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WISCONSIN COURT OF APPEALS

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DISTRICT II

August 2, 2024

To:

Hon. Daniel J. Bissett
Circuit Court Judge
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Paul M. Nigl 280834
Oshkosh Correctional Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

You are hereby notified that the Court has entered the following opinion and order:

2024AP1420-W

State of Wisconsin ex rel. Paul M. Nigl v. Cheryl Eplett
(L.C. # 2001CF86)

Before Neubauer, Grogan and Lazar, JJ.

Paul M. Nigl petitions for a writ of habeas corpus pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). He alleges ineffective assistance of appellate counsel. Upon consideration of the petition, we deny it without requiring a response. WIS. STAT. RULE 809.51(2).

In 2001, Nigl was convicted following a jury trial of two counts of homicide by intoxicated use of a motor vehicle. The circuit court sentenced him to sixty years of initial confinement and forty years of extended supervision.

On direct appeal, Nigl, by counsel, argued that blood test results should have been suppressed, that he was denied the effective assistance of trial counsel because trial counsel failed to request an instruction on a lesser-included offense, that the circuit court should have

granted his request for a continuance, and that the sentence was the result of an erroneous exercise of discretion. We rejected his claims and affirmed. *State v. Nigl*, No. 2003AP557-CR, unpublished slip op. (WI App Mar. 3, 2004).

Nigl subsequently filed three pro se appeals seeking sentence modification and other relief. All three were denied by this court. See *State v. Nigl*, No. 2003AP2994-CR, unpublished op. and order (WI App Oct. 26, 2005); *State v. Nigl*, No. 2009AP357, unpublished op. and order (WI App Nov. 18, 2009); *State v. Nigl*, No. 2011AP1620, unpublished op. and order (WI App June 13, 2012).

Over twelve years later, on July 16, 2024, Nigl filed this petition for a writ of habeas corpus. In it, he accuses his appellate counsel of ineffective assistance for failing to raise an additional claim of ineffective assistance against trial counsel. Specifically, Nigl faults trial counsel for failing to communicate a plea offer from the prosecution.

We conclude that the circuit court, not the court of appeals, is the proper forum to hear Nigl's claim.¹ That is because if error occurred, it occurred in the circuit court by postconviction counsel's failure to raise the additional claim of ineffective assistance against trial counsel.² See *State ex rel. Kyles v. Pollard*, 2014 WI 38, 354 Wis. 2d 626, ¶38, 847 N.W.2d 805 (claims of ineffective assistance of counsel should generally be brought in the forum where the alleged error occurred); *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677-79, 556 N.W.2d

¹ If Nigl elects to bring his claim in the circuit court, he will have to overcome the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

² Nigl suggests that the additional claim of ineffective assistance was adjudicated by the circuit court in a hearing before his direct appeal. However, his filings do not show that the claim was ever raised by postconviction counsel or specifically rejected by the circuit court at that hearing.

136 (Ct. App. 1996) (a defendant who alleges ineffective assistance of trial counsel must first raise the allegation by postconviction motion in the circuit court; appellate counsel is not ineffective for failing to argue on appeal issues not preserved). Accordingly, we must deny the petition.

Nigl also moves for the appointment of counsel in this matter. Because we deny the petition, we deny this motion as moot.

Upon the foregoing reasons,

IT IS ORDERED that the petition for a writ of habeas corpus is denied without costs.

IT IS FURTHER ORDERED that the motion for the appointment of counsel is denied as moot.

Samuel A. Christensen
Clerk of Court of Appeals



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DISTRICT II

August 12, 2024

To:

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Jennifer L. Vandermeuse
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Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Paul M. Nigl 280834
Oshkosh Correctional Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

You are hereby notified that the Court has entered the following order:

2024AP1420-W

State of Wisconsin ex rel. Paul M. Nigl v. Cheryl Eplett
(L.C. # 2001CF86)

Before Neubauer, Grogan and Lazar, JJ.

Paul M. Nigl moves for reconsideration of the opinion entered August 2, 2024. WIS. STAT. RULE 809.24(1). The motion does not persuade us that reconsideration is warranted. Therefore,

IT IS ORDERED that the motion for reconsideration is denied. WIS. STAT. RULE 809.24(2).

Samuel A. Christensen
Clerk of Court of Appeals



OFFICE OF THE CLERK

Supreme Court of Wisconsin

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June 25, 2025

To:

Hon Daniel J. Bissett
Circuit Court Judge
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

John Blimling
Electronic Notice

Paul M. Nigl 280834
Kettle Moraine Correctional Inst.
P.O. Box 282
Plymouth, WI 53073-0282

You are hereby notified that the Court has entered the following order:

No. 2024AP1420-W Nigl v. Eplett, L.C.#2001CF86

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of petitioner-petitioner, Paul M. Nigl, pro se, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Samuel A. Christensen
Clerk of Supreme Court

1 Q So there wasn't much of a plea offer?

2 A No. And, in fact, when I had met with Paul in the very
3 beginning, he made it very clear to me he would not
4 plead to the homicide by intoxicated use of motor
5 vehicle.

6 Q Just to be clear: Did Mr. Paulus provide any
7 parameters for sentencing or anything of that nature in
8 exchange for a plea to the charges?

9 A He indicated to me after the trial, had Mr. Nigl plead
10 to the charges, he would have made a sentence
11 recommendation. That's what the plea would have been,
12 the reduced sentence recommendation.

13 Q Do you remember what that was?

14 A He didn't say because we never discussed it. I never
15 accepted any offers from him.

16 Q Did you communicate that to Mr. Nigl?

17 A Mr. Nigl in the very beginning told me he will not
18 plead to homicide by intoxicated use of motor vehicle,
19 so I didn't offer that to him. In fact, we spoke later
20 about that and I believe it may have been the time that
21 we met just prior to trial, to prepare for trial, and I
22 believe it was in that context that I explained the
23 only thing he could do is to plead to the charges and
24 he -- and I knew he wouldn't do that and he said he
25 wouldn't do that.

1 attorney. He knows what applies. He knows what to
2 object to. He knows what to try to bring in. He knows
3 the trial strategy to present here and he did that and
4 I think he did that in a very professional and
5 competent way. Obviously he didn't get a not guilty
6 finding, but that does not mean in and of itself that
7 he did a poor job. And, as I indicated, I think he did
8 just the opposite. I think he did a very good job in
9 light of everything that he was dealing with in this
10 case.

11 Even if the Court could find some
12 deficiencies in what he did -- and I can't -- but for
13 the sake of argument, assuming that some could be
14 found, I in no way can see that anything that was done
15 or not done here in any way prejudiced Mr. Nigl in his
16 case, so I cannot find that even one prong of the
17 two-prong test has been met, but certainly I can't find
18 that both prongs have been met which is required before
19 the Court can find ineffective assistance of counsel,
20 so, on that basis, the motion will be denied.

21 There are a number of other prejudicial
22 errors that are alleged here; one, allowing the juror
23 to remain even after the juror's father had been the
24 victim of a drunk driving accident. I cannot
25 specifically find that in the transcript.