COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP1253 **Cir. Ct. No. 2001CF122**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR E. HOLM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Forest County: PATRICK F. O'MELIA, Judge. *Judgment affirmed and cause remanded with directions; order affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Victor Holm, pro se, appeals a judgment convicting him of first-degree intentional homicide, as party to a crime, and an order denying postconviction relief. Holm argues the circuit court erred by:

(1) violating the law of the case doctrine when a successor judge allegedly "started over from step one upon taking over the case"; (2) refusing to deem admitted Holm's requests for admission; (3) failing to accept as true the allegations in Holm's affidavit; and (4) failing to address certain postconviction discovery issues. Holm also argues that both his trial and postconviction attorneys were ineffective, and that the circuit court erred by denying his postconviction motion without a hearing. We reject Holm's arguments and affirm.

BACKGROUND

¶2 On December 10, 2001, the State charged Holm with first-degree intentional homicide, as party to a crime, in connection with the shooting death of Lance Leonard. Following two days of jury trial, the parties entered into a plea agreement. In exchange for Holm's guilty plea, the State agreed to take no position regarding Holm's eligibility for extended supervision. The circuit court, the Honorable Robert A. Kennedy presiding, accepted Holm's plea and sentenced him to life in prison without eligibility for extended supervision.[1]

¶3 Holm's postconviction counsel subsequently filed a motion for plea withdrawal, pursuant to WIS. STAT. § 974.02.[2] Counsel argued Holm's trial attorney was ineffective for misinforming Holm about the availability of a coercion defense, failing to explain party to a crime liability properly, and failing

[1] Although Holm was sentenced to life in prison without eligibility for extended supervision, the corrected judgment of conviction erroneously states "life in prison without the eligibility of parole." (Capitalization omitted.) Thus, although we affirm the judgment and the order denying postconviction relief, we remand for the circuit court to correct the judgment so that it reflects Holm's actual sentence.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

to object to the State's alleged breach of the plea agreement. Following a ***Machner***[3] hearing, the circuit court denied Holm's motion. Holm then discharged his postconviction attorney and filed a direct appeal pro se. We affirmed the circuit court. *See* ***State v. Holm***, No. 2004AP672-CR, unpublished slip op. (WI App Dec. 28, 2005).

¶4 On March 3, 2008, Holm, pro se, moved for postconviction relief under WIS. STAT. § 974.06. He also filed a forty-six-page affidavit and a motion seeking postconviction discovery. Judge Kennedy held several hearings regarding Holm's discovery requests and other procedural issues, and entered a series of procedural orders. The Honorable Patrick F. O'Melia was subsequently assigned to the case. On June 9, 2009, Holm filed a "Request for Admissions" consisting of 1,301 individual requests. The State did not respond to Holm's requests.

¶5 On November 23, 2009, Holm filed an amended postconviction motion, which spanned over one-hundred pages. The amended motion alleged that Holm's trial attorney was ineffective in numerous ways, and that his postconviction attorney was ineffective for failing to make these ineffective assistance of trial counsel arguments in Holm's WIS. STAT. § 974.02 motion. The circuit court denied Holm's amended motion without holding an evidentiary hearing. Holm then moved for reconsideration, arguing the court had erred by violating the law of the case doctrine, failing to deem his requests for admission admitted, failing to accept as true the allegations in his affidavit, and refusing to resolve outstanding discovery disputes before denying postconviction relief. The court denied Holm's reconsideration motion.

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

DISCUSSION

I. Violation of the law of the case doctrine

¶6 On appeal, Holm first argues that the circuit court violated the law of the case doctrine by "start[ing] over from step one upon taking over the case." However, Holm misapprehends the law of the case doctrine, which is a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." *See* ***Univest Corp. v. General Split Corp.***, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989). While the law of the case doctrine requires a circuit court on remand to follow an appellate court's decisions on questions of law, it does not prevent a circuit court judge from reconsidering his or her previous rulings, or those of a predecessor circuit court judge. Consequently, even assuming Judge O'Melia "started over from step one" when he was assigned to Holm's case, doing so did not violate the law of the case doctrine.

