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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

April 13, 2016

To:

Hon. Mary Kay Wagner
Circuit Court Judge
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Robert D. Zapf
District Attorney
Molinaro Bldg
912 56th Street
Kenosha, WI 53140-3747

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Rodrigo Rodriguez 410238
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

Anne Christenson Murphy
Assistant Attorney General
P. O. Box 7857
Madison, WI 53707-7857

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

2015AP1411 State of Wisconsin v. Rodrigo Rodriguez (L.C. #1998CF343, 2000CF1134)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Rodrigo Rodriguez appeals pro se from an order denying, without a hearing, his WIS. STAT. § 974.06 (2013-14)[1] motion for postconviction relief. His motion sought an evidentiary hearing and a new trial on his claims of prosecutorial misconduct and ineffective assistance of postconviction counsel. Rodriguez has filed a motion for summary disposition. *See* WIS. STAT.

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

RULE 809.21. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. We affirm the order.

In 2001, a jury found Rodriguez guilty of possession with intent to deliver cocaine and conspiracy to manufacture/deliver cocaine and Schedule I or II drugs within 1000 feet of a school. He later filed a WIS. STAT. RULE 809.30 motion for postconviction relief, a direct appeal from the denial of that motion, a ***Knight*** petition,[2] and a WIS. STAT. § 974.06 motion. A second § 974.06 motion underlies this appeal. The circuit court denied his motion without a hearing. He appeals.

Rodriguez contends he should have been granted a hearing on his claims of prosecutorial misconduct and fraud for the State's alleged failure to disclose exculpatory evidence; he also alleges ineffective assistance of postconviction counsel. WISCONSIN STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), bar his claims.

Successive motions and appeals are procedurally barred unless the defendant can show a sufficient reason for not previously raising the alleged errors. ***Escalona-Naranjo***, 185 Wis. 2d at 185; *see also* WIS. STAT. § 974.06(4). Rodriguez already raised his prosecutorial misconduct claim in his 2012 § 974.06 motion. He also has had several opportunities to raise any claims that his postconviction counsel was ineffective. To the extent he did not raise these claims earlier, ***Escalona-Naranjo*** bars his current attempt, as he makes no effort to present a "sufficient reason" for his prior failure to do so. To the extent he did raise them before, "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the

[2] *See* ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

defendant may rephrase the issue." *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Rodriguez next contends the circuit court erroneously denied his motion without a hearing and without explanation. He seeks either a hearing, incorporating a ***Machner*** hearing[3] on his claim that postconviction counsel was ineffective for not making certain arguments, or a new trial.

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted).

Here, the record conclusively demonstrates that Rodriguez is not entitled to relief. As we have noted, his claims are procedurally barred. In addition, a defendant who alleges that postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that those claims are "clearly stronger" than the claims postconviction counsel actually brought. ***State v. Romero-Georgana***, 2014 WI 83, ¶4, 360 Wis. 2d 522, 849 N.W.2d 668. Rodriguez's assertion that his claims are "clearly stronger" than those postconviction counsel raised is a conclusory allegation that does not *demonstrate* that they, in fact, are "clearly

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

stronger." Further, the allegedly stronger claims are simply a renewed attempt to resurrect his already-litigated argument that the State withheld exculpatory evidence. We agree with the circuit court that his motion did not raise facts sufficient to entitle him to relief.

We disagree with Rodriguez that the court gave no explanation for not granting a hearing. The order states that the motion was denied without a hearing because his "conviction has been affirmed by the higher courts," invoking ***Escalona-Naranjo***, and the motion was not supported by "sufficient grounds," invoking ***Allen***. Nothing more was required.

Finally, the State requests this court to advise Rodriguez that further attacks on his convictions will result in conditions restricting the circumstances under which he may pursue appeals and sanctions for violating those conditions. *See* ***State v. Casteel***, 2001 WI App 188, ¶¶19-27, 247 Wis. 2d 451, 634 N.W.2d 338. It also urges that, if we dismiss an appeal he files for a reason set forth in WIS. STAT. RULE 809.103(2), we make him responsible for the full filing fee, as well as the fee for this appeal. While we decline at this point to issue a definite ***Casteel*** warning, we remind Rodriguez that claims unsupported by a sufficient reason for not previously raising them, rephrasing of resolved issues, and conclusory assertions will not earn him postconviction relief.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals