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DISTRICT II

July 22, 2026

To:

Hon. J. Arthur Melvin III
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Sarah Catherine Geers
Electronic Notice

Kenneth J. Thomas, #612958
Racine Correctional Institution
2019 Wisconsin St.
Sturtevant, WI 53177-1829

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

2023AP2301

State of Wisconsin v. Kenneth J. Thomas (L.C. #2015CF54)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kenneth J. Thomas appeals from an order of the circuit court denying his motions for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).¹ For the following reasons, we affirm.

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

BACKGROUND

Thomas pled guilty to felony murder and armed robbery for committing two armed robberies at gas stations, one of which resulted in the murder of an employee. Thomas received a plea deal from the State in exchange for his testimony against Darrin L. Malone, his accomplice to the robberies. Thomas was sentenced to 45 years of initial confinement and 20 years of extended supervision.

In 2017, Thomas filed a postconviction motion seeking to withdraw his guilty pleas. He argued that his pleas were not knowing and intelligent and asserted ineffective assistance of trial counsel for counsel's failure to explain the charges and potential penalties. Following a *Machner*² hearing, the circuit court denied Thomas's postconviction motion. The court concluded Thomas "was completely oriented as to person, place, and time" and had "no difficulty comprehending spoken language," and thus deemed his plea knowing and intelligent. The court also concluded Thomas's trial counsel was not ineffective because counsel did inform Thomas of the elements of the crimes and potential penalties.

On appeal, Thomas raised the same issues he had presented in his postconviction motion and further asserted that the circuit court judge who presided over his postconviction hearing was biased in favor of his trial counsel. After briefing concluded and before this court issued a decision, Thomas filed a motion asking to withdraw the briefs and remand the case to the circuit court so he could file another postconviction motion in order to address affidavits from his brother asserting that his brother, not Thomas, committed the crimes to which Thomas pled

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

guilty. We denied the motion, concluding that Thomas did not show good cause for such relief. We then affirmed the judgment of conviction and the circuit court's order denying Thomas's postconviction motion. **State v. Thomas**, Case No. 2017AP1213-CR, unpublished op. and order (WI App Sept. 20, 2018). We agreed with the circuit court's determination that Thomas's guilty plea was knowing and voluntary, recognizing that the court's conclusion that trial counsel did inform Thomas of the elements of the crimes and the potential penalties (and thus was not ineffective) was based on the court finding trial counsel credible and Thomas "incredible and unbelievable." *Id.* at 2, 8. The court's credibility determination was based not only on their testimony at the hearing but also the court's observation of them during the case, including Thomas's testimony at his accomplice's trial. *Id.* at 4-7. We also concluded that Thomas's argument of judicial bias was insufficiently developed but nevertheless observed that "[t]he record does not lead to the conclusion that the judge was actually biased against Thomas or that there was an appearance of bias that 'reveal[ed] a great risk of actual bias.'" *Id.* at 3, 8 (second alteration in original; quoting **State v. Hermann**, 2015 WI 84, ¶3, 364 Wis. 2d 336, 867 N.W.2d 772).

In 2020, Thomas filed a pro se petition for a writ of habeas corpus pursuant to **State v. Knight**, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), alleging ineffective assistance of appellate counsel and that the district attorney committed prosecutorial misconduct by allowing Thomas to provide false testimony in his co-defendant's trial. We denied Thomas's petition, concluding appellate counsel was not ineffective and Thomas had not preserved his prosecutorial misconduct claim via a trial objection or a postconviction motion. **Thomas v. Fuchs**, Case No. 2020AP1563-W, unpublished slip op. at 6-7 (WI App May 25, 2023).

In 2023, Thomas filed the instant WIS. STAT. § 974.06 postconviction motions, asserting that the State withheld exculpatory evidence in the form of the DNA analysis of a pair of pants worn during the January 13, 2025 robbery and that the district attorney committed prosecutorial misconduct by presenting “[t]estimony” the district attorney knew to be false during Thomas’ plea hearing and during his co-defendant’s trial. The circuit court held a hearing on Thomas’s motions and entered an order denying them “for reasons as stated on the record.”

Thomas now appeals the circuit court’s denial of his postconviction motions.

DISCUSSION

On appeal, Thomas contends the circuit court erred in denying his postconviction motions. We conclude Thomas is procedurally barred from bringing either of his claims. See WIS. STAT. § 974.06(4); ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

“We need finality in our litigation.” ***Escalona-Naranjo***, 185 Wis. 2d at 185. Because of this need, the law holds that any claim that could have been raised in a prior postconviction motion or on direct appeal cannot form the basis for a subsequent motion under WIS. STAT. § 974.06 unless the defendant demonstrates a sufficient reason for failing to raise the claim earlier. ***Escalona-Naranjo***, 185 Wis. 2d at 185; see § 974.06(4). We decide *de novo* whether the defendant demonstrated a sufficient reason for failing to previously raise a claim. ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

A “[d]efendant[] must, at the very minimum, *allege* a sufficient reason ... to overcome the ***Escalona-Naranjo*** bar.” ***Allen***, 328 Wis. 2d 1, ¶46 (emphasis added). Thomas failed this basic requirement, asserting no reason at all. Additionally, although the State raised ***Escalona-***

Naranjo in its response brief, Thomas failed to acknowledge it in his reply brief.³ Without a sufficient reason for his failure to previously raise either claim he raised in his current postconviction motions, his claims are procedurally barred. See WIS. STAT. § 974.06(4); **Escalona-Naranjo**, 185 Wis. 2d at 180.

Beyond the procedural **Escalona-Naranjo** bar, Thomas’s brief fails to comply with several requirements of the Wisconsin Rules of Appellate Procedure. The facts represented throughout Thomas’s brief-in-chief lack support from citations to the record, as required by WIS. STAT. RULE 809.19(1)(d)-(e). See **Madely v. RadioShack Corp.**, 2007 WI App 244, ¶14 n.7, 306 Wis. 2d 312, 742 N.W.2d 559 (“[W]e have no duty to scour the record to review arguments unaccompanied by adequate record citations.”). And, while Thomas’s brief does cite some legal authorities and statutes, he fails to apply the facts of his case to those authorities and fails to develop a sufficient legal argument to support his claims of error by the circuit court. See **Clean Wis., Inc. v. PSC**, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 (“We will not address undeveloped arguments”). It is not our responsibility to develop arguments for a party, “and we will not abandon our neutrality,” to do so for Thomas. See **Industrial Risk Insurers v. American Eng’g Testing, Inc.**, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

Finally, we note that Thomas failed to include the transcript of the hearing on his postconviction motions, which transcript presumably would detail the reasons for the circuit court’s denial of his motions. As the appellant, Thomas bears the burden of demonstrating that

³ See **United Co-op v. Frontier FS Co-Op.**, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (2007) (concluding a party’s failure to address a topic in a reply brief may be taken as a concession).

the circuit court erred, *see Gaethke v. Pozder*, 2017 WI App 38, ¶36, 376 Wis. 2d 448, 899 N.W.2d 381, and “[i]t is the appellant’s responsibility to ensure completion of the appellate record and ‘when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the [circuit] court’s ruling,’” *State v. McAttee*, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (citation omitted). Here, we cannot even begin to ascertain if the circuit court erred without knowing the reasons it provided for its denial of his motions. *See Jocius v. Jocius*, 218 Wis. 2d 103, 119, 580 N.W.2d 708 (Ct. App. 1998). As a result, he has not met his burden as the appellant to demonstrate that the court erred.

For all of the foregoing reasons, we affirm.

Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals