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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted August 19, 2020
Decided August 25, 2020

Before

MICHAEL S. KANNE, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

No. 19-3030

TYRONE ROBINSON,
Petitioner-Appellant,

v.

REED RICHARDSON,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 3:17-cv-00750-wmc

William M. Conley,
District Judge.

ORDER

Tyrone Robinson has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 15, 2020

Before

MICHAEL S. KANNE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 19-3030

TYRONE ROBINSON,
Petitioner-Appellant,

v.

REED RICHARDSON,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 3:17-cv-00750-wmc

William M. Conley,
Judge.

ORDER

On consideration of the petition for rehearing filed on September 14, 2020, by appellant Tyrone Robinson, Judge Kanne has voted to deny rehearing. Judge Scudder, who has been substituted for Judge Barrett, likewise has voted to deny rehearing.

Accordingly, **IT IS ORDERED** that the petition for rehearing is **DENIED.**

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TYRONE ROBINSON,

Petitioner,

v.

REED RICHARDSON, Warden,
Stanley Correctional Institution,

Respondent.

JUDGMENT IN A CIVIL CASE

Case No. 17-cv-750-wmc

This action came for consideration before the court with District Judge William M. Conley presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered dismissing petitioner Tyrone Robinson's petition for a writ of habeas corpus under 28 U.S.C. § 2254.

/s/

Peter Oppeneer, Clerk of Court

6/19/2018

Date

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TYRONE ROBINSON,

Petitioner,

v.

REED RICHARDSON, Warden,
Stanley Correctional Institution,

Respondent.

OPINION AND ORDER

17-cv-750-wmc

Tyrone Robinson, an inmate at Stanley Correctional Institution, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 and paid the $5 filing fee. The petition is now before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases. In conducting this review, the court has considered the petition and its attachments, Robinson's supporting brief, the decisions of the Wisconsin Court of Appeals on his direct appeal, *State v. Robinson*, 2014 WI App 1, ¶ 8, 352 Wis. 2d 245, 841 N.W.2d 580 (unpublished disposition), and his appeal from denial of his post-conviction motion brought under Wis. Stat. § 974.06, *State v. Robinson*, 2017 WI App 21, ¶ 2, 374 Wis. 2d 437, 896 N.W.2d 391 (unpublished disposition). Because these materials show plainly that Robinson is not entitled to relief, his petition will be dismissed.

BACKGROUND[1]

Robinson's conviction arose from events that took place during the night and early

[1] The following facts are drawn from the materials cited above, particularly previous state appellate court decisions.

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morning hours of November 21 and 22, 2009. Robinson was later charged in a criminal complaint filed in Dane County Circuit Court with committing repeated sexual assaults of the same child, who was then 15 years old; kidnapping; and felony intimidation of a victim.

The victim described to police a number of sex acts that Robinson forced her to perform in the back of his van, and said he threatened to kill her if she told anyone about his actions. Law enforcement also obtained DNA evidence from the victim, Robinson and his van. The state crime lab issued a report finding that stains in the van contained Robinson's sperm, and the victim's DNA was found under Robinson's fingernails and in the van. A swab of the inner front of Robinson's boxer shorts further revealed a DNA mixture with at least one female and one male contributor. The lab concluded that the victim here was the source of the major female DNA component, while Robinson was a possible male contributor, finding (1) "[t]he probability of randomly selecting an unrelated [female] individual that could have contributed to this mixture profile is approximately" 1 in 59,000, and (2) male DNA matching Robinson's profile found inside the victim's underwear was shared by 73 out of 14,540 males.

After the state crime lab released its findings, Robinson agreed to plead no contest to one count of second-degree sexual assault of a child and one count of false imprisonment. By agreeing to plead to one count of sexual assault of a child, Robinson avoided facing trial on the charge of repeated sexual assaults of a child, which carried a 25-year mandatory minimum prison sentence. The plea hearing was on March 1, 2010. On May 7, 2010, the court sentenced Robinson to 17 years of initial confinement to be followed by 13 years of extended supervision.

Robinson was appointed a new lawyer for the purpose of pursuing post-conviction relief, who moved under Wis. Stat. § 974.02 to withdraw his plea on the grounds that it was not knowing and voluntary due to defects in the plea colloquy. The only other ground raised in that motion was for sentencing relief on the basis of the state crime lab's own DNA analysis, which petitioner argued proved that it was extremely unlikely that he had sexual intercourse with the victim. After considering the testimony of Robinson and his original counsel, the trial court denied the motion.

On November 27, 2013, the Wisconsin Court of Appeals affirmed Robinson's conviction; the Wisconsin Supreme Court then denied his petition for review on June 12, 2014. Robinson's conviction became final 90 days later, on September 10, 2014. *See Anderson v. Litscher*, 281 F.3d 672, 674-675 (7th Cir. 2002) (time for seeking direct review under § 2244(d)(1)(A) includes 90-day period in which prisoner could have filed petition for writ of certiorari with United States Supreme Court).

On October 5, 2015, a little more than one year after his direct appeal rights had been exhausted, Robinson filed a *pro se,* post-judgment motion for relief under Wis. Stat. § 974.06, Wisconsin's collateral attack statute. This time Robinson argued that his trial counsel had been ineffective in failing to adequately explain the crime lab's actual findings or do follow up on potentially exculpatory discovery and that his post-conviction counsel was ineffective for failing to raise these same claims on direct appeal. His primary claim was that his trial lawyer had "provided gross misadvice when he misinformed Robinson that his semen had been found in the alleged victim's underwear," a fact he claimed was material to his decision to enter a plea. *Robinson*, 2017 WI App 21, at ¶6. Robinson also

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claimed that trial counsel had provided ineffective assistance by failing to procure exculpatory video surveillance recordings or interview additional witnesses. The circuit court denied petitioner's motion without an evidentiary hearing, finding that the record established conclusively that Robinson was not entitled to relief. Among other things, the court noted that Robinson had testified at the original postconviction hearing "that he chose to plead in order to avoid the mandatory minimum penalty." *Id.* ¶ 7.

