COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2382 **Cir. Ct. No. 2006CF4929**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER D. JONES,

DEFENDANT-APPELLANT.

APPEAL from order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed*.

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

¶1 PER CURIAM. Christopher D. Jones, *pro se*, appeals an order denying his motion for postconviction relief.[1] Jones filed prior postconviction

[1] The Honorable Ellen R. Brostrom issued the order denying the motion for postconviction relief that underlies this appeal.

motions and had a direct appeal; consequently, he attempts to avoid the prohibition against successive postconviction motions by alleging that his postconviction counsel was ineffective for not arguing that his trial counsel was ineffective. Jones claims that his trial counsel was ineffective for failing to conduct an adequate investigation of the discovery materials. According to Jones, if trial counsel had conducted an adequate investigation, counsel would have been able to impeach three of the State's key witnesses. We reject Jones's arguments and affirm.

BACKGROUND

¶2 We will not repeat the extensive recitation of facts outlined in our prior published decision resolving Jones's direct appeal.[2] *See* ***State v. Jones***, 2010 WI App 133, ¶¶2-13, 329 Wis. 2d 498, 791 N.W.2d 390, *review denied*, 2011 WI 15, 331 Wis. 2d 47, 794 N.W.2d 901. For purposes of resolving this appeal, it suffices to say that a jury convicted Jones of first-degree reckless homicide while armed and attempted armed robbery with use of force. With the assistance of counsel, Jones appealed his convictions. He raised many issues, placing particular emphasis on his challenge to the use of gun-toolmark evidence in general and in his case specifically. He also argued that prosecutorial misconduct deprived him of a fair trial; his trial counsel was constitutionally ineffective; newly discovered evidence required a new trial; the circuit court erred by denying him a postconviction expert at taxpayer expense; the circuit court erred again by denying

[2] The Honorable Daniel L. Konkol presided over the jury trial, sentenced Jones, and issued the orders denying postconviction motions filed by Jones prior to his direct appeal.

his motions for postconviction relief without a hearing; and he was entitled to a new trial in the interest of justice. We rejected Jones's contentions and affirmed.

¶3 More than two years after our decision was released, Jones, *pro se*, filed the postconviction motion underlying this appeal, pursuant to WIS. STAT. § 974.06 and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). In his motion, Jones faulted his trial counsel for failing to explore areas of potential impeachment, which he contends could have undermined the credibility of three of the State's witnesses: Edward Hervey; Jada Carter; and Kandice Perry. Jones asserts that his postconviction counsel should have argued his trial counsel was ineffective in this regard and that this issue was clearly stronger than the prosecutorial misconduct issue raised in his direct appeal.

DISCUSSION

¶4 "A defendant is not automatically entitled to a hearing on a postconviction motion." ***State v. Ziebart***, 2003 WI App 258, ¶33, 268 Wis. 2d 468, 673 N.W.2d 369. If the motion presents only conclusory allegations or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may deny the motion on its face. *See* ***id.*** Sufficiency of the motion is a question of law we review *de novo*. *See* ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W.2d 62. If the motion is insufficient, the decision to grant or deny a hearing is left to the circuit court's discretion, which we review only for an erroneous exercise of that discretion. *See* ***id.***

¶5 A motion brought under WIS. STAT. § 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. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

Ineffective assistance of postconviction counsel may constitute a "sufficient reason" for not previously raising an issue. ***Rothering***, 205 Wis. 2d at 682.

¶6 To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's action or inaction constituted deficient performance and that the deficiency prejudiced the defendant. *See* ***Love***, 284 Wis. 2d 111, ¶30. To prove deficiency, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the results of the proceeding would have been different. ***Id.*** If we conclude that a defendant has failed to demonstrate one of the prongs, we need not address the other. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

¶7 Even if we set aside the shortcomings of Jones's assertions of postconviction-counsel ineffectiveness, *see* ***State v. Balliette***, 2011 WI 79, ¶¶62-70, 336 Wis. 2d 358, 805 N.W.2d 334, his assertions of trial-counsel ineffectiveness still fail.[3] Analyzing the merits of Jones's ineffective-assistance-of-trial-counsel claims, the circuit court explained:

> The defendant now asserts that trial counsel should have properly impeached three of the State's witnesses and that postconviction counsel was ineffective for failing to raise trial counsel's ineffectiveness in this regard. The three witnesses he claims would have been less credible at trial had counsel properly impeached them are Edward

[3] Jones fails to appreciate the necessity of adequately alleging the ineffectiveness of postconviction counsel in this procedural context. As noted, this is problematic under ***State v. Balliette***, 2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334, which holds 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." ***Balliette***, 336 Wis. 2d 358, ¶63.

Hervey (the victim's friend), Jada Carter (a passer-by), and Kandice Perry (the defendant's girlfriend).

….

