

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 13, 2013

Diane M. Fremgen
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. 2011AP2989

Cir. Ct. No. 2006CF685

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT LEE ARTIC, SR.,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Robert Lee Artic, Sr., *pro se*, appeals the order denying his WIS. STAT. § 974.06 (2011-12) motion for postconviction relief.¹

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Artic argues his postconviction counsel was ineffective for failing to argue his trial counsel was ineffective in a number of ways. We affirm.

BACKGROUND

¶2 We will not repeat the extensive recitation of facts or procedural history outlined in the Wisconsin Supreme Court’s decision resolving Artic’s direct appeal.² See *State v. Artic*, 2010 WI 83, ¶¶6-21, 327 Wis. 2d 392, 786 N.W.2d 430. Suffice it to say that one year after the decision was issued, Artic filed the WIS. STAT. § 974.06 motion at issue in this appeal.

¶3 In the motion (and the addendum that followed), Artic argued that his postconviction counsel was ineffective for failing to argue that trial counsel was ineffective on the following grounds: (1) for failing to object when the circuit court allowed the bailiff to present an alleged kilogram cocaine wrapper to the jury during deliberations and when the circuit court had, what Artic describes as, *ex parte* communications with the jury when it asked to see the wrapper; (2) for failing to argue that Artic was unlawfully seized within his home; (3) for failing to investigate and impeach one of the State’s witnesses; (4) for failing to file a

² We note that prior to his direct appeal, Artic filed a postconviction motion, arguing “among other claims, that his trial counsel was ineffective for failing to preserve the argument that the police improperly created their own exigent circumstances and for failing to object to [an officer]’s testimony because it was illegally obtained by her presence within the curtilage of Artic’s property.” *State v. Artic*, 2010 WI 83, ¶19, 327 Wis. 2d 392, 786 N.W.2d 430. The circuit court denied the motion and Artic appealed. *Id.*, ¶¶19-20. Against this procedural backdrop, we conclude that the case before us is not implicated by the Wisconsin Supreme Court’s recent decision in *State v. Starks*, 2013 WI 69, ___ Wis. 2d ___, 833 N.W.2d 146. See *id.*, ¶¶34-35 (explaining that where appointed counsel did not file any postconviction motions on his client’s behalf and instead pursued a direct appeal, he was acting not as postconviction counsel but as appellate counsel and that a defendant arguing ineffective assistance of appellate counsel may not seek relief under WIS. STAT. § 974.06). In contrast to the situation presented in *Starks*, here Artic’s counsel was acting as postconviction counsel and as such, § 974.06 was a proper avenue for the relief sought by Artic.

motion *in limine* addressing the admissibility of the alleged cocaine wrapper and a photo of it, which prevented him from pursuing a “police fabrication defense”; and (5) for failing to challenge the initial entry on the first floor of Artic’s home. After reviewing the parties’ briefs, the circuit court denied Artic’s motion without a hearing.

DISCUSSION

¶4 A WIS. STAT. § 974.06 motion filed after a direct appeal may be procedurally barred absent a showing of a sufficient reason why the claims were not raised in a previous motion or on direct appeal. See *State v. Lo*, 2003 WI 107, ¶44 n.11, 264 Wis. 2d 1, 665 N.W.2d 756; *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). The ineffective assistance of postconviction counsel may constitute a sufficient reason for failing to raise a claim on direct appeal. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 683, 556 N.W.2d 136 (Ct. App. 1996).

¶5 To establish postconviction counsel’s ineffectiveness for failing to challenge trial counsel’s effectiveness, a defendant must show that trial counsel was constitutionally ineffective. See *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. This requires a defendant to show: (1) deficient performance; and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not consider both prongs “if the defendant makes an insufficient showing on one.” *Id.* at 697. On appeal, the circuit court’s findings of fact with respect to ineffective assistance of counsel will not be disturbed unless shown to be clearly erroneous, but whether there was ineffective assistance of

counsel is a question of law that this court reviews *de novo*. See *State v. Balliette*, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334.³

¶6 The circuit court, addressing the merits of Artic’s ineffective-assistance-of-trial-counsel claims, explained:

First, the defendant alleges that trial counsel was ineffective for failing to object when the trial court allowed its bailiff to present the jury with the alleged cocaine wrapper during its deliberations and when the court “apparently” had *ex parte* communications with the jury without the defendant or defense counsel present. This claim has no merit. The record shows that the parties stipulated to the exhibits that could be sent to the jury during its deliberations, if requested, so that the court would not have to call the parties every time the jury asked for a specific exhibit. The alleged cocaine wrapper was *not* one of the exhibits that the parties decided that the jury would not be allowed to view.⁴ After the bailiff notified the court that the jury had reached a verdict, the court informed the parties that the jury had requested a number of exhibits, including the wrapper stating[,] “My bailiff took it back and let them examine it. I think he held it in his hands and then brought it back based on concerns.” Sending

³ The circuit court did not hold Artic to the pleading requirements set forth in *State v. Balliette*, 2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334, which was released shortly before Artic filed his motion and had yet to be published in the Wisconsin Reports. See *id.*, ¶63 (holding that a defendant claiming the ineffective assistance of postconviction counsel under WIS. STAT. § 974.06 must “do more than assert that his postconviction counsel was ineffective for failing to challenge on direct appeal several acts and omissions of trial counsel that he alleges constituted ineffective assistance”). Instead the circuit court, like the State, addressed the merits of Artic’s underlying claims.