The Wisconsin Court of Appeals affirmed the circuit court's decision, reviewing each of Robinson's claims of ineffective assistance of trial counsel and finding them without merit. *Robinson*, 2017 WI App 21, at ¶¶8-12. In particular, the court found that the record refuted Robinson's assertions that (1) his trial lawyer told him that his semen was found inside the victim's underwear and (2) this affected his decision to enter a plea. Specifically, the court noted that Robinson's lawyer had introduced the crime lab report as a defense exhibit at sentencing to demonstrate the lack of inculpatory DNA findings, and "[a]s plain as day . . . told the sentencing court that Robinson's semen was not detected in *either* his boxers or the victim's underwear." *Robinson*, 2017 WI App 21, ¶ 8. The court was unmoved by Robinson's claim that he was "too overmedicated to think clearly or to hear trial counsel's sentencing argument," noting that: (1) when he entered his plea, he denied that his medication affected his ability to understand what he was doing, *id.* ¶ 9; (2) when Robinson was later represented by post-conviction counsel and "was by his own admission properly medicated and clear headed," he filed a postconviction motion that sought plea withdrawal only on the ground of a defective colloquy, *id.* ¶ 10; and (3) at his original post-conviction hearing, Robinson complained that he was misinformed that the

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victim's DNA was found in the front of his boxer shorts, and "[t]hough he emphasized his newfound familiarity with and understanding of the crime lab report," he still did not claim that he was misinformed by his counsel as to whether or not his semen was found in the victim's underwear. *Id.* ¶ 11.

The Wisconsin Court of Appeals further found that the circuit court had properly denied Robinson's remaining claims without an evidentiary hearing. *Id.* ¶ 12. Addressing Robinson's claim that his trial lawyer was ineffective for failing to procure other exculpatory video surveillance records, the court noted that not only was Robinson aware that such recordings might exist when he entered his plea, but any claim of prejudice was purely speculative because Robinson "cannot establish that the recordings actually exist, much less their exculpatory value." *Id.* ¶ 12. Likewise, the court found that Robinson failed to show any prejudice from his lawyer's claimed failure to interview certain witnesses. *Id.*

Finally, with respect to these last two claims, the Wisconsin Court of Appeals found that they were procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), a decision prohibiting a defendant from raising new issues in a Wis. Stat. § 974.06 motion absent sufficient reason. The court observed that in particular, while acknowledging Robinson had asserted the claim that his post-conviction counsel was ineffective as the reason he failed to assert his claims earlier, Robinson had failed in his Wis. Stat. § 974.06 motion to allege with particularity how post-conviction counsel's conduct was deficient or prejudicial. *Id.* All Robinson said in his motion was that his post-conviction lawyer had failed to raise the issues, which was not enough to

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overcome the strong presumption that post-conviction counsel rendered effective assistance. *Id.*

The Wisconsin Supreme Court denied Robinson's petition for review on July 11, 2017. Robinson filed the instant petition for habeas corpus on September 29, 2017.

OPINION

Rule 4 of the Rules Governing Section 2254 Cases directs this court to dismiss a petition if it "plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief[.]" If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or take other action. The court's initial review of habeas petitions requires an evaluation of whether petitioner has set forth cognizable constitutional or federal law claims, and whether petitioner has exhausted available state remedies. Further, the petition must cross "some threshold of plausibility" before the state will be required to answer. *Harris v. McAdory*, 334 F.3d 665, 669 (7th Cir. 2003); *Dellenbach v. Hanks*, 76 F.3d 820, 822 (7th Cir. 1996).

From his petition and supporting brief, Robinson appears to be seeking habeas relief on three grounds: (1) the state violated Robinson's rights to due process when it failed to turn over potentially exculpatory evidence, namely gas station surveillance videotapes and the results of HIV/STD testing; (2) trial counsel provided ineffective assistance in violation of Robinson's Sixth Amendment right to counsel; and (3) postconviction counsel provided ineffective assistance. For the reasons set forth below, none of these grounds justify the

issuance of a writ in this case.[2]

I. Due Process

Robinson's claim for denial of due process must be dismissed because he makes *no* showing in his petition that the state actually possessed either the gas station videos or STD testing results, much less that those items would have been material to disproving his guilt or the basis for punishment. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression by prosecution of evidence favorable to accused upon request violates due process where evidence is material either to guilt or punishment, irrespective of good faith or bad faith of prosecution). Instead, Robinson merely speculates that these items "might" have been exculpatory, which is not enough to establish a plausible due process claim. *Id.*

II. Ineffective Assistance of Trial Counsel

Robinson next alleges that his trial counsel committed the following errors: (1) incorrectly advised Robinson that the crime lab report found Robinson's semen in the

[2] The petition also appears to be untimely. As noted above, Robinson's conviction became final on September 10, 2014. Under 28 U.S.C. §§ 2244(d)(1)(A) and 2254(d)(2), Robinson had one year from that date, or until September 10, 2015, to file either a federal habeas petition or a state court collateral proceeding that would have tolled the limitations period. Robinson did not file his § 974.06 motion in the state circuit court until October 5, 2015, 25 days after his one-year habeas clock expired. He then waited more than two months after the Wisconsin Supreme Court denied his petition for review to file this federal habeas petition.

Ordinarily, this court will allow a petitioner the opportunity to show that his untimeliness should be excused on grounds of equitable tolling or actual innocence before the court enters an order dismissing the petition. It is unnecessary to do so in this case because even if the petition was timely, the grounds asserted for relief are plainly without merit.

[illegible]

[illegible] meeting [illegible] constitutionally entered [illegible] [illegible] to the extent [illegible] which are grossly unreasonable. This [illegible] is true with respect to [illegible] claims of [illegible] [illegible] and [illegible] [illegible] [illegible] qualify [illegible] [illegible] Mahan, [illegible] 59 (1987). For example, [illegible] [illegible] potentially [illegible] [illegible] [illegible] [illegible] that directly [illegible] [illegible] [illegible] the plea [illegible] [illegible] an evaluation of [illegible] [illegible]

[illegible] Alleged [illegible] concerning Substance of [illegible]

[illegible]

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victim's underwear; (2) failed to develop a defense that would discredit the victim's version of events with contradictory statements in the police reports and the state crime lab report, with a potential witness named Lakeem Allen, and with the gas station surveillance videotapes; and (3) failed to request a competency hearing before advising Robinson to enter a plea.

As a starting point, Robinson actually entered a "no contest" plea to the charges for which he stands convicted. This means that, with respect to his claims of ineffective assistance of counsel, Robinson must show "that there is reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). For example, where "the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence," a showing of prejudice "will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." *Hill*, 474 U.S. at 59. This assessment, in turn, depends largely on an evaluation of whether the evidence likely would have changed the outcome of a trial. *Id.*

A. Alleged Misadvice Concerning Substance of Crime Lab Report

Robinson presented this same claim to the state courts in his Wis. Stat. § 974.06 petition. As discussed above, both the state circuit and appellate courts found the following facts of record wholly refuted Robinson's claim that his lawyer had misinformed him about the crime lab's finding of his semen in the victim's underwear. First, at sentencing, trial counsel told the court, *in Robinson's presence*, that Robinson's semen was

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not detected in either his boxers *or* the victim's underwear. Second, although Robinson testified at his original post-conviction hearing that he had learned more about the crime lab report only after his plea and sentencing, he did not claim specifically that he had been misinformed that his semen was found in the victim's underwear before his plea, but only that he had been misinformed that the victim's DNA was found in the front of his boxer shorts. Third, "[i]t was only after the circuit court denied the postconviction motion and Robinson's convictions were affirmed on direct appeal that he alleged a new and different misunderstanding of the DNA report." *Robinson*, 2017 WI App 21, ¶11. Fourth and finally, the circuit court noted that Robinson affirmatively testified at his original postconviction hearing "that he chose to plead [no contest to a single count of sexual assault] in order to avoid the mandatory minimum penalty." *Id.* ¶ 7. For all these reasons, the Wisconsin courts found no truth to Robinson's claim that he had been misinformed as to the crime lab's findings, nor that this misinformation had been material to his decision to plead no contest.

In a habeas corpus proceeding brought under 28 U.S.C. § 2254, "a determination of a factual issue made by a State court shall be presumed to be correct" unless the petitioner produces clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1). Although Robinson asserts that the court of appeals' decision was erroneous and an unreasonable application of federal law, he does not point to any evidence, much less evidence that is clear and convincing, to rebut the state courts' *factual* determination that he had not been misinformed that his semen was found in the victim's underwear. Accordingly, this claim plainly lacks merit and will be dismissed.

B. Failure to Investigate

Broadly characterized as a failure to investigate, Robinson's second claim of ineffective assistance also falls short. Acknowledging there are various threads to this claim, Robinson basically alleges that his lawyer should have done more to contest the charges and challenge the victim's version of events. For example, Robinson points to inconsistencies between the victim's initial statements to police and other reports that he says his lawyer should have explored. In addition, he claims his lawyer should have interviewed an individual by the name of Lakeem Allen (whom the victim originally told her mother she had been with during the time of the sexual assaults) and should have procured the gas station videotapes.

Assuming for the sake of argument that trial counsel's performance was deficient, however, Robinson must still allege facts showing that the evidence he claims his lawyer should have investigated would have changed the outcome of a trial. As an example, consistent with the state court proceedings, Robinson does not even plead that the gas station video surveillance tapes existed, much less that they would have been exculpatory. Similarly, Robinson fails to allege that the witness he claims his lawyer should have interviewed would have provided exculpatory testimony. In light of these deficiencies, the state court of appeals found that Robinson had failed to show prejudice from his trial counsel's alleges failures to procure the video surveillance recordings or to interview certain witnesses. *Robinson*, 2017 WI App 21, ¶ 12.

Moreover, because that conclusion was based upon a proper understanding of controlling Supreme Court precedent *and* a reasonable assessment of the facts in light of

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the evidence presented, Robinson's petition for habeas corpus on that ground cannot be granted. *See* 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 103 (2011) ("As a condition for obtaining habeas corpus from a federal court, a prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."); *Wood v. Allen*, 558 U.S. 290, 301 (2010) (state court's factual determinations are entitled to substantial deference and may not be superseded even if "[r]easonable minds reviewing the record might disagree" about the finding in question) (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)).

As for Robinson's claim that his lawyer should have "attack[ed] complainant's credibility" by exploring potential inconsistencies between the victim's statements and some of the evidence (dkt.#1-1, at 5), Robinson likely defaulted this claim altogether by failing to present it to the state courts in his Wis. Stat. § 974.06 motion. *See also Coleman v. Hardy*, 628 F.3d 314, 318 (7th Cir. 2010) (when a petitioner fails to raise a particular claim on direct appeal or in post-conviction proceedings, the claim is procedurally defaulted). In any case, it is plain from the allegations in the petition that this claim has no merit. First, Robinson does not aver that he was unaware of these "inconsistencies" at the time he decided to enter his guilty plea. Second, given the victim's detailed account of a series of brutal sexual assaults committed by Robinson, and the presence of incriminating DNA evidence found in Robinson's van, boxer shorts and under his fingernails, the minor inconsistencies that Robinson identifies in the reports would not likely have led to an acquittal at trial. Third, Robinson would have faced a 25-year

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mandatory minimum prison sentence if convicted, which by his own admission he was trying to avoid, there is *no* reasonable basis to conclude that Robinson would have opted to go to trial but for the errors he alleges in his petition. ONLY BECAUSE LAWYER MISTAKE

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C. Failure to Request Competency Hearing

Finally, Robinson now asserts that he was so overmedicated that he was incompetent to enter his original no contest plea, and that his lawyer had reason to know this. To be incompetent to stand trial the defendant must "lack[ ] the capacity to understand the nature and object of the proceedings against him [or her], to consult with counsel, and to assist in preparing [a] defense." *State v. Garfoot*, 207 Wis.2d 214, 222, 558 N.W.2d 626 (1997); Wis. Stat. § 971.13(1). Thus, a "person is competent to proceed if: (1) he or she possesses sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and (2) he or she possesses a rational as well as factual understanding of a proceeding against him or her." *Garfoot*, 207 Wis. 2d at 222, 558 N.W.2d 626.