As to Edward Hervey, the defendant contends that counsel should have conducted an adequate investigation of the discovery because he would have learned that Hervey was mentally challenged and that his ability to accurately perceive events may have been affected by his mental infirmities. Thus, he believes trial counsel could have attacked him as an unreliable witness by discovering his psychological incapacities and cross[-]examining him in that respect. He also claims that Hervey was biased due to his long years of friendship with the victim and by demonstrating his bias towards the defendant by identifying Jones as the person who killed his friend. He further submits that Hervey should have been impeached on the basis of contradiction as to whether or not he had seen the defendant with a weapon at the scene of the crime.

The defendant's first claim is conclusory and without the requisite factual support necessary to show that Edward Hervey's mental limitations somehow caused him to inaccurately perceive events. The defendant offers no support whatsoever for this speculative and conclusory claim.

The defendant's second claim is without merit. Merely because the victim was Hervey's friend and both were in the Special Olympics does not mean he could not objectively identify the person who shot him.

The third claim does not constitute a basis for ordering a new trial. In an attempt to show that Hervey was lying or not believable, trial counsel raised issues during cross[-]examination with respect to what Hervey saw during the time of the shooting and the absence of his claim in the September 7 police report that the defendant had shot his friend. In addition, trial counsel brought all of this information to the forefront when he cross[-]examined

> Detective Heier on May 2, 2007.[4] The court perceives no ineffective assistance in this regard.
>
> The defendant next contends that there were inconsistencies in Jada Carter's testimony that would have made a difference in the trial had they been pursued more thoroughly. Counsel did an adequate job of drawing out the inconsistencies in Carter's testimony regarding the identification of the defendant. Given the overwhelming abundance of other evidence against the defendant, there is not a reasonable probability that further cross[-]examination in this regard would have made a singular difference in the outcome of the trial. The Court of Appeals summarized the testimony in its decision, and defendant was affirmatively linked with the firearm that fired the bullet that killed Brandon Sprewer. In addition, his juvenile accomplice Demonta Gray testified that the defendant was the one who shot the victim.
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> The defendant also faults trial counsel for failing to question his girlfriend, Kandice Perry, about her motivation for testifying against him, reasoning that if she faced exposure for being charged with the same offenses as an aider and abettor (for driving the defendant to a location to commit a robbery), she would have had grounds to deliberately misrepresent the facts. Thus, he contends that counsel should have asked her about whether she was told she would be charged, and with what, to determine how her testimony was colored. He maintains that the discovery information showed that Perry was arrested for aiding and abetting a felon, and if jurors had known this, it would have made a difference. He also asserts that counsel should have impeached her for prior inconsistent statements to police.
>
> Perry was questioned about her inconsistent statements to police by both parties, and there is not a reasonable probability that further questioning … the defendant now claims should have occurred would have impacted the outcome of the trial. In addition, whether the jury knew if Perry was charged with aiding and abetting a felon, or with drug possession, such knowledge would not

[4] In his brief-in-chief, Jones argues "[t]he [circuit] court failed to acknowledge that [D]etective Heier was not a witness at the scene of the shooting or at the bus stop when Brandon was shot." This argument misses its mark. The circuit court referenced Detective Heier's testimony only insofar as it further supported its conclusion that inconsistencies in statements made by Hervey were explored during Jones's trial.

> have affected the ultimate result.[5] Perry didn't cooperate with the police at first because she was afraid of what would happen to her and to her mother's house. The court rejects the defendant's argument that had counsel done more, Perry wouldn't have been believable. Given all of the other evidence connecting the defendant to the shooting, including three eye witnesses, the testimony about the transfer of the gun, and the firearms expert, there is not a reasonable probability that the outcome of the trial would have been any different.
>
> In sum, the court cannot find that trial counsel's performance was deficient or prejudicial to the defendant's case, and therefore, postconviction counsel cannot be found to be ineffective for failing to raise all of the above contentions.

(Record citations omitted.)

¶8 This court agrees with the circuit court's thorough analysis of the merits of Jones'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.").

¶9 Jones asserts that the circuit court failed to look at the cumulative effects of counsel's errors. However, even when considered cumulatively, overwhelming evidence of Jones's guilt remains. *See* ***State v. Thiel***, 2003 WI 111, ¶61, 264 Wis. 2d 571, 665 N.W.2d 305 ("[I]n most cases errors, even

[5] As the State further points out, Jones's trial "[c]ounsel no doubt steered clear of this line of inquiry [i.e., Perry's exposure for aiding and abetting] because it would do nothing to disprove Jones's guilt; it only shows that Perry could have *also* been charged as an accomplice to the murder *committed by her boyfriend, Jones*."

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."). This evidence, summed up by the State, includes:

> Jones's accomplice, Gray, [who] confirmed the eyewitness accounts of Hervey and Carter that Jones shot Sprewer in the chest in a botched attempted robbery at the 91st and Silver Spring bus stop; Jones owned the gun that was used to kill Sprewer and, after the shooting, passed the gun to his brother; and Jones bragged to a cellmate about shooting a "retarded guy," telling the cellmate his brother turned him in when caught with the gun used in the shooting.

Because Jones's trial counsel was not ineffective, his claim of postconviction counsel ineffectiveness fails. The circuit court properly denied the WIS. STAT. § 974.06 motion without a hearing.

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).