing.<sup>2</sup> Polzin contends that he is entitled

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<sup>2</sup> Polzin also contends that the court erred in denying his pro se motion for postconviction discovery regarding the State’s investigation into Polzin’s childhood abuse. The only argument Polzin advances on this issue is that he was entitled to have his appellate counsel present at the hearing on his pro se motion on July 24, 2007, because we did not issue our decision in his no-merit appeal releasing counsel of her obligation to represent Polzin until October 30, 2007. He says that the circuit court will not allow him a transcript of the hearing to establish that the court erred in stating that Polzin had not been appointed counsel for the hearing. First, we do not agree with Polzin that his appellate counsel was required to attend a hearing on

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to the court reporter notes as a part of the court record.<sup>3</sup> In support, Polzin cites SCR 71.03, which states: “The original notes of all court reporters ... made in open court ... constitute part of the records of the court in which made ....” Polzin contends that the circuit court has denied him access to those notes to conceal the fact that the circuit court intentionally altered the transcript. He contends, therefore, that he has been denied his right to a complete transcript on appeal, citing *Griffin v. Illinois*, 351 U.S. 12 (1956). Specifically, Polzin contends that the sentencing transcript omitted the following: questions by the circuit court to the special prosecutor and investigators as to why they did not believe Polzin had been sexually abused and if they had spoken to any of Polzin’s family members, and a question by the court as to the statute of limitations on sexual assault of a child. Polzin also contends that the transcript contains the following statement by the court that was not made at the sentencing hearing: “I appreciate that the state takes a ... position that, you know, we can’t look to this in a reliable way and -- and in a way that attaches meaning to it.”<sup>4</sup>

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his pro se motion after she submitted a no-merit report; in fact, because Polzin was represented by counsel at that point, Polzin was not entitled to submit pro se motions. See *Moore v. State*, 83 Wis. 2d 285, 299-300, 265 N.W.2d 540 (1978) (defendant does not have right to simultaneous representation by counsel and self-representation). Next, Polzin has not explained why the court would be required to provide him with the transcript of the hearing. It is the defendant’s responsibility to obtain all transcripts necessary for an appeal. See WIS. STAT. RULE 809.11(4). And, in any event, it does not appear that the transcript of the hearing would be relevant to this appeal.

<sup>3</sup> Polzin also contends that the court reporter notes are a matter of public record. To the extent that Polzin is attempting to assert that he is entitled to the court reporter notes under Wisconsin’s Open Records Law, WIS. STAT. § 19.37, that argument is not properly before us in this appeal.

<sup>4</sup> Polzin contends that the court would not have stated that it appreciated the State’s position, because the court was incredulous that the State did not believe Polzin’s allegations of abuse against his uncle. Our review of the sentencing hearing transcript indicates that the court

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¶6 We addressed Polzin’s claim of a defective transcript in our decision in Polzin’s no-merit appeal. In Polzin’s response to the no-merit report, he raised the same claims of transcript defects that he raises here. After our independent review of the record, we concluded that Polzin’s claims of defects in the transcript, even if true, would have no impact on his sentencing. We explained that the transcript established that the circuit court resolved the dispute over Polzin’s claim of abuse by his uncle in Polzin’s favor, and treated that fact as a mitigating factor in sentencing. Thus, because the issue of transcript defects was raised and addressed on Polzin’s no-merit appeal, we will not address the same argument here in the context of whether Polzin is entitled to court reporter notes to support that claim. *See State v. Tillman*, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574 (if a defendant raised an issue on a no-merit appeal, the defendant may not then raise the same issue in a WIS. STAT. § 974.06 postconviction motion); *State v. Witkowski*, 163 Wis. 2d 985, 990-92, 473 N.W.2d 512 (Ct. App. 1991) (we will not consider an issue in a § 974.06 motion that is merely a re-theorizing of an issue raised on direct appeal).

¶7 Next, Polzin contends that the circuit court erroneously denied his motion to appoint a special prosecutor for the WIS. STAT. § 974.06 postconviction motion proceedings. He contends that because the circuit court appointed a special prosecutor at trial on the district attorney’s request, due to a conflict of interest based on Polzin’s relationship with the district attorney’s office as a police officer, the court was required to appoint a special prosecutor for these proceedings. We disagree.

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did credit Polzin’s allegation of abuse against his uncle, and used the term “appreciate” in this context to indicate simply that it understood the State’s contrary position.

¶8 Under WIS. STAT. § 978.045(1r)(h), a circuit court may appoint a special prosecutor if the district attorney determines that there is a conflict of interest with the district attorney’s office. This is what happened during Polzin’s trial: the district attorney determined that there was a conflict of interest because Polzin was an Appleton police officer at that time. The court therefore appointed a special prosecutor. The circuit court explained that it denied Polzin’s motion for a special prosecutor for postconviction proceedings because the district attorney’s office had submitted that it was not materially limited in handling these issues. Thus, the statutory requirement for appointing a special prosecutor—that the district had determined there was a conflict of interest—was not met. To the extent that Polzin is contending that a conflict of interest necessarily existed, we disagree. We are persuaded by the State’s reasoning that the conflict that existed at trial—that Polzin was then an Appleton police officer—arguably no longer exists. Absent a determination from the district attorney that a conflict of interest existed for the postconviction proceedings, we have no basis to conclude that the circuit court erroneously exercised its discretion in denying Polzin’s motion to appoint a special prosecutor.

¶9 Polzin also contends that the circuit court erred in denying his motion for the circuit court judge to disqualify himself from the postconviction proceedings. Polzin contends that the circuit court judge was biased, as evidenced by the fact that the circuit court judge altered the transcripts and then denied Polzin access to the court reporter notes.

¶10 When we review a claim of judicial bias, “[w]e begin with a presumption that the judge is free of bias and prejudice and the burden is on the party asserting judicial bias to show by a preponderance of the evidence that the judge is biased or prejudiced.” *Neuaone*, 284 Wis. 2d 473, ¶16. Our analysis

involves “both a subjective and an objective test.” *Id.* First, we review “the challenged judge’s own determination of whether the judge will be able to act impartially. Next, we look to whether there are objective facts demonstrating that the judge was actually biased. This requires that the judge actually treated the defendant unfairly.” *Id.* (citations omitted).

¶11 Here, Polzin’s claims of judicial bias are not supported with a factual basis, and are merely uncorroborated allegations. On our own review of the record, we have discovered no indication of apparent or actual bias on the part of the circuit court judge. We therefore conclude that the circuit court judge was not required to disqualify himself from this case.

¶12 Finally, Polzin contends that his First, Eighth, Fourteenth, Fifth and Sixth Amendment Constitutional rights were violated during the trial proceedings. He also contends that he is not procedurally barred from raising any of these issues in his WIS. STAT. § 974.06 postconviction motion because he is raising them in terms of ineffective assistance of appellate counsel—for failing to argue the ineffective assistance of trial counsel—and prosecutorial misconduct. We disagree. We conclude that Polzin’s constitutional arguments are barred because they were already addressed in his no-merit appeal, and his ineffectiveness of counsel claims lack merit.

¶13 In our decision on Polzin’s no-merit appeal, we addressed Polzin’s claims in his response to the no-merit report that his constitutional rights were violated during the trial proceedings. Specifically, we rejected Polzin’s claims that his First Amendment rights were violated when the prosecutor retaliated against him for accusing his uncle of abusing him; that his Eighth Amendment rights were violated because it was cruel and unusual punishment to subject him to

an open-court discussion of the abuse; that his Fourteenth Amendment rights to equal protection were violated when the State failed to pursue abuse charges against his uncle; and that his Fifth and Fourteenth Amendment rights to due process were violated because that conduct by the State was an abuse of process and outrageous government conduct.

¶14 Polzin contends that these issues are nonetheless not procedurally barred here because he is claiming that his appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel and prosecutorial misconduct. Additionally, Polzin claims that his plea was involuntary because he did not know he would be relinquishing those constitutional rights by entering a plea. He contends that his appellate counsel was ineffective for failing to raise those issues on appeal. However, all of those arguments are based on the same claims of constitutional violations in the trial proceedings, which we rejected in Polzin's non-merit appeal.

¶15 Because we have already addressed each of Polzin's claims of constitutional violations, and determined that each lacks merit, we will not address those claims again here, even though Polzin claims he is raising them in a different context. *See Tillman*, 281 Wis. 2d 157, ¶19; *Witkowski*, 163 Wis. 2d at 990-92. Further, because Polzin's claims of ineffective assistance of trial and appellate counsel and the invalidity of his plea rely on his claims of constitutional violations, we reject those claims as well. Accordingly, we affirm.

*By the Court.*—Order affirmed.

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