⁴ In his reply brief on appeal, Artic asserts that while his trial counsel stipulated to allow the jury review exhibits, Artic did not. Artic was, however, present when the parties were discussing and stipulating to which exhibits could be sent to the jury. There is no indication in the transcript that he raised any concerns or otherwise voiced objections to the stipulations with either counsel or the court. Moreover, to the extent this amounts to an argument, Artic makes it for the first time in his reply brief. As such, we will not consider it further. See *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995) (It is a well-established rule of appellate practice that the court will not consider arguments raised for the first time in a reply brief.).

exhibits back to the jury room upon request is not an *ex parte* communication, and the court was not required to contact the parties when the jury requested this specific exhibit because of the stipulation. While the defendant argues that the record contains no written notes from the jury requesting exhibits, there is no indication that the jury put their requests in writing. Even assuming for purposes of this motion that the jury made written rather than oral requests for exhibits and that the court failed to preserve those requests, the court made a sufficient record of its communications with the jury regarding the exhibits. The court perceives no error in the manner in which the court allowed the jury to view the wrapper, and the court agrees with the State that the defendant's claim that the jury placed undue emphasis upon the wrapper because of the manner in which it was handled is speculative. Consequently, the court finds that trial counsel was not ineffective for failing to raise these objections.

The defendant also argues that trial counsel was ineffective for failing to argue that the [sic] he was unlawfully seized within his home and that his consent to police was tainted by his unlawful detention. The consent issue was extensively litigated during the appeal. The Wisconsin Supreme Court has already ruled that the defendant's consent to search was freely and voluntarily made and that his consent was sufficiently attenuated from the unlawful entry into the residence. The Wisconsin Supreme Court's decision is the law of this case. The defendant has no legal grounds to raise an ineffective assistance claim on this basis when the Wisconsin Supreme Court has determined that lawful consent was given.

Next, the defendant contends that trial counsel was ineffective for failing to impeach the false testimony of witness Detective Mark Wagner at the suppression hearing. The court agrees with the State's analysis of this issue and adopts it.⁵ More importantly, the defendant's argument goes to the issue of the legality of the officers' entry into the home and does not invalidate the consent that was given

⁵ In its response to Artic's WIS. STAT. § 974.06 motion on this issue, the State asserted that Artic's argument failed because he "put forth no evidence that Wagner's testimony at the motion hearing *was* false." To prove its point, the State provided a detailed account of the testimony offered by Detective Wagner and others during both the suppression hearing and the trial.

to the officers—consent that the Wisconsin Supreme Court has concluded was attenuated from the illegal entry.

The defendant also argues that trial counsel should have moved *in limine* to exclude evidence of the alleged cocaine wrapper and the photograph of it because there were no tests conducted on the wrapper. The jury heard testimony that the wrapper was not sent to the State Crime Lab, and therefore, the defendant was not prejudiced by the admission of this evidence. Even without this evidence, there is no reasonable probability that the outcome of the trial would have been different.

The defendant also argues that counsel failed to present a fabrication defense. This claim is related to the defendant's claim that Detective Wagner testified falsely at the suppression hearing about his house being the target of the undercover investigation. At trial, Detective Wagner testified that he was part of a team investigating the purported delivery of narcotics in the 3200 block of North 15th Street. Even if trial counsel had tried to impeach the detective with his prior statements, the court fails to perceive how it would have had any significant impact on his credibility. Detective Wagner testified at the suppression hearing and at the trial that he did not have direct contact with the [confidential informant] and that the information he had was given to him by other officers. There is simply no reasonable probability that the jury would have dismissed his credibility and the credibility of the other officers based upon his statements at the suppression hearing.

Lastly the defendant argues that postconviction counsel was ineffective for not raising [as] an issue that trial counsel was ineffective for failing to challenge the entry into the first floor of the home and to move to suppress evidence taken from the first floor, to wit, the alleged cocaine wrapper. Trial counsel filed a motion challenging the officers' entry in the defendant's home and requesting that *all* evidence seized in the home be suppressed. The motion was litigated on July 11, 2006, and the court denied it. The court does not read the Wisconsin Supreme Court's decision in this case as limiting the validity of the defendant's consent to a search of the second floor. The Court's ruling was on the voluntariness of the defendant's consent to search and not the scope of his consent. Even if this evidence had been suppressed, there is no reasonable probability that the result of the trial would have been different.

Based upon the foregoing, the court finds that trial counsel was not ineffective for failing to raise any of the above issues.

(Record citations and a footnote omitted.)

¶7 This court agrees with the circuit court’s thorough analysis of the merits of Artic’s postconviction claims. As such, we adopt the circuit court’s decision as our own and affirm. *See* WIS. CT. APP. IOP VI(5)(a) (Jan 1, 2013) (“When the [circuit] court’s decision was based upon a written opinion ... of its grounds for decision that adequately express the panel’s view of the law, the panel may incorporate the [circuit] court’s opinion or statement of grounds, or make reference thereto, and affirm on the basis of that opinion.”). Because Artic’s trial counsel was not ineffective, his claim of postconviction counsel ineffectiveness fails.

By the Court.—Order affirmed.

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

