

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2008

David R. Schanker
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. 2007AP2526

Cir. Ct. No. 2003CF3914

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OMAR CARRASQUILLO, A/K/A ERNESTO C. RIVERA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 PER CURIAM. Omar Carrasquillo, a/k/a Ernesto Rivera, appeals *pro se* from an order denying his postconviction motion brought pursuant to WIS.

STAT. § 974.06 (2005-06).¹ The circuit court denied the motion as conclusory and unsupported. We affirm, but on the alternative ground that the claim is procedurally barred.

Background

¶2 Carrasquillo entered a no contest plea to one count of second-degree intentional homicide by use of a dangerous weapon. According to Carrasquillo's confession, he struck Robert Puente on the head with a gun, then fired six or seven shots into Puente's chest. On January 26, 2004, the circuit court imposed a thirty-five year term of imprisonment.

¶3 With the assistance of postconviction counsel, Carrasquillo moved to withdraw his plea, alleging that he did not know or understand that his plea waived a claim of self-defense. The circuit court denied the motion. On appeal, this court affirmed the order and the judgment of conviction. *See State v. Carrasquillo*, No. 2004AP2631-CR, unpublished slip op. (WI App May 10, 2006).

¶4 In August 2007, Carrasquillo filed a second postconviction motion for plea withdrawal. In this motion, he claimed that he did not kill Puente. Rather, Carrasquillo alleged that the emergency room doctor "cut Mr. Puente's body halfway open like fish gills experimenting," causing Puente to bleed to death. Carrasquillo alleged that his trial attorney was ineffective by failing to investigate this claim.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶5 The circuit court determined that the evidentiary support for Carrasquillo's allegations consisted of photographs of an unknown individual. The court therefore denied the motion, stating that it contained only conclusory allegations and lacked supporting materials facts, such as medical reports or witness statements explaining the source of Carrasquillo's information. This appeal followed.

Discussion

¶6 Any postconviction claim that could have been raised in a prior proceeding is barred in a subsequent proceeding, absent the defendant demonstrating a sufficient reason for the failure to raise the issue in the first appeal. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). In the instant proceeding, Carrasquillo claims that his trial counsel was ineffective by failing to investigate negligent medical treatment as a defense to the homicide charge. He asserts that his postconviction counsel's failure to pursue this claim in the first postconviction proceeding was in turn ineffective, and he therefore has a sufficient reason for a second postconviction motion.

¶7 Ineffective assistance of postconviction counsel may constitute a sufficient reason for an additional postconviction motion pursuant to WIS. STAT. § 974.06. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 683, 556 N.W.2d 136 (Ct. App. 1996). Implicit in this formulation, however, is that the claim of postconviction counsel's ineffectiveness must be more than an empty incantation. The claim must be accompanied by colorable support to be a "sufficient" reason for serial litigation. Carrasquillo's claim fails in this regard.

¶8 A defendant claiming ineffective assistance of counsel must show both that counsel's performance was deficient and that the defendant was

prejudiced by that deficient performance. See *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). To prove deficient performance, a defendant must show that counsel’s specific “acts or omissions were outside the wide range of professionally competent assistance.” *Strickland v. Washington*, 466 U.S. 668, 690 (1984). To prove prejudice, a defendant must show a reasonable probability that, but for counsel’s error, the outcome of the proceeding would have been different. See *id.* at 694.

¶9 An attorney is not required to raise every conceivable issue. Counsel has the duty to select the issues that have merit for appeal. See *State v. Evans*, 2004 WI 84, ¶30, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. “[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citation omitted).

¶10 Carrasquillo’s claim that medical negligence was a contributing cause of Puente’s death is not a clearly stronger basis for postconviction relief than the claim counsel presented. In a prosecution for second-degree intentional homicide, the State must prove only that the defendant’s actions were a substantial factor, not the sole factor, in causing the victim’s death.² See *State v. Block*, 170 Wis. 2d 676, 678, 683, 489 N.W.2d 715 (Ct. App. 1992). Consequently, “any medical negligence in connection with procedures undertaken in response to a life-threatening situation created by the defendant does ‘not break the chain of

² The State originally charged Carrasquillo with first-degree intentional homicide. A conviction for that offense, as for second-degree intentional homicide, requires proof “that the defendant’s act was a substantial factor in producing the death.” WIS JI—CRIMINAL 1010.

causation’ even though that negligence may have ‘contributed’ to the victim’s death.” *Id.* at 683 (citation omitted). In light of this long-standing doctrine, Carrasquillo’s claim for postconviction relief grounded on the assertion that negligent medical treatment contributed to Puente’s death is meritless.

¶11 Carrasquillo’s assertion that his postconviction counsel was ineffective is not supported by a colorable showing that counsel’s performance was deficient or prejudicial. No attorney is ineffective for failing to raise a meritless claim. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Therefore, Carrasquillo has not demonstrated a sufficient reason to permit a second postconviction motion. *See Rothering*, 205 Wis. 2d at 683. Accordingly, his claim is barred. On this ground, we affirm the order of the circuit court. *See State v. Holt*, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985) (appellate court may affirm on a ground other than that relied on by the lower court).

By the Court.—Order affirmed.

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