As evidence that his lawyer should have questioned his competence, Robinson submits medical records from his prison file showing that he was evaluated at Dodge Correctional Institution on June 24, 2010, and found to have a "heavily sedated demeanor" and "an apparent toxic level of Depakote and a high level of lithium." (Dkt.#1-3, at 1-2). Robinson then makes the unsworn assertion that he told his trial lawyer that his medications were making it hard for him to focus on much of anything and that he asked his lawyer "to talk to someone about it." (Dkt.#1-1, at 10)

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As an initial matter, Robinson acknowledges that he did not present this claim in his initial post-conviction motion brought under Wis. Stat. § 974.02, but claims this was because his post-conviction lawyer was ineffective. However, it does not appear that Robinson raised this claim in his *pro se* Wis. Stat. § 974.06 motion either, except as a response to the state's assertion that he was present at the sentencing hearing when his lawyer accurately summarized the evidence concerning the presence of semen in the victim's underwear, contrary to the same lawyer's summary Robinson claims he was given and relied upon fairly contemporaneously. *See Robinson*, 2017 WI App 21, ¶ 9. Thus, Robinson appears to have procedurally defaulted this claim by failing to give the state courts a meaningful opportunity to review it.

Even if not barred by procedural default analysis, Robinson is plainly not entitled to relief based on facts affirmatively pleaded in his petition and found in the court of appeals' decisions. As the court of appeals found, "Robinson told the plea-taking court that he understood all of the information in his plea questionnaire, his medication did not affect his ability to understand what he was doing at the plea hearing, he was able to make decisions about what was in his best interest, and he was thinking clearly at the time he entered his pleas." *Id.* At the evidentiary hearing on his first postconviction motion, Robinson further testified that when he entered a plea of second-degree sexual assault, he understood that he was pleading to having sex with a minor, that "sex" included various forms of penile penetration, hand to penis contact and finger to vagina contact, and "that he was pleading to having had sex in one way or another with the victim." *State v. Robinson*, 2014 WI App 1, ¶ 9.

The fact that Robinson was found to be overmedicated nearly four months later does not undo his own statements at his plea, which wholly support the state court's contemporaneous finding that he had a rational and factual understanding of the case against him and was able to consult with his lawyer. Moreover, for purpose of claiming ineffective assistance of counsel, Robinson presents no evidence that his *lawyer* had any reason at the time of the plea hearing to question Robinson's competence, unless the court were to credit Robinson's unsworn, self-serving assertion that on some unknown date Robinson told his lawyer that his medications were making it difficult for him to focus, which would still not be enough to overcome his sworn, in-court statements and the findings of the plea-taking court. 28 U.S.C. § 2254(e) (state court factual findings presumed correct absent clear and convincing evidence).

In sum, because it is plain from the petition and attachments that Robinson is not entitled to relief on a claim of ineffective assistance of trial counsel, it must be dismissed.

III. Ineffective Assistance of Post-Conviction Counsel

Finally, Robinson claims that his post-conviction lawyer rendered ineffective assistance by failing to raise any of the foregoing issues in Robinson's initial, post-conviction motion. Because none of these claims have arguable merit for the reasons set forth above, and certainly were not clearly stronger than the issues counsel actually did raise, there is no merit to this claim either. *See Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of [appellate] counsel be overcome.").

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IV. Certificate of Appealability

If Robinson seeks to appeal this decision, he must first obtain a certificate of appealability. See 28 U.S.C. § 2253(c) (providing that an appeal may not be taken to the court of appeals from the final order in a § 2255 proceeding unless a circuit justice or judge issues a certificate of appealability. A certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For all the reasons just discussed, Robinson has not made a substantial showing of the denial of a constitutional right. Therefore, a certificate of appealability will not issue.

ORDER

IT IS ORDERED that:

1. Tyrone Robinson's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

2. A certificate of appealability under 28 U.S.C. § 2253(c) is DENIED.

Entered this 18th day of June, 2018.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TYRONE ROBINSON,

Petitioner,

ORDER

v.

17-cv-750-wmc

REED RICHARDSON, Warden,
Stanley Correctional Institution,

Respondent.

Tyrone Robinson has filed a motion under Fed. R. Civ. P. 59(e) for reconsideration of this court's order denying his application for a writ of habeas corpus under 28 U.S.C. § 2254. (Dkt. #10.) Under Rule 59(e), a court has the opportunity to consider newly discovered material evidence or intervening changes in the controlling law or to correct its own manifest errors of law or fact to avoid unnecessary appellate procedures. *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996); *see Harrington v. City of Chi.*, 433 F.3d 542, 546 (7th Cir. 2006). A "manifest error" occurs when the district court commits a "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Burritt v. Ditlefsen*, 807 F.3d 239, 253 (7th Cir. 2015) (internal quotations and citations omitted). Rule 59(e) "does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." *Moro*, 91 F.3d at 876. Rule 59(e) relief is only available if the movant clearly establishes one of

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the foregoing grounds for relief. *Harrington*, 433 F.3d at 546 (citing *Romo v. Gulf Stream Coach, Inc.*, 250 F.3d 1119, 1122 n. 3 (7th Cir. 2001)).

Petitioner fails in his Rule 59(e) motion to present any evidence or argument warranting reconsideration of the judgment in this case. Instead, he simply re-argues all the same points he made in his petition and supporting brief. None of petitioner's arguments convince the court that it committed a manifest error in denying the petition. Accordingly, the motion for reconsideration is denied.

ORDER

Tyrone Robinson's motion under Fed. R. Civ. P 59(e) for reconsideration of the order dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (dkt. #10) is DENIED.

Entered this 11th day of September, 2019.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP447 Cir. Ct. No. 2009CF1913

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYRONE T. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed.*

Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Tyrone T. Robinson, pro se, appeals an order denying his WIS. STAT. § 974.06 (2015-16)[1] motion for postconviction relief. Robinson argues that his postconviction counsel was ineffective for failing to challenge the effectiveness of his trial counsel and that the circuit court erroneously denied his motion without conducting an evidentiary hearing. We reject Robinson's arguments and affirm.

BACKGROUND

¶2 In 2010, Robinson pled no contest to second-degree sexual assault of a child and to false imprisonment. As part of Robinson's WIS. STAT. RULE 809.30 direct appeal, appointed counsel filed a postconviction motion requesting plea withdrawal due to a defective plea colloquy, and sentencing relief in light of the state crime lab's DNA analysis report. After considering the testimony of Robinson and his trial attorney, the circuit court denied the motion in full. We affirmed the judgment of conviction and order denying postconviction relief. ***State v. Robinson***, No. 2012AP432-CR, unpublished slip op. (WI App Nov. 27, 2013). The Wisconsin Supreme Court denied Robinson's petition for review.

