COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2015

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. 2012AP1425 **Cir. Ct. No. 1996CF228**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. HUMPHREY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Mark A. Humphrey, *pro se*, appeals an order of the circuit court denying his postconviction motion filed pursuant to WIS. STAT. § 974.06 (2013-14), in which Humphrey asserted that his appellate counsel was

ineffective for failing to argue on direct appeal that Humphrey's trial attorneys were ineffective.[1] For the reasons discussed below, we affirm.

BACKGROUND

¶2 In October 1996, Humphrey was charged with first-degree intentional homicide and robbery with threat of force, both as a habitual criminal. The complaint alleged that Humphrey had escaped from the Drug Abuse Correctional Center in Oshkosh, Wisconsin, along with another inmate, Jesse Hummitsch, and that following their escape, Humphrey and Hummitsch were given a ride by Humphrey's girlfriend, Katherine Davison. The complaint alleged that Hummitsch informed the police that after Davison had picked them up, Humphrey demanded that Davison give him her credit cards and that after she did, he and Humphrey strangled Davison.

¶3 In December 1997, Humphrey pled no contest to one count each of felony murder and armed robbery, both as party to a crime. In exchange for Humphrey's plea, the State agreed to amend the information against Humphrey to charge him with felony murder rather than first-degree intentional homicide, to dismiss, but read-in, other charges against Humphrey, including first-degree reckless endangerment, eluding, two counts of attempted entry into a locked

[1] As we explain in more detail, *infra* at ¶8, Humphrey's assertion that he received ineffective assistance of appellate counsel was not properly brought in his WIS. STAT. § 974.06 motion; rather, the claims should have been brought in a habeas corpus petition pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). However, as we explain below, in the interest of judicial efficiency, we address his claim as if it had been brought in a *habeas corpus* petition pursuant to ***Knight.***

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

building, and obstructing, and to make a sentencing recommendation of sixty years, under which Humphrey would be eligible for parole after thirty years.[2] In addition, the Columbia County prosecutor agreed that he would not object to the dismissal of an escape charge against Humphrey in Winnebago County.

¶4 In June 1998, the circuit court entered a judgment of conviction against Humphrey for felony murder and armed robbery, both as party to a crime. The judgment of conviction indicated that Humphrey had "[p]arole eligibility in 25 years."[3] Through counsel, Humphrey filed a direct appeal of his conviction, arguing that the circuit court did not have authority to assign a parole eligibility date. The direct appeal was successful. Humphrey's conviction was summarily reversed and his case was remanded to the circuit court, which, in a modified judgment of conviction, removed the judicially assigned parole eligibility date.

¶5 Thereafter, Humphrey filed a *pro se* postconviction motion for relief pursuant to WIS. STAT. § 974.06 and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). Humphrey alleged that his counsel on direct appeal had been ineffective for failing to raise claims that his trial attorneys were ineffective for failing to inform him that conviction for both felony murder and the lesser-included offense of armed robbery is a violation of double jeopardy. Humphrey asked the circuit court to vacate his conviction for armed robbery and to resentence him on only the felony murder conviction.

[2] Humphrey was sentenced prior to the effective date of the truth in sentencing statutory scheme. *See* 1997 Wis. Act 283, § 419..

[3] An amended judgment of conviction was entered in September 1998, which removed sentence credit previously indicated in the June 1998 judgment.

¶6 The circuit court denied Humphrey's postconviction motion without a ***Machner***[4] hearing. Humphrey appeals.

DISCUSSION

¶7 Humphrey contends on appeal that the circuit court erred in denying his WIS. STAT. § 974.06 postconviction motion. Humphrey argues that his appellate counsel was ineffective for failing to raise the issue of the ineffectiveness of his two trial attorneys on direct appeal, who he asserts were ineffective for failing to inform him that the charges to which he pled violated his protection against double jeopardy.

¶8 Humphrey's challenge is that of the performance of his appellate counsel, and as such, his claims must have been brought in the form of a petition for a writ of habeas corpus to this court pursuant to ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992). *See* ***State v. Starks***, 2013 WI 69, ¶4, 349 Wis. 2d 274, 833 N.W.2d 146. By bringing his claim of ineffective assistance of appellate counsel in a postconviction motion before the circuit court, Humphrey pursued his claims in the wrong forum. *See* ***id.***, ¶4. However, in the interest of judicial efficiency, we address his claim as if it had been brought in a *habeas corpus* petition pursuant to ***Knight***.[5] *See* ***id.***, ¶31.

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[4] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[5] Because we treat Humphrey's claim as though it had been properly brought in a *habeas corpus* petition, and not in a postconviction motion pursuant to WIS. STAT. § 974.06, we do not address the State's arguments that Humphrey's motion is insufficient under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996).

¶9 Due process requires that a defendant be afforded effective assistance of appellate counsel on direct appeal. ***Knight***, 168 Wis. 2d at 511-12. "The purpose of a ***Knight*** petition is to challenge the lawfulness of a defendant's imprisonment based on the denial of effective assistance of counsel on direct appeal." ***State ex rel. Van Hout v. Endicott***, 2006 WI App 196, ¶14, 296 Wis. 2d 580, 724 N.W.2d 692. In order to establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, the other prong need not be addressed. ***Id.*** at 697. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review de novo. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶10 To demonstrate deficient performance, Humphrey must point to specific acts or omissions by counsel that "fell below an objective standard of reasonableness." *See* ***Strickland***, 466 U.S. at 688. In ***Starks***, the supreme court held that when a defendant challenges the effectiveness of appellate counsel in a habeas petition, the defendant must also show "that the claims of ineffective assistance of trial counsel that were not argued were 'clearly stronger' than the arguments [trial counsel] did pursue." ***Starks***, 349 Wis. 2d 274, ¶¶59-60, 66.

¶11 In his brief, Humphrey makes extensive argument that the armed robbery felony was a lesser-included offense of felony murder, that the constitutional guarantee against double jeopardy affords him protection against the conviction for both crimes, and that his trial attorneys were ineffective in failing to advise him of the double jeopardy problem. Humphrey also argues that his appellate counsel's failure to pursue a challenge of the effectiveness of his trial

attorneys on direct appeal was deficient, stating that such a challenge was "obvious and very strong—indeed obviously stronger" than the issue of the sentencing error that was successfully pursued on direct appeal. However, Humphrey does not argue that the ineffective assistance of trial counsel claim was "clearly stronger" than the issue that was pursued on direct appeal, as required under ***Starks***.

¶12 In additional briefing to this court, Humphrey argues that he need not make a showing that the ineffective assistance of trial counsel claim was "clearly stronger," because, under ***State v. Balliette***, 2011 WI 79, ¶69, 336 Wis. 2d 358, 805 N.W.2d 334, it is sufficient to show that the ineffective assistance of counsel claim was "obvious and very strong." Humphrey argues that no decision has "explicitly overrule[d], or modif[ied, or] withdraw[n] the 'obvious and very strong' … standard" and no case has "explicitly announce[d]" that a defendant must always make a "clearly stronger" showing when challenging the effectiveness of "postconviction counsel."

¶13 ***Balliette*** concerned a postconviction motion under WIS. STAT. § 974.06. As we explained above in ¶8, Humphrey's claim of ineffective assistance of appellate counsel was not properly brought in a WIS. STAT. § 974.06 motion, but should have instead been raised in a *habeas corpus* petition, and we have treated it as such. Our supreme court was clear in ***Starks*** when it stated: "We now adopt this 'clearly stronger' pleading standard for the deficiency prong of the ***Strickland*** test in Wisconsin for criminal defendants alleging in a habeas petition that they received ineffective assistance of appellate counsel due to counsel's failure to raise certain issues." ***Starks***, 349 Wis. 2d 274, ¶60. Because Humphrey has not even attempted to make a showing that his ineffective assistance of trial counsel issue was "clearly stronger" than the issue that appellate

counsel did pursue, successfully at that, he has not shown that appellate counsel was deficient.

¶14 Accordingly, we affirm.

By the Court.—Order affirmed.

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