¶7 Moreover, while Holm repeatedly alleges that Judge O'Melia "started over from step one," he fails to point to specific instances in which Judge O'Melia ignored or overturned Judge Kennedy's prior rulings. For instance, Holm suggests that Judge O'Melia contravened Judge Kennedy's third amended procedural order by denying Holm's postconviction motion without allowing Holm to conduct additional discovery. However, the third amended procedural order did not include any discovery orders. Instead, it rejected Holm's request for a free copy of a transcript, specifically deferred decisions on an array of discovery requests, noted that the court had provided Holm with a courtesy copy of "CCAP entries concerning companion cases," and directed the clerk of court to provide a third person with a "quote on obtaining copies of certain records." Holm does not

clearly identify any other order by Judge Kennedy that Judge O'Melia disregarded. Consequently, Holm has not developed a convincing argument that Judge O'Melia "started over from step one" after being assigned to Holm's case.

II. Failure to deem Holm's requests for admission admitted

¶8 Holm next argues the circuit court erred by failing to consider his requests for admission. He contends that, because the State never responded to his requests, the court should have deemed each request admitted for purposes of deciding his postconviction motion. *See* WIS. STAT. § 804.11(1)(b) (a request for admission is deemed admitted unless the party to whom the request is directed responds within thirty days). For several reasons, we disagree.

¶9 First, Holm did not obtain the circuit court's permission to serve requests for admission on the State. In ***State v. O'Brien***, 223 Wis. 2d 303, 323, 588 N.W.2d 8 (1999), our supreme court recognized that a criminal defendant has a limited right to postconviction discovery. However, to obtain postconviction discovery, the defendant must first establish that: (1) the sought-after evidence is consequential to the case; and (2) there is a reasonable probability the evidence would have resulted in a different outcome. ***Id.*** The circuit court has discretion to grant or deny a request for postconviction discovery. ***State v. Ziebart***, 2003 WI App 258, ¶32, 268 Wis. 2d 468, 673 N.W.2d 369. Consequently, under ***O'Brien*** and its progeny, Holm was required to obtain the circuit court's permission before serving his requests for admission on the State. Because Holm did not do so, the

State was not required to respond to Holm's requests, and the circuit court correctly refused to deem the requests admitted.[4]

¶10 Second, WIS. STAT. § 804.11, the statute permitting litigants to serve requests for admission, is a civil discovery statute. Holm has not directed our attention to any case stating that § 804.11 is applicable in postconviction proceedings. While Holm cites a number of cases to support his argument that a criminal defendant may use requests for admission in the postconviction context, each of these cases involved *pretrial* discovery in *civil*, not criminal, cases. *See* ***United States v. Kasuboski***, 834 F.2d 1345, 1347, 1349-50 (7th Cir. 1987); ***F.T.C. v. Medicor, LLC***, 217 F. Supp. 2d 1048, 1050, 1053 (C.D. Cal. 2002); ***Luckett v. Bodner***, 2009 WI 68, ¶¶10-16, 318 Wis. 2d 423, 769 N.W.2d 504; ***Mucek v. Nationwide Commc'ns, Inc.***, 2002 WI App 60, 252 Wis. 2d 426, 643 N.W.2d 98.[5] Thus, none of the cases Holm cites suggest that requests for admission are a proper discovery tool in postconviction proceedings.

¶11 Third, even in civil cases, WIS. STAT. § 804.11 does not apply in the postjudgment context. WISCONSIN STAT. ch. 804 sets forth the rules of pretrial discovery; it does not authorize any postjudgment discovery. If § 804.11 is inapplicable in the postjudgment phase of civil proceedings, there is little reason to

[4] Holm cannot claim ignorance of his obligation under ***State v. O'Brien***, 223 Wis. 2d 303, 588 N.W.2d 8 (1999). In a motion for postconviction discovery filed fifteen months before Holm issued his requests for admission, Holm specifically cited ***O'Brien*** and correctly stated that ***O'Brien*** sets forth the test for "determin[ing] whether to grant postconviction discovery to a defendant."

