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DISTRICT I

July 21, 2026

To:

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Circuit Court Judge
Electronic Notice

Gary Grass
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Clerk of Circuit Court
Milwaukee County Safety Building
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Lisa E.F. Kumfer
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You are hereby notified that the Court has entered the following opinion and order:

2023AP980

State of Wisconsin v. Dewitt Antonio Faulkner
(L.C. # 2005CF7024)

Before Donald, C.J., Colón, P.J., and Geenen, J.

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).

Dewitt Antonio Faulkner appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 (2023-24)¹ postconviction motion without a hearing. 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. The order is summarily affirmed.

In 2006, a jury convicted Faulkner of first-degree reckless homicide with a dangerous weapon as a party to a crime, conspiracy to commit armed robbery, and two counts of possession

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

of a firearm by a felon as a habitual criminal. The trial court imposed consecutive and concurrent sentences totaling fifty-nine years' imprisonment. Faulkner filed a postconviction motion challenging his jury's racial composition under *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986). The State could not recall why it used a peremptory challenge against the sole black prospective juror, so the court granted Faulkner a new trial. In 2011, the second jury convicted Faulkner. The trial court imposed sentences totaling seventy years' imprisonment.

Faulkner, assisted by new counsel, Attorney Gary Grass, filed a postconviction motion that, by its own admission, raised "about 25 independent grounds for relief." In particular, Faulkner argued that: (1) the jury instructions for party to a crime liability "were inaccurate and confusing"; (2) the trial court erroneously denied a suppression motion; (3) the trial court's evidentiary rulings regarding the co-actors and deals for their testimony "did not permit an adequate presentation of his defense"; (4) the State misrepresented the plea deals made with co-defendants in its closing argument; (5) the trial court at sentencing was "unduly focused" on the fact that Faulkner "proclaimed his innocence [and] took the matter to trial," secured a new trial, and continued to insist he was innocent after the second jury convicted him; and (6) his sentence was improperly increased after the second trial. The circuit court denied relief on every claim except for the increased total sentence following re-trial, and amended Faulkner's sentences back to fifty-nine years' imprisonment. Faulkner, still represented by Attorney Grass, appealed.

On appeal, we addressed seven issues, including (1) whether the prosecutor's closing argument and the jury instructions misled the jury; (2) whether the circuit court should have

suppressed an illegally seized pistol; and (3) whether Faulkner’s co-actors were incompetent² to testify against him because of concessions they received from the State. We concluded that Faulkner’s claims about the closing arguments and jury instructions were forfeited by lack of contemporaneous objection. See *State v. Faulkner*, No. 2013AP2782-CR, ¶14, unpublished slip op. (WI App July 21, 2015). We also determined that although the pistol was illegally seized, failure to suppress it was harmless, and Faulkner’s co-actors were properly permitted to testify. See *id.*, ¶¶15, 19-20. We affirmed Faulkner’s conviction. *Id.*, ¶2.

Faulkner next 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 that Attorney Grass had been ineffective as appellate counsel because he inadequately challenged trial counsel’s performance and inadequately replied to the State’s harmless error argument regarding suppression of the gun. In denying the petition, we first explained that we rejected several of the same issues, now presented as ineffective assistance claims, on their merits in the direct appeal. To the extent that Faulkner was attempting to relitigate issues already rejected on their merits, he was not permitted to do so. See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Further, because a trial attorney is not ineffective for failing to raise meritless issues, see *State v. Jacobsen*, 2014 WI App 13, ¶49, 352 Wis. 2d 409, 842 N.W.2d 365, appellate counsel was not ineffective for failing to also couch his substantive claims as alternative claims of ineffective trial counsel, see *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

² “Every person is competent to be a witness except as otherwise provided” in the rules of evidence. WIS. STAT. § 906.01.

