COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1524 **Cir. Ct. No. 2008CF1445**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA J. KARASTI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: CHAD G. KERKMAN, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Joshua Karasti appeals pro se from an order denying his WIS. STAT. § 974.06 (2013-14)[1] motion for postconviction relief. Karasti raises issues regarding newly discovered evidence, the suppression of statements he made to police, the sufficiency of the evidence, ineffective assistance of trial and postconviction counsel, and an alleged inability to fully present his arguments at the postconviction motion hearing. We reject his contentions and affirm.

¶2 Karasti was charged with failing to stop his vehicle after mortally injuring a highly intoxicated pedestrian who slipped in the snow just as Karasti drove by. A jury found him guilty of homicide by intoxicated use of a vehicle, hit-and-run involving death, and operating while intoxicated, third offense, all as a habitual criminal.

¶3 Karasti's motion for postconviction relief was denied after a hearing. A no-merit appeal followed. This court summarily affirmed the judgment of conviction and order denying postconviction relief.

¶4 Karasti filed a pro se motion under WIS. STAT. § 974.06. The trial court denied his motion after a partial hearing.[2] This appeal followed.

¶5 Karasti contends he has newly discovered evidence, a report from a professional engineer, that would have demonstrated his innocence. To warrant a new trial, newly discovered evidence must: (1) have been discovered after the

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

[2] Karasti appeared by videoconference from prison. The trial court apparently determined that Karasti's claims were meritless and ended the hearing after Karasti presented the first two of his four issues.

trial; (2) not be the product of the moving party's negligence in seeking to discover it; (3) be material to the issue; (4) not merely be cumulative to evidence introduced at trial; and (5) make it reasonably probable that a different result would be reached at a new trial. *See* ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990).

¶6 Karasti does not clear the first hurdle. The report was filed in the trial court and served on the State over four months before trial. Trial counsel opted not to use the report, as he believed presenting an accident reconstructionist and testimony about opinions on such things as stopping distances would undermine Karasti's sole defense that he was not at the scene at all.

¶7 Karasti points to other parts of the report that state, for example, that the body of his vehicle did not suffer the considerable damage that would be expected had he struck a standing pedestrian, as one witness testified. Other witnesses testified, however, that the offending vehicle ran over the victim's head *after* he fell into the street. Also, "'[n]ewly discovered evidence' does not include a new appreciation of the importance of evidence previously known but not used." ***State v. Bembenek***, 140 Wis. 2d 248, 256, 409 N.W.2d 432 (Ct. App. 1987).

¶8 Karasti next asserts that police failed to give him timely ***Miranda***[3] warnings and to honor his invocation of his right to remain silent, such that his statements to them should have been suppressed. The State argues that this claim and several others are procedurally barred. That presents a question of law that we

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

review de novo. ***State v. Fortier***, 2006 WI App 11, ¶18, 289 Wis. 2d 179, 709 N.W.2d 893.

¶9 WISCONSIN STAT. § 974.06(4) requires a prisoner to raise all grounds for postconviction relief in his or her original, supplemental, or amended motion or appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). Claims for relief that could have been, but were not, raised on direct appeal may not be presented in a later § 974.06 motion absent a sufficient reason for the party's failure to raise them previously. *See* ***State v. Tillman***, 2005 WI App 71, ¶1, 281 Wis. 2d 157, 696 N.W.2d 574. "A no-merit appeal clearly qualifies as a previous motion under § 974.06(4)." ***State v. Aaron Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124.

¶10 Karasti filed a response to the no-merit report. His one-paragraph "argument" in this brief offers no reason for failing to raise this issue in his no-merit response. The State is correct. His claim is barred. *See* ***id.***

¶11 Next, Karasti argues at some length that the evidence was insufficient to convict him. The sufficiency of the evidence was addressed in his direct appeal. Accordingly, this claim, too, is barred.

¶12 WISCONSIN STAT. § 974.06 "does not … create an unlimited right to file successive motions for relief." ***State ex rel. Dismuke v. Kolb***, 149 Wis. 2d 270, 273, 441 N.W.2d 253 (Ct. App. 1989). "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully a defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶13 Trial counsel was ineffective, Karasti next asserts, for failing to present the engineer's report at trial and postconviction counsel was ineffective for failing to challenge trial counsel's failure to do so. This claim goes nowhere.

¶14 Postconviction counsel did challenge trial counsel's failure to present the report. The trial court rejected Karasti's claim after a hearing. It found that trial counsel had a reasoned strategy for choosing not to present the report and that the defense was not prejudiced by counsel's decision. The ineffective assistance issue then was revisited on appeal. This court likewise rejected Karasti's challenge and concluded counsel's trial strategy was reasonable. As this claim already has been litigated, it is barred. *See* ***id.***

¶15 Karasti's additional claims of ineffective assistance of counsel likewise have no merit.

¶16 Appellate review of an ineffective-assistance-of-counsel claim presents a mixed question of fact and law. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. We will not disturb the trial court's findings of fact unless they are clearly erroneous, but determining whether counsel's performance falls below the constitutional minimum presents a question of law we review independently. ***Id.***

¶17 Establishing ineffectiveness requires a defendant to prove both deficient performance and prejudice—*i.e.*, that counsel "made errors so serious that counsel was not functioning as the 'counsel'" the Sixth Amendment guarantees and that there exists "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." ***State v. John Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted). To the extent the claim is that postconviction counsel was ineffective for failing to

assert trial counsel's ineffectiveness, the defendant first must establish that trial counsel in fact was ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶18 Karasti contends that trial and postconviction counsel both failed to challenge the sufficiency of the evidence. Trial counsel did not have to challenge it, however, because a challenge to the sufficiency of the evidence may be raised on appeal as a matter of right regardless of if it was raised in the trial court. ***State v. Hayes***, 2004 WI 80, ¶54, 273 Wis. 2d 1, 681 N.W.2d 203. Further, postconviction/appellate counsel did raise it on direct appeal and this court rejected the argument. The failure of trial counsel to make an argument that would not have prevailed is neither deficient nor prejudicial. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996).

¶19 Next, without more, Karasti alleges that postconviction counsel was ineffective because he "failed to raise my suppression of my statements to police on postconviction." We construe his argument to be that counsel should have challenged the trial court's evidentiary decision in the postconviction motion.[4]

¶20 Trial counsel moved to suppress the statements and three police officers testified at the motion hearing. The trial court ruled that Karasti's statements were admissible, as being either noncustodial, voluntarily made, or

[4] The State understands his claim to be that "Karasti means to challenge postconviction counsel's failure to challenge his trial counsel's failure to move to suppress statements Karasti made to police." If that is the correct reading, the claim necessarily fails because trial counsel did move to suppress the statements, which, in turn, precludes a determination that he performed ineffectively. Therefore, Karasti would fail to prove that postconviction counsel was ineffective for not challenging trial counsel's performance. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

made after he was advised of his ***Miranda*** rights. Postconviction counsel did not challenge these rulings.

¶21 "[I]n some circumstances … ineffective postconviction counsel" may constitute "sufficient reason as to why an issue which could have been raised on direct appeal was not." ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Not here. Karasti could have, but did not, raise the issue in his no-merit response. As he gives no explanation for not doing so, the claim is barred. *See* ***Tillman***, 281 Wis. 2d 157, ¶19.

¶22 Beyond neglecting to explain his own failure to raise the issue, Karasti alleges no facts that, if proved, would constitute deficient performance and prejudice. *See* ***Aaron Allen***, 328 Wis. 2d 1, ¶86. To allow a conclusory allegation that postconviction counsel was ineffective to constitute a sufficient reason for failing to raise an issue in a response to a no-merit report undermines the basic principle that "[w]e need finality in our litigation." ***Id.***, ¶90 (quoting ***Escalona-Naranjo***, 185 Wis. 2d at 185).

¶23 Finally, Karasti alleges error in the trial court's handling of the hearing on his WIS. STAT. § 974.06 motion. He asserts that the court demonstrated unfairness and bias by halting the videoconference after he had argued only the newly discovered evidence and suppression issues and by failing to have the hearing transcribed. He contends the court's actions violated his Fourteenth Amendment due process rights.

¶24 The first four issues in Karasti's appellate brief mirror the four in his postconviction motion. He does not supply "sufficient material facts"—the "who, what, where, when, why, and how"—that, if true, would "move [him] beyond the initial prerequisites of WIS. STAT. § 974.06(4) and ***Escalona-Naranjo***" to

"adequately raise a claim for relief." ***State v. Romero-Georgana***, 2014 WI 83, ¶37, 360 Wis. 2d 522, 849 N.W.2d 668. The trial court could have denied his motion without any hearing at all. *See* ***John Allen***, 274 Wis. 2d 568, ¶2.

¶25 To make a colorable claim of prejudice arising from an incomplete record, a defendant must allege that some error occurred during the unrecorded proceedings in order. ***State v. Perry***, 136 Wis. 2d 92, 101, 103, 401 N.W.2d 748 (1987). Karasti states only that the court "just said … [that] he agrees with the [S]tate and just cut the video off at the prison … without allowing me to argue all four of my arguments …." He cites no authority, and we know of none, for his claim that this amounts to a violation of his due process rights.

By the Court.—Order affirmed.

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