[5] Holm also cites an unpublished Wisconsin Court of Appeals opinion from 1997. The rules of appellate procedure state that unpublished opinions issued before July 1, 2009 may not be cited as precedential or persuasive authority. *See* WIS. STAT. RULE 809.23(3).

think the statute would be applicable in the postconviction phase of a criminal case.

¶12 Fourth, the only civil procedure statute that provides for postjudgment discovery is WIS. STAT. § 816.03(1)(a), which allows for very limited discovery related to a specific procedure for enforcing civil judgments. However, like a criminal defendant seeking postconviction discovery, a civil judgment creditor who wishes to conduct the discovery allowed by § 816.03(1)(a) must first obtain the circuit court's permission. Furthermore, the procedure set forth in § 816.03(1)(a) is used to *enforce* judgments obtained using a preponderance of the evidence standard. In contrast, postconviction discovery is used to *challenge* judgments obtained under the more rigorous beyond a reasonable doubt standard. The existence of the postjudgment discovery procedure in § 816.03(1)(a) therefore lends little support to Holm's argument that requests for admission are a proper discovery tool in postconviction proceedings.

¶13 In summary, Holm has not presented any authority for the proposition that requests for admission may be used in postconviction proceedings. Moreover, even assuming requests for admission are available in the postconviction context, Holm was required to obtain the court's permission before serving requests for admission on the State. Because Holm did not do so, the State was not obligated to respond to his requests. Accordingly, the circuit court did not err by refusing to deem the requests admitted.

III. Failure to accept as true the allegations in Holm's affidavit

¶14 Holm next argues the circuit court erred by refusing to accept as true all of the facts alleged in the affidavit accompanying his postconviction motion. However, nowhere in its decision denying Holm's postconviction motion did the

court state that it refused to accept the facts in the affidavit as true. Instead, the court correctly stated that a court may deny a postconviction motion without a hearing "if all the facts alleged in the motion, *assuming them to be true*, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief." *See* ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433 (emphasis added). The court then analyzed Holm's claims and concluded, "[T]he record conclusively shows that Holm is not entitled to relief." The court's decision therefore comports with the procedure set forth in ***Allen***.

¶15 At base, Holm appears to take issue with the standard ***Allen*** sets forth for deciding postconviction motions. He argues that "***Allen***'s unfortunate verb[i]age (in ¶¶9 & 12) in summarizing the holding in [***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996)] is leading to unreasonable, absurd, and unintended consequences."[6] While Holm may consider ***Allen***'s verbiage "unfortunate," that verbiage is binding on lower courts. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Holm does not argue that the circuit court failed to follow the procedure set forth in ***Allen***. Accordingly, he implicitly concedes that the circuit court applied the proper standard in denying his postconviction motion.

[6] *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 ("[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing."); ***id.***, ¶12 (circuit court may deny a postconviction motion without a hearing "if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.") (footnote omitted).

IV. Failure to resolve outstanding discovery disputes

¶16 Holm also contends the circuit court erred by denying his postconviction motion without first resolving certain discovery disputes. However, as the circuit court noted in its decision on Holm's motion for reconsideration, Holm's amended postconviction motion specifically described his pending discovery motions as "currently moot." Holm cannot legitimately complain about the circuit court declining to address motions he himself declared moot.

¶17 Furthermore, the circuit court noted that, throughout the postconviction proceedings, Holm took a scattershot approach to discovery and consistently failed to make clear which materials he wanted the State to provide and why. The court explained:

> Further, it is far from clear that Holm was in fact seeking to obtain copies of these materials, and which materials in particular he was discussing. For instance, at a June 18, 2008 hearing, Holm agreed that he wasn't necessarily looking to obtain these discovery materials, but instead simply wanted to be able to prove that they existed, to show that his trial counsel was ineffective in failing to obtain them.