We also explained that in the direct appeal, we held two of Faulkner’s substantive issues—claims that the jury instructions were improper and that the State’s closing argument was misleading—to have been forfeited because trial counsel made no contemporaneous objection. However, before appellate counsel can raise a claim of ineffective assistance of trial counsel, the ineffectiveness claim has to be preserved by postconviction motion. Faulkner’s complaint that trial counsel should have made contemporaneous objections was not preserved, and appellate counsel is not ineffective for failing to raise unpreserved issues. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). We therefore denied the writ. See *State ex rel. Faulkner v. Fuchs*, No. 2017AP16-W, unpublished op. and order (WI App Jan. 18, 2022).

In February 2023, Faulkner filed the WIS. STAT. § 974.06 motion that underlies this appeal, again assisted by Attorney Grass.³ To avoid the procedural bar against successive postconviction motions established by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), Faulkner argued that Attorney Grass was ineffective as postconviction counsel by “failing to afford sufficient development to some of the strongest issues,” including claims of ineffective trial counsel regarding “the impeachment of Faulkner’s alleged co-actors” and counsel’s “ready acceptance of bad jury instructions.” Faulkner also asserted that “clear error” had occurred at sentencing, claiming the circuit court had improperly treated his exercise of his right to a trial as an aggravating factor. The circuit court denied the motion, concluding Faulkner

³ The State asks us to disqualify Attorney Grass from further representing Faulkner in this matter because attorneys are typically not permitted to make ineffective assistance claims against themselves. See *State v. Quackenbush*, 2005 WI App 2, ¶20, 278 Wis. 2d 611, 692 N.W.2d 340. We are not persuaded it is necessary or appropriate to do so at this time, although this denial should not be interpreted as approval of counsel’s tactics.

had not shown ineffective assistance of postconviction counsel, that his claims were conclusory, and that the issues were not clearly stronger than ones postconviction counsel had raised. Faulkner appeals.

A defendant may file a WIS. STAT. § 974.06 motion at any time after the time for appeal or postconviction remedy provided in WIS. STAT. § 974.02 has expired, but “without a sufficient reason, a movant may not bring a claim in a § 974.06 motion if it ‘could have been raised in a previously filed sec. 974.02 motion and/or on direct appeal.’” *State v. Romero-Georgana*, 2014 WI 83, ¶34, 360 Wis. 2d 522, 849 N.W.2d 668 (quoting *Escalona*, 185 Wis. 2d at 173). Ineffective assistance of postconviction counsel sometimes constitutes a sufficient reason, see *Rothering*, 205 Wis. 2d at 682, but a defendant claiming postconviction counsel was ineffective for failing to raise certain issues must show that the unraised issues are “clearly stronger” than those that were raised, *Romero-Georgana*, 360 Wis. 2d 522, ¶4.

To move beyond the initial prerequisites of WIS. STAT. § 974.06 and *Escalona* and to adequately raise a claim for relief, the defendant’s postconviction motion must allege sufficient material facts that, if true, would entitle the defendant to relief. *State v. Allen*, 2004 WI 106, ¶2, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion alleges sufficient facts, the circuit court is required to hold an evidentiary hearing. *Id.*, ¶9. If the motion does not raise sufficient facts or presents only conclusory allegations, the circuit court has the discretion to grant or deny a hearing. *Id.*

As an initial matter, Faulkner complains that the circuit court was required to expressly address the multitude of issues raised in his motion, rather than rejecting them “sub rosa.”⁴ Review of the sufficiency of a postconviction motion is limited to allegations within the four corners of the motion. See *id.*, ¶27. The specific issues identified in the WIS. STAT. § 974.06 motion are: (1) ineffective assistance of trial counsel for failing to impeach Faulkner’s co-actors; (2) trial counsel’s “acceptance of bad jury instructions”; and (3) “clear error” at sentencing, all of which the circuit court addressed. Faulkner’s allusion or cross-reference to arguments in other documents is insufficient to actually raise those arguments, and accordingly, we do not address those arguments.

The first issue in Faulkner’s WIS. STAT. § 974.06 motion “is ineffective assistance of trial counsel ... beginning with the impeachment of Faulkner’s alleged co-actors,” which Faulkner says “should have been a key objective of the defense.” In particular, Faulkner claims trial counsel should have ensured that “the jury understood the tremendous incentives given to the witnesses to testify in a manner that would implicate Faulkner.”

