COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1192 **Cir. Ct. No. 2007CF5188**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACQUESE FRANKLIN HARRELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jacquese Franklin Harrell, *pro se*, appeals an order of the circuit court denying his WIS. STAT. § 974.06 (2011-12)[1] motion without a

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

hearing. Harrell complains that trial counsel was ineffective for not objecting to or directly challenging the State's ballistics expert's testimony. We agree with the circuit court's conclusion that the motion is insufficiently pled, so we affirm.

BACKGROUND

¶2 Harrell was charged with one count of first-degree reckless homicide while armed and one count of possession of a firearm by a felon for the shooting death of Victoria Jackson. Part of the case against Harrell was testimony from forensic firearms examiner Kyle Anderson, who testified that recovered bullets came from a gun linked to Harrell and that the bullets could not have been fired from any gun other than the one possessed by Harrell. On May 14, 2008, a jury convicted Harrell on both counts. The circuit court sentenced him to thirty years' initial confinement and fifteen years' extended supervision for the first-degree reckless homicide while armed, and a concurrent ten years' imprisonment for the possession.

¶3 Harrell filed a postconviction motion alleging ineffective assistance of trial counsel in certain aspects and challenging the earlier denial of a suppression motion. The circuit court denied the motion without a hearing. Harrell appealed, and we affirmed. *See* ***State v. Harrell***, 2010 WI App 132, 329 Wis. 2d 480, 791 N.W.2d 677, *review denied* 2010 WI 125, 329 Wis. 2d 376, 791 N.W.2d 383.

¶4 In February 2012, Harrell filed the underlying postconviction motion under WIS. STAT. § 974.06. He alleged that trial counsel had been "ineffective for failing to object to expert testimony of ballistics match of firearm to projectiles to a degree of scientific certainty." (Capitalization omitted.) His basis for this contention was "[r]ecent State and federal cases [that] have concluded that firearm

toolmark evidence [is] questionable[.]" Harrell also challenged Anderson's qualifications to be an expert. Cognizant of procedural bars, Harrell further asserted that the reason this particular claim of ineffective trial counsel was not raised on appeal was because "he was represented by Attorney Michael S. Holzman on direct appeal, and Holzman could not raise ineffective assistance of appellate counsel on himself" on direct appeal.

¶5 The circuit court denied the motion without a hearing on two grounds. First, Harrell had previously filed a *pro se* motion to vacate a DNA surcharge pursuant to ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. Thus, the circuit court concluded that the subsequent WIS. STAT. § 974.06 motion was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994), because Harrell could have raised his current challenges with that motion. Second, the circuit court determined that Harrell had not set forth a viable ineffective-assistance claim, explaining that it would not have granted a motion to strike Anderson's testimony and that Harrell had not shown a reasonable probability that trial counsel's failure to object to Anderson's testimony affected the outcome of the case.

DISCUSSION

¶6 The purpose of WIS. STAT. § 974.06 is to consolidate all claims of error into one motion or appeal; therefore, claims that could have been raised in the defendant's direct appeal or a prior § 974.06 motion are barred absent a sufficient reason. *See* ***State v. Balliette***, 2011 WI 79, ¶36, 336 Wis. 2d 358, 805 N.W.2d 334; ***Escalona-Naranjo***, 185 Wis. 2d at 178. Recently, our supreme court explained that a ***Cherry*** motion, standing alone, does not bar a later § 974.06 motion. *See* ***State v. Starks***, 2013 WI 69, ¶47, 349 Wis. 2d 274, 833 N.W.2d 146.

Thus, the circuit court's invocation of the ***Escalona-Naranjo*** procedural bar based on Harrell's prior ***Cherry*** motion was inappropriate. However, the circuit court also rejected Harrell's motion as insufficiently pled with respect to the ineffective-trial-counsel argument. We therefore turn our review to the motion's substance.

¶7 We first note that Harrell seems to be confused about whom he should call ineffective. He appears to believe that appellate counsel Holzman was ineffective for not claiming on appeal that trial counsel was ineffective for failing to object to Anderson's testimony. Thus, Harrell thinks Holzman's failure on appeal is a "sufficient reason" for not challenging trial counsel's performance earlier because Holzman "could not raise ineffective assistance of appeal counsel on himself."[2] However, a claim of ineffective assistance of trial counsel cannot be raised on appeal absent a postconviction motion, *see* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996), and appellate counsel is not ineffective for failing to raise an unpreserved issue, ***id.*** at 678.

¶8 Harrell may have meant that Holzman was ineffective as *postconviction* counsel for failing to preserve this particular claim against trial counsel and that the failure to preserve the issue is sufficient reason why trial counsel's performance regarding Anderson was not challenged in the first appeal. However, to successfully show that postconviction counsel's ineffectiveness constitutes a "sufficient reason," Harrell must establish that trial counsel actually

[2] In addition, Harrell cites several cases that apply when trial and appellate counsel are the same attorney. *See* ***State v. Hensley***, 221 Wis. 2d 473, 474, 585 N.W.2d 683 (Ct. App. 1998); ***State v. Robinson***, 177 Wis. 2d 46, 53, 501 N.W.2d 831 (Ct. App. 1993); ***United States v. Taglia***, 922 F.2d 413, 418 (7th Cir. 1991). However, Holzman was not Harrell's trial attorney; instead, Harrell was represented at trial by Attorney Ann T. Bowe.

was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶9 To prevail on his claim of ineffective assistance of trial counsel, Harrell must show that trial counsel performed deficiently and that the deficiency prejudiced his defense. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. To prove deficient performance, a defendant must demonstrate that counsel's conduct falls below an objective standard of reasonableness. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. A defendant must successfully show both deficiency and prejudice, so if one prong is unfulfilled, we need not address the other. ***State v. Manuel***, 2005 WI 75, ¶72, 281 Wis. 2d 554, 697 N.W.2d 811.

¶10 A postconviction ***Machner*** hearing is a prerequisite to appellate review of ineffective-assistance claims. ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998); ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, a trial court may deny a postconviction motion without a hearing if the defendant fails to allege sufficient facts entitling him or her to relief or presents only conclusory allegations, or if the record conclusively demonstrates the defendant is not entitled to relief. ***State v. Allen***, 2004 WI 106, ¶¶13-14, 274 Wis. 2d 568, 682 N.W.2d 433; ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

¶11 Relying on three cases, Harrell believes that trial counsel was ineffective for not challenging Anderson's designation as an expert. However, the

two federal cases on which Harrell relies are not applicable: both rely on the standard set forth in ***Daubert v. Merrill Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), for expert testimony. *See* ***United States v. Monteiro***, 407 F.Supp. 2d 351, 356 (D. Mass. 2006); ***United States v. Green***, 405 F.Supp. 2d 104, 106 (D. Mass. 2005). Wisconsin did not adopt the ***Daubert*** standard until 2011, and that new standard first applied to actions commenced on or after February 1, 2011. *See* 2011 Wis. Act 2, §§ 34m, 45(5). Harrell's case commenced October 25, 2007, and, therefore, was not subject to the ***Daubert*** standard for expert testimony.

¶12 Instead, the appropriate standard for the admissibility of expert testimony at the time of Harrell's trial was simply one of relevance. *See* ***State v. Jones***, 2010 WI App 133, ¶22, 329 Wis. 2d 498, 791 N.W.2d 390. More specifically, expert testimony was admissible if: (1) the evidence was relevant; (2) the witness was qualified as an expert by knowledge, skill, expertise, training, or education; and (3) the evidence would assist the trier of fact in determining a fact in issue. *See* ***State v. Alger***, 2013 WI App 148, ¶22, 352 Wis. 2d 145, 841 N.W.2d 329.

¶13 Harrell makes multiple complaints about Anderson's testimony. He complains, for example, that Anderson did not adequately testify about his identification process or follow "base level standards" typical for his field. Harrell also contends that Anderson lacked sufficient education and training to call himself an expert.[3] However, under the applicable relevancy standard, Harrell's

[3] Specifically, Harrell complained that Anderson "has not attained a college degree in science," is not a member of any professional organization, and had not taken any proficiency tests at the time he performed the ballistics tests in issue. Aside from the fact that Harrell has not established that any of Anderson's "deficiencies" are actual requirements, Anderson testified that he had trained for three years in an apprenticeship-type program with a forensic tool mark examiner who had thirty years' experience.

complaints go only to the weight of Anderson's testimony and not its admissibility.

¶14 Further, though Harrell thinks that Anderson's testimony should be excluded because Harrell believes current literature indicates there is no such thing as a "perfect match" between bullets and a particular gun, we note that the third case on which Harrell relies, ***Jones***, addressed exactly that question. Jones sought "a blanket rule barring as a matter of course all testimony purporting to tie cartridge cases and bullets to a particular gun … [citing] a number of articles and trial-level decisions questioning the efficacy of such evidence." *See* ***id.***, 329 Wis. 2d 498, ¶20. We refused to impose such a rule in light of our then-status as a non-***Daubert*** state. *See* ***Jones***, 329 Wis. 2d, ¶¶21-23. Accordingly, the circuit court could properly conclude it would not have granted any attempt by trial counsel to exclude Anderson's testimony, because there was no basis on which the court should have done so.

¶15 The circuit court additionally concluded Harrell had not sufficiently alleged prejudice. In particular, Harrell made no allegation that he had spoken to some other expert who might have refuted Anderson's conclusions. The circuit court was also unpersuaded that a more vigorous cross-examination of Anderson by trial counsel would have had a material impact on the case in light of other witness testimony. Specifically, witness John David testified he was driving a vehicle in which Harrell was the passenger. David heard one or two shots inside his car and looked over to see Harrell with a gun. Two other individuals, Santana Walker and Antwain Childs, both testified that Harrell admitted the shooting. *See* ***Harrell***, 329 Wis. 2d 480, ¶2. Thus, Harrell has not established a reasonable probability that the results of the proceedings would have been different had trial counsel challenged Anderson's testimony.

¶16 We therefore agree with the circuit court that Harrell has not sufficiently alleged ineffective assistance of trial counsel for failure to challenge Anderson's testimony, nor ineffective assistance of postconviction counsel for failing to raise the claim against trial counsel. Accordingly, the circuit court properly denied Harrell's WIS. STAT. § 974.06 motion without a hearing.

By the Court.—Order affirmed.

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