¶3 In October 2015, Robinson filed a WIS. STAT. § 974.06 postconviction motion for plea withdrawal alleging that trial counsel's ineffective assistance rendered his pleas infirm, and that postconviction counsel should have raised these claims as part of Robinson's direct appeal. The circuit court denied Robinson's motion without an evidentiary hearing, determining that the record conclusively established Robinson was not entitled to relief. Robinson appeals.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

STANDARD OF REVIEW

¶4 To withdraw a guilty or no contest plea after sentencing, a defendant must show by clear and convincing evidence that a refusal to allow plea withdrawal would result in a manifest injustice. ***State v. Dillard***, 2014 WI 123, ¶83, 358 Wis. 2d 543, 859 N.W.2d 44. Where ineffective assistance of trial counsel is the alleged manifest injustice, *see* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996), the defendant must prove that counsel's performance was deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

¶5 Because Robinson had a prior postconviction motion, it is not enough for him to allege that trial counsel's ineffective assistance constituted a manifest injustice entitling him to plea withdrawal. Absent a sufficient reason, a defendant is procedurally barred from raising issues in a WIS. STAT. § 974.06 postconviction motion that could have been raised on direct appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Where as here the ineffective assistance of postconviction counsel is alleged as the sufficient reason, the defendant must set forth with particularity facts showing that postconviction counsel's performance was both deficient and prejudicial. ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334 (citing ***Strickland***, 466 U.S. at 687. In addition, as part of the pleading requirements, the defendant must allege that his newly raised issues are "clearly stronger" than those raised previously. ***State v. Starks***, 2013 WI 69, ¶57, 349 Wis. 2d 274, 833 N.W.2d 146. "[N]o hearing is required if the defendant fails to allege sufficient facts in his or

her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157.

DISCUSSION

¶6 Prior to the entry of Robinson's no contest pleas, the state crime lab released a report containing its analysis of and findings concerning the DNA evidence collected and submitted by law enforcement. The primary claim in Robinson's WIS. STAT. § 974.06 postconviction motion was that trial counsel "provided gross misadvice when he misinformed Robinson that his semen had been found in the alleged victim's underwear."[2] Robinson alleged that but for trial counsel's incorrect information, he would not have pled and would have proceeded to trial. The motion further claimed that trial counsel provided ineffective assistance by failing to procure potentially exculpatory video surveillance recordings or interview additional witnesses.

¶7 The circuit court determined that Robinson was not entitled to an evidentiary hearing, finding that Robinson's new claims essentially rehashed the same issues adjudicated in his prior postconviction proceeding and that to the

[2] According to the report, stains containing Robinson's sperm were located in his van, where the assaults allegedly occurred. The victim's DNA was found under Robinson's fingernails and in the van. A swab of the inner front of Robinson's boxer shorts revealed a DNA mixture with at least one female and one male contributor. The victim was found to be the source of the major female DNA component, and Robinson was included as a possible male contributor: "The probability of randomly selecting an unrelated individual that could have contributed to this mixture profile is approximately" 1 in 59,000. Male DNA matching Robinson's profile was detected inside the victim's underwear. The report concluded that this profile was shared by 73 out of 14,540 males.

extent the claims were different, Robinson failed to set forth a sufficient reason for not raising them earlier. The circuit court also rejected Robinson's claim that he would not have pled but for trial counsel's alleged misinformation concerning the presence of Robinson's semen in the victim's underwear. Here, the court cited to additional DNA evidence as well as Robinson's testimony at the original postconviction hearing that he chose to plead in order to avoid the mandatory minimum penalty.

¶8 We conclude that the circuit court properly denied Robinson's postconviction motion without an evidentiary hearing. *See* ***State v. Sulla***, 2016 WI 46, ¶¶41, 43, 369 Wis. 2d 225, 880 N.W.2d 659 (whether the record conclusively demonstrates that a defendant is not entitled to relief presents a question of law that we review independently). The assertion that trial counsel told Robinson his semen was found inside the victim's underwear and that this impacted Robinson's decision to plead is belied by the record. At sentencing, trial counsel introduced the crime lab report as a defense exhibit to demonstrate the lack of inculpatory DNA findings. As plain as day, trial counsel told the sentencing court that Robinson's semen was not detected in either his boxers or the victim's underwear.

¶9 Attempting to circumvent this fatal fact, Robinson maintains he was too overmedicated to think clearly or to hear trial counsel's sentencing argument correctly characterizing the nature of the DNA evidence. This self-serving claim does not warrant an evidentiary hearing. First, Robinson told the plea-taking court that he understood all of the information in his plea questionnaire, his medication did not affect his ability to understand what he was doing at the plea hearing, he was able to make decisions about what was in his best interest, and he was thinking clearly at the time he entered his pleas.

¶10 Second, prior to the appointment of postconviction counsel, Robinson asked both trial counsel and an appellate attorney from the State Public Defender's Office about the possibility of withdrawing his pleas. Trial counsel testified that after a meeting, Robinson decided not to pursue plea withdrawal. The SPD attorney wrote a letter to Robinson stating that an attempt to withdraw his pleas "because of medication issues" would be made difficult by Robinson's statements at the plea hearing. Thereafter, when Robinson was represented by postconviction counsel and was by his own admission properly medicated and clear headed, he filed a postconviction motion seeking plea withdrawal due to a defective colloquy. Robinson knowingly bypassed the chance to argue in his original postconviction motion that trial counsel's supposed misinformation concerning the presence of semen in the victim's underwear supported plea withdrawal.

¶11 Third and in a similar vein, at his original postconviction hearing, Robinson testified that he did not understand the definition of sexual contact and complained he was misinformed that the victim's DNA was found in the front of his boxer shorts. Though he emphasized his newfound familiarity with and understanding of the crime lab report, Robinson did not claim he was misinformed that his semen was found in the victim's underwear. It was only after the circuit court denied the postconviction motion and Robinson's convictions were affirmed on direct appeal that he alleged a new and different misunderstanding of the DNA report. Robinson's claims of ineffective assistance of trial counsel were properly rejected by the circuit court without a new evidentiary hearing because the record as a whole, including the record made at the earlier evidentiary hearing, conclusively shows that those claims had no merit.