When we addressed in the first appeal whether the co-actors were properly permitted to testify against Faulkner, we considered whether the jury was sufficiently apprised of the benefits the co-actors received from the State. See *Faulkner*, No. 2013AP2782-CR, ¶¶19-20. Thus, to the extent that Faulkner is attempting to revisit an already litigated issue, he is not permitted to do so. See *Witkowski*, 163 Wis. 2d at 990. Faulkner also spends considerable time detailing

⁴ The phrase “sub rosa” means “confidential” or “secret.” *Sub rosa*, BLACK’S LAW DICTIONARY (12th ed. 2024). Faulkner likely meant “sub silentio,” which means “tacitly” or “without being expressly mentioned.” *Sub silentio*, BLACK’S LAW DICTIONARY (12th ed. 2024).

what he thinks trial counsel could have done better with respect to impeaching the co-actors, but what he does not do is demonstrate any actual prejudice from trial counsel's actions. If he cannot establish prejudice, he cannot establish ineffective assistance of trial counsel, and if there is no ineffective assistance of trial counsel, then postconviction counsel was not ineffective for failing to raise the claim. See **Ziebart**, 268 Wis. 2d 468, ¶15. To the extent that Faulkner identifies other questions he thinks trial counsel should have asked the co-actors, he does not identify what the answer to the questions would have been, how the questions and answers would undermine witness credibility, or how those answers would result in a different verdict.

Faulkner next contends that the “second most glaring deficiency of trial counsel was his ready acceptance of bad jury instructions.” Faulkner complains that the jury instructions for party to a crime liability were improperly “cobbled together” from WIS JI—CRIMINAL 400 and WIS JI—CRIMINAL 1020, the standard instructions for party to a crime liability and first-degree reckless homicide.

Faulkner previously raised a direct claim of error relating to the jury instructions in the first appeal. See **Faulkner**, No. 2013AP2782-CR, ¶14. While we concluded that the issue was forfeited by lack of contemporaneous objection, the circuit court addressed the issue in its ruling and concluded the instructions were not improper. Assuming without deciding that Faulkner could escape the various procedural bars and relitigate the merits of the jury instructions, his WIS. STAT. § 974.06 motion is still conclusory. Faulkner's motion does not identify how the jury instructions were erroneous, nor does he suggest how any error in the instructions impacted the verdict.

Finally, Faulkner claims that the circuit court “treated Faulkner’s exercise of his fundamental right to a trial and to assert his innocence as an aggravating factor” and that postconviction counsel should have raise this issue. In denying the WIS. STAT. § 974.06 motion, the circuit court reviewed the sentencing comments and said:

In particularly conclusory fashion, the defense asserts that postconviction counsel should have “emphasized” Judge Borowski’s treatment of the defendant’s “exercise of his fundamental right to a trial and to assert his innocence as an aggravating factor, contrary to *Scales v. State*, 64 Wis. 2d 485, 496, 219 N.W.2d 286 (1974). (Motion pp.19-20). The court finds that the quotes pulled from sentencing do not establish a violation of the defendant’s right to maintain his innocence. Rather, the comments cited in the motion reflect Judge Borowski’s appropriate consideration of the defendant’s lack of remorse, and lack of credibility—both of which a sentencing court may take into consideration.... Postconviction counsel’s failure to raise a *Scales* claim does not rise to the level of ineffective assistance of counsel, and this court discerns no prejudice from counsel’s failure to do so.

We agree with this assessment of both the postconviction motion and the sentencing comments.

Finally, we are unpersuaded that any of the issues in Faulkner’s WIS. STAT. § 974.06 are clearly stronger than the ones raised in his prior postconviction motions. See *Romero-Georgana*, 360 Wis. 2d 522, ¶4. The first postconviction motion won Faulkner a new trial; the second postconviction motion secured him sentencing relief.

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. See 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