Additionally, the court noted that "despite numerous hearings on the issue of discovery, Holm has not alleged that the result of the trial proceedings would have been different, or that he would not have pled guilty, if this discovery had been available to his trial counsel[.]" We agree with the circuit court that, under the circumstances, there was no need for the court to resolve whatever discovery disputes remained outstanding before deciding Holm's postconviction motion. This is particularly true given, as we conclude below, that the claims in Holm's postconviction motion were procedurally barred. *See supra*, ¶¶19-22.

V. Failure to hold an evidentiary hearing

¶18 Finally, Holm contends the circuit court erred by denying his postconviction motion without an evidentiary hearing. Holm's amended postconviction motion alleged that his trial attorney was ineffective in numerous ways, and that his postconviction attorney was ineffective for failing to raise these ineffective assistance of trial counsel arguments in Holm's WIS. STAT. § 974.02 motion. The circuit court determined the record conclusively showed that Holm's trial attorney was not ineffective, and consequently, the court denied Holm's motion without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. We agree that a hearing was unnecessary, albeit for a different reason. *See* ***State v. Sharp***, 180 Wis. 2d 640, 650, 511 N.W.2d 316 (Ct. App. 1993) (we may sustain the trial court's determination on different grounds).

¶19 Specifically, we conclude Holm's ineffective assistance claims were procedurally barred. Under WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), a defendant is required to raise all grounds for relief in his or her initial postconviction motion, or on direct appeal. Thus, arguments that were raised in a previous postconviction motion or appeal may not be raised again in a subsequent motion. ***Escalona-Naranjo***, 185 Wis. 2d at 185. "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).

¶20 In his amended postconviction motion, Holm contended his trial attorney was ineffective for failing to properly explain party to a crime liability and failing to object to the State's alleged breach of the plea agreement. We

explicitly rejected these arguments in Holm's direct appeal, concluding that counsel properly explained party to a crime liability and that the State did not breach the plea agreement. *See* ***Holm***, No. 2004AP672-CR, unpublished slip op. ¶¶8-9. Accordingly, Holm is barred from raising these arguments again.

¶21 The remainder of Holm's ineffective assistance arguments are also procedurally barred. A defendant may not raise in a successive postconviction motion any claim that could have been raised on direct appeal or in a prior postconviction motion, unless he or she presents a "sufficient reason" for failing to do so. ***Escalona-Naranjo***, 185 Wis. 2d at 185. Here, Holm alleges that his postconviction attorney was ineffective for failing to raise various ineffective assistance of trial counsel arguments in Holm's WIS. STAT. § 974.02 motion. He correctly points out that ineffective assistance of postconviction counsel can be a sufficient reason for failing to raise ineffective assistance of trial counsel in a previous postconviction motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). However, Holm does not explain why he failed to argue on direct appeal that his postconviction attorney was ineffective for failing to raise these ineffective assistance of trial counsel arguments.

¶22 In his direct appeal, Holm argued that his postconviction attorney was ineffective because Holm "was left to try and bring [his] own direct appeal … without the aid[] of counsel" after postconviction counsel determined there were no meritorious issues for appeal. *See* ***Holm***, No. 2004AP672-CR, unpublished slip op. ¶17. Holm did not argue that postconviction counsel should have raised any ineffective assistance of trial counsel arguments in Holm's WIS. STAT. § 974.02 motion. Holm has not presented any reason, let alone a sufficient reason, for failing to argue on direct appeal that postconviction counsel was ineffective for

failing to raise ineffective assistance of trial counsel. Consequently, Holm is procedurally barred from making that argument now.

¶23 Even if Holm's ineffective assistance claims were not procedurally barred, we agree with the State and the circuit court that the record conclusively demonstrates the claims have no merit. Accordingly, the circuit court properly denied Holm's amended postconviction motion without a hearing. We therefore affirm. As noted in footnote one, we remand for the circuit court to correct the judgment of conviction to reflect a sentence of life in prison without eligibility for extended supervision.

By the Court.—Judgment affirmed and cause remanded with directions; order affirmed.

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