¶12 We further conclude that the circuit court properly denied Robinson's remaining claims without an evidentiary hearing. As to the charge that trial counsel was ineffective for failing to procure potentially exculpatory video surveillance recordings, Robinson was aware that such recordings might exist at the time he entered his no contest pleas. Moreover, he cannot establish that the recordings actually exist, much less their exculpatory value, and, therefore, any prejudice is merely speculative. Likewise, Robinson has not shown any prejudice from trial counsel's failure to interview certain witnesses. Finally, though Robinson asserts the ineffective assistance of postconviction counsel as his sufficient reason for failing to raise these claims earlier, his WIS. STAT. § 974.06 postconviction motion fails to allege with particularity how postconviction counsel's conduct was deficient or prejudicial. ***Balliette***, 336 Wis. 2d 358, ¶18 (whether a postconviction motion is sufficient on its face to require an evidentiary hearing is a question of law we review independently). Robinson was required to demonstrate within the four corners of his motion that as a matter of appellate strategy, his postconviction counsel clearly erred by not challenging trial counsel's failure to obtain videos or interview witnesses. *See* ***id.***, ¶¶65-68. Rather than asserting specific facts relevant to postconviction counsel's representation, Robinson merely alleges that postconviction counsel "presented none of these issues before the trial court, thereby foreclosing Robinson's ability to argue these issues on direct appeal" and "has thus proved ineffective." *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶62, 360 Wis. 2d 522, 849 N.W.2d 668 (the mere fact that postconviction counsel did not pursue certain claims does not demonstrate ineffectiveness, and "[w]e will not assume ineffective assistance from a conclusory assertion"). Given the strong presumption that postconviction counsel rendered effective assistance, *see* ***Balliette***, 336 Wis. 2d 358, ¶¶26, 28, Robinson's

motion fails to establish a reason sufficient to overcome *Escalona's* procedural bar.

By the Court.—Order affirmed.

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

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STATE OF WISCONSIN CIRCUIT COURT BRANCH 15 DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

TYRONE ROBINSON,

Defendant.

FILED
JAN 19 2013
COPY
DANE COUNTY CIRCUIT COURT

Case No. 09CF1913

DECISION AND ORDER

This case comes before the court on Tyrone Robinson's motion for post-conviction relief pursuant to Wis. Stat. 974.06. Based on a thorough review of the record, Mr. Robinson is not entitled to any relief. As a result, his request for an evidentiary hearing is summarily DENIED.

BACKGROUND

On March 1, 2010, Mr. Robinson pled no contest to: (1) second degree sexual assault of a child, and (2) false imprisonment. On the sexual assault charge, this court sentenced Mr. Robinson to 17 years confinement and 13 years extended supervision. On the false imprisonment charge, this court sentenced Mr. Robinson to 2 years confinement and 2 years extended supervision. The sentences ran concurrently.

On October 27, 2011, Mr. Robinson filed a motion for post-conviction relief. He alleged that his plea was involuntary because he did not understand the elements of sexual assault, and that his sentence was based on "inaccurate" information regarding DNA evidence derived from the victim's body. On January 6, 2012, this court held an evidentiary hearing. Atty. Schoenfeldt appeared as post-conviction counsel on behalf of Mr. Robinson, Atty. Raush appeared on behalf of the State, and the court took comprehensive testimony from Atty. Jensen who served as Mr. Robinson's trial counsel. Among other things, this court concluded that Atty. Jensen's representation of Mr. Robinson satisfied *Bangert*, and that lack of conclusive DNA evidence on the victim's body neither proved innocence nor constituted inaccurate information. As a result, this court denied the motion on February 16, 2012. The Wisconsin Court of Appeals affirmed on

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November 27, 2013, and the Wisconsin Supreme Court denied review in December 2013. Mr. Robinson now files this post-conviction motion alleging ineffective assistance of both trial counsel and post-conviction counsel.

STANDARD OF REVIEW

Motions for post-conviction relief have developed their own particularized standard of review. WIS. STAT. §974.06 (2011-12); *State v. Balliette*, 2011 WI 79, ¶ 41, 336 Wis. 2d 358, 805 N.W.2d 334. Once the criminal process is complete, and the defendant convicted and sentenced, the reasons that support a less stringent standard for pretrial motions are no longer compelling. *Id.*, ¶ 53. Instead, public policy strongly favors finality. *Id.* As a result, a petitioner who seeks to prevail on a post-conviction motion carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should consider his motion to correct a "manifest injustice." *State v. Washington*, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993).

The mere assertion of "manifest injustice" does not entitle the petitioner to relief. *Id.* at 214. The motion must set forth sufficient facts, which if true, would entitle him to relief. *Id.* at 215-16. The Wisconsin Supreme Court provided a practical and specific blueprint for applying this more demanding standard: the five "w's" and one "h" test, that is, who, what, where, when, why, and how. *State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433. When the four corners of the document allege the facts described above, it allows the court to meaningfully assess a petitioner's post-conviction motion. *Balliette,* 2011 WI 79, ¶ 59; *Allen*, 2004 WI 106, ¶ 23. Motions that do not meet this standard are typically conclusory allegations that are legally insufficient. *Id.*

DISCUSSION

Mr. Robinson seeks to withdraw his guilty plea based: (1) on ineffective assistance of trial counsel, and (2) ineffective assistance of post-conviction counsel for failure to raise ineffective assistance of trial counsel. For the reasons discussed below, the motion is denied.

In order to prevail on a claim of ineffective assistance of trial counsel, the defendant must show by clear and convincing evidence that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must identify specific acts or omissions of his attorney that fall "outside the wide range of professionally competent

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assistance." *Id.* at 690. To show prejudice, the defendant must allege that "but for the counsel's error, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52. 59 (1985). If the defendant fails on either prong – deficient performance or prejudice – his ineffective assistance of counsel claims fails. *Strickland,* 466 U.S. at 687 (1984).

Further, all grounds for relief must be raised in the original, supplemental or amended post-conviction motion. Wis. Stat. § 974.06(4) (2013-14). "Any ground finally adjudicated or not so raised... may not be the basis for a subsequent motion." *Id.* Claims of error that could have been raised in the direct appeal or in a previous motion under §974.06 cannot be raised in a subsequent §974.06 motion absent a "sufficient reason" for the failure to raise the claims in the earlier proceeding. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994); *State v. Lo,* 2003 WI 107, ¶ 44, 264 Wis. 2d 1, 665 N.W.2d 756.

Mr. Robinson's claims against Atty. Jensen essentially rehash the same issues already adjudicated by this court in the prior post-conviction motion. Mr. Robinson alleges that Atty. Jensen misinformed him "as to his semen being found in CAO's underwear" and failed to investigate apparent problems with Robinson's "mental health," specifically his foggy memory due to prescription medication. Both of these claims fall squarely within the two issues finally adjudicated in the prior post-conviction motion: (1) whether the sentence was based on "accurate information," (2) and whether the plea was "voluntary."

Mr. Robinson's claim that Atty. Jensen "misinformed" him about the presence of "semen...in CAO's underwear" was adjudicated when the court concluded that lack of DNA evidence on the victim's body neither proved innocence nor constituted inaccurate information. Further, Mr. Robinson's claim that prescription medication prevented him from understanding the plea was adjudicated when the court concluded that Mr. Robinson understood his plea based on his request to add and change certain words in Count 1 before taking the plea. Mr. Robinson's new claims merely reframe the issues already adjudicated in the prior motion under a different theory of ineffective assistance of counsel.

In any case, Mr. Robinson's "sufficient reason" for failure to raise these specific claims in the prior motion is unpersuasive. An allegation of "ineffective assistance of *post-conviction* counsel" does not in itself constitute a "sufficient reason" for failure to raise claims in a prior post-conviction motion. *State ex rel. Rothering v. McCaughtry,* 205 Wis.2d 675, 682, 556

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N.W.2d 136(Ct. App. 1996). This is true because every post-conviction motion filed with the aid of post-conviction counsel would be subject to review with the mere allegation that post-conviction counsel was also "ineffective." *See id.* Instead, the court analyzes the factual allegations in the petition to determine whether the ignored issues are clearly stronger than those presented. *Smith v. Robbins*, 528 U.S. 259, 288 (2000). To be sure, post-conviction counsel does not perform "deficiently" by failing to raise meritless arguments. *State v. Ziebart*, 2003 WI App 258, ¶ 15, 268 Wis. 2d 468, 673 N.W.2d 369.

Mr. Robinson's allegation that he would not have entered his plea but for Atty. Jensen's errors is undermined by the totality of the record, and cannot serve as the basis for either ineffective assistance of counsel claim. The DNA evidence found in Mr. Robinson's boxer shorts was consistent with the semen detected in the back of the van where the assaults occurred. Thus, Mr. Robinson's testimony at the hearing that he chose to plead out to avoid the maximum penalties was strong evidence that his plea was voluntary and that it would not have changed even though semen was not found in the victim's underwear. Further, Mr. Robinson and Atty. Jensen negotiated on the plea date, and amended the original Second Degree Sexual Assault count to include sexual contact as well as sexual intercourse. In fact, the exhibits he attaches in the petition, Ex. C, Q, N, O, and P, indicate that that his judgment appeared "adequate" and that he appeared "fully oriented." Thus, Atty. Schoenfeldt had no basis for asserting ineffective assistance of trial counsel. Accordingly, the petition for post-conviction relief is denied.

CONCLUSION

Mr. Robinson motion for post-conviction relief is summarily **DENIED** because an independent review of the record conclusively establishes that he is not entitled to relief. This order is final for purposes of appeal.

Dated this 19th day of January, 2016

By the Court:

Judge Stephen Ehlke

Circuit Court Judge

cc: AAG Shelly Rusch

Tyrone Robinson

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COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 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. 2012AP432-CR
STATE OF WISCONSIN

Cir. Ct. No. 2009CF1913

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYRONE T. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed.*

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Tyrone Robinson appeals a judgment of conviction, entered after he pled no contest to second-degree sexual assault of a child and false imprisonment, as well as an order denying his postconviction

motion. *See* WIS. STAT. § 948.02(2) and § 940.30 (2011-12).[1] On appeal, Robinson argues that he is entitled to withdraw his plea of no contest to the sexual assault count because the plea colloquy did not conform to WIS. STAT. § 971.08 in that he was never informed, and was otherwise unaware, that the State had to prove sexual gratification as an element of the offense. Robinson also challenges the sentence imposed on the sexual assault count. For the reasons set forth below, we affirm the judgment and order of the circuit court.

BACKGROUND

¶2 This case arises from events that took place during the night and early morning hours of November 21-22, 2009. The complaint alleged that Robinson committed repeated sexual assaults of the same child, who was then fifteen years old. Robinson pled no contest to second-degree sexual assault of a child and false imprisonment. On the sexual assault count, the court imposed a bifurcated sentence of seventeen years of initial confinement and thirteen years of extended supervision. On the false imprisonment count, the court imposed a concurrent bifurcated sentence of two years of initial confinement and two years of extended supervision.

¶3 After sentencing, Robinson filed a postconviction motion to withdraw his plea as to the sexual assault count and to modify his sentence on that count. The circuit court concluded that Robinson was entitled to an evidentiary hearing, at which the State had the burden of proof to show by clear and convincing evidence that the plea was knowingly and voluntarily made. *See* ***State***

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

v. ***Bangert***, 131 Wis. 2d 246, 275, 389 N.W.2d 12 (1986). At the conclusion of the evidentiary hearing, the circuit court denied Robinson's postconviction motion. Robinson now appeals.

STANDARD OF REVIEW

¶4 Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. We will accept the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous, but whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary is subject to our independent review. ***Id.*** As to Robinson's challenge to his sentence, our review of a sentence is limited to determining whether the circuit court erroneously exercised its discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

DISCUSSION

Plea Withdrawal

¶5 A defendant who shows by reference to the plea hearing transcript that the procedures outlined in WIS. STAT. § 971.08 or other court-mandated duties were not followed at the plea colloquy (*i.e.*, a ***Bangert*** violation), and further alleges that he did not understand the omitted information is entitled to a hearing on his plea withdrawal motion. ***State v. Hampton***, 2004 WI 107, ¶¶56-65, 274 Wis. 2d 379, 683 N.W.2d 14. In this case, it is not disputed that the plea hearing transcript reveals that the circuit court did not explain the term "sexual intercourse" or "sexual conduct" to Robinson during the plea colloquy.

¶6 Robinson argues that he was entitled to withdraw his plea after sentencing because he was never informed, and was otherwise unaware, that the State had to prove sexual gratification as an element of second-degree sexual assault of a child. The State concedes that the circuit court did not inform Robinson during the plea colloquy that sexual gratification was an element of the crime. However, the State takes the position that second-degree sexual assault does not necessarily require proof of sexual gratification. *See* WIS. STAT. § 948.02(2). The State argues that, to prove second-degree sexual assault of a child, the State needs only to prove either sexual intercourse *or* sexual contact by the defendant, and that proof of sexual gratification is required only in those cases where sexual contact is the basis of the crime.

¶7 WISCONSIN STAT. § 948.02(2) states, "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony." This court has held that, when a defendant pleads guilty or no contest to sexual assault of a child based on sexual contact, the defendant must be informed that one element of the crime is that "'the alleged contact was for the purpose of defendant's sexual gratification or the victim's humiliation.'" ***State v. Jipson***, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18 (quoted source omitted). We know of no such requirement when a defendant pleads guilty or no contest to having sexual intercourse with a child under the age of sixteen years.

¶8 In this case, the complaint contains detailed factual accounts of three separate acts of sexual intercourse between Robinson and the victim that occurred on November 21-22, 2009. The complaint also contains allegations of one incident of sexual contact without intercourse in that same time frame. Before

accepting Robinson's plea, the court asked whether the complaint could provide a factual basis for the plea. Defense counsel confirmed on the record that it could.

¶9 In addition, Robinson testified at the evidentiary hearing on the postconviction motion that, when he pled no contest, he understood second-degree sexual assault to mean "[h]aving sex with a minor." He confirmed that, when he entered his plea, he understood "sex" to include various forms of penile penetration, hand to penis contact, and finger to vagina contact. He admitted that he understood that he was pleading to having had sex in one way or another with the victim.

¶10 Robinson's trial counsel, Daryl Jensen, testified at the evidentiary hearing that it was his routine practice to go over the elements of the crime charged with his clients. Although Jensen testified that he could not say with one hundred percent certainty that he had discussed the definitions of sexual contact and sexual intercourse with Jensen, he believed that he had done so. Jensen also testified that his notes indicated that he had met with Robinson twenty-six times to discuss the case. Robinson testified that he had met with Jensen only two or three times. Robinson also testified that Jensen never explained the definition of sexual contact or sexual intercourse to him.

¶11 The circuit court's decision to deny Robinson's postconviction motion was based, in part, on its finding that Jensen's testimony was credible. We will not overturn credibility determinations on appeal unless the testimony upon which they are based is inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d

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588, 644 N.W.2d 269. We find nothing in the record to suggest that that is the case here.

¶12 Prior to the plea hearing, the State filed a second amended information. Jensen requested that the State add the words "or sexual contact" to Count 1, which previously had alleged only that Robinson "did have sexual intercourse with a child under the age of sixteen." Jensen testified at the postconviction motion hearing that he did this because Robinson had requested this change. I did not The circuit court indicated in its oral decision on the postconviction motion that the change to the second amended information was strong evidence that Robinson knew what he was pleading to and understood the distinction between "sexual contact" and "sexual intercourse." We agree. In light of this and the other record facts discussed above, we are satisfied that Robinson's plea was knowing and voluntary, such that the circuit court properly denied his motion to withdraw the plea.

Sentencing

¶13 Robinson argues that the circuit court erroneously exercised its discretion by relying upon inaccurate information at sentencing. A defendant has a constitutionally protected due process right to be sentenced based upon accurate information. *See* ***U.S. v. Tucker***, 404 U.S. 443 (1972); WIS. CONST. art. I, § 8, cl. 1. However, a defendant moving for resentencing on the basis that the circuit court relied upon inaccurate information must establish both that there was information before the sentencing court that was inaccurate and that the circuit court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1.

This is a cover up for their Bull crap.

III

¶14 Specifically, Robinson argues that the DNA evidence in this case indicates that it is extremely unlikely that sexual intercourse occurred between him and the victim. He argues that, therefore, the victim's allegations in the complaint were not accurate. Once again, we note that Robinson accepted the facts alleged in the criminal complaint, with its detailed accounts of sexual intercourse and sexual contact with the victim, as a factual basis for his plea.

¶15 In addition, Robinson fails to identify any incorrect or inaccurate information related to the DNA evidence. The DNA evidence derived from the victim's body and the crime scene did not conclusively prove that Robinson was guilty of the alleged acts of sexual intercourse. However, as the circuit court noted both at sentencing and at the conclusion of the evidentiary hearing on the postconviction motion, the lack of conclusive DNA evidence does not prove that Robinson is innocent. Inconclusive evidence is not the same thing as inaccurate information, and Robinson has failed to identify any inaccurate information relied upon by the circuit court at sentencing. We find nothing in the record to indicate that the circuit court erroneously exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

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

The DNA information was the inaccurate information! D.A. said they had DNA, but really didn't.

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COURT OF APPEALS OF WISCONSIN - DISTRICT IV

STATE OF WISCONSIN | **CIRCUIT COURT** | **DANE COUNTY**

STATE OF WISCONSIN,
Plaintiff-Respondent,

V

TYRONE T. ROBINSON,
Defendant-Appellant

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61	14	State's Brief in Response to Defendant's 974.06 Motion Alleging Ineffective Assistant of Postconviction and Trial Counsel, filed 12/18/15
62	4	Decision and Order, filed 01/19/16
63	13	Defendant's Reply Brief, filed 01/25/16
64	1	Motion for Waiver of Costs of Preparing the Transcript, filed 02/29/16, granted 03/02/16
65	1	Defendant's Statement of the Nature of the Appeal and Requested Relief, filed 02/29/16
66	5	Prisoner's Petition for Waiver of Fees/Costs – Affidavit of Indigency and supporting documents, filed 02/29/16
67	1	Notice of Appeal, filed 02/29/16
		TRANSCRIPTS
68	18	12/14/15 Hearing, filed 03/30/16
69	1	Clerk's Certificate