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DISTRICT I

September 4, 2024

To:

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Presiding Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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Anne Christenson Murphy
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Andre L. Thornton 650430
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You are hereby notified that the Court has entered the following opinion and order:

2023AP92 State of Wisconsin v. Andre L. Thornton (L.C. # 2016CF493)

Before White, C.J., Geenen and Colón, 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).

Andre L. Thornton, *pro se*, appeals an order denying the postconviction motion that he filed pursuant to WIS. STAT. § 974.06 (2021-22).[1] In the motion, Thornton alleged that his postconviction counsel was ineffective for failing to raise several issues during the direct appeal proceedings. The circuit court determined that Thornton's claims were procedurally barred. 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. We agree with the circuit court, and we summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

A jury found Thornton guilty of first-degree reckless homicide as a party to a crime, but the jury acquitted him of using a dangerous weapon to commit the crime. With the assistance of counsel, he filed a postconviction motion, then pursued an appeal from the judgment of conviction and the adverse postconviction order. In the postconviction and appellate proceedings, Thornton alleged the existence of newly discovered evidence, namely, that a prosecution witness had committed perjury in federal court ten years before testifying at Thornton's trial. ***State v. Thornton*** (***Thornton I***), No. 2018AP871-CR, unpublished slip op., ¶2 (WI App Mar. 26, 2019). We rejected the claim and affirmed his conviction, concluding that the circuit court reasonably determined that, if the jury had heard the alleged newly discovered evidence, no reasonable probability existed that the outcome of the trial would have been different. ***Id.*** Our supreme court denied Thornton's petition for review.

Thornton, proceeding *pro se*, next filed a petition in this court seeking a writ of *habeas corpus* pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). He alleged that his appellate counsel was ineffective for failing to raise a claim of insufficiency of the evidence. He also alleged that his trial counsel was ineffective for failing to object to allegedly erroneous jury instructions and for failing to argue that another person committed the crime. We denied Thornton's challenge to appellate counsel's effectiveness on the merits; we denied his challenges to trial counsel's effectiveness on the procedural ground that he raised those challenges in the wrong forum. ***State ex rel. Thornton v. Meisner*** (***Thornton II***), No. 2020AP64-W, unpublished op. and order at 2-3 (WI App Apr. 19, 2021). Our supreme court denied his petition for review.

Thornton next filed the postconviction motion underlying this appeal. He alleged that the circuit court committed plain error when crafting one of the jury instructions and that his trial counsel was ineffective both for failing to request additional jury instructions and for failing "to

explicitly argue" certain defenses. He also alleged that his postconviction counsel was ineffective for failing to pursue these claims in Thornton's first postconviction motion. The circuit court denied relief without a hearing, concluding that Thornton's claims were procedurally barred. Thornton appeals.

Pursuant to WIS. STAT. § 974.06(4), a person who wishes to litigate a second or subsequent postconviction motion must demonstrate a sufficient reason for failing to raise or adequately address his or her claims in prior postconviction proceedings. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel may, in some circumstances, constitute the sufficient reason required for an additional postconviction motion. ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. However, a bare allegation of ineffective assistance of postconviction counsel does not clear the procedural bar imposed by § 974.06. ***Id.*** Rather, a convicted person must "make the case" of postconviction counsel's alleged ineffective assistance. ***State v. Balliette***, 2011 WI 79, ¶67, 336 Wis. 2d 358, 805 N.W.2d 334.

To make the case that postconviction counsel was ineffective, a convicted person must satisfy the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Balliette***, 336 Wis. 2d 358, ¶¶3, 28. The test requires that the convicted person show both a deficiency in counsel's performance and prejudice as a result. ***Strickland***, 466 U.S. at 687. To satisfy the deficiency prong, the person must show that counsel's actions or omissions "fell below an objective standard of reasonableness." ***Id.*** at 688. To satisfy the prejudice prong, the person "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review

independently. ***State v. Reinwand***, 2019 WI 25, ¶18, 385 Wis. 2d 700, 924 N.W.2d 184. When conducting that review, we may consider either prong of the analysis first, and if the convicted person fails to make an adequate showing as to one prong, we need not address the other. ***Strickland***, 466 U.S. at 697.

We begin here by considering the deficiency prong. When, as in this case, a convicted person claims that postconviction counsel was ineffective for failing to raise issues, proof of the deficiency prong requires the person to allege and show that the neglected issues were "clearly stronger" than the claims that postconviction counsel pursued. ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶4, 46. The burden is on the convicted person to satisfy the "clearly stronger" standard. ***Id.***, ¶58. Our case law provides a well-settled methodology for the convicted person to apply, requiring the person to allege and discuss "sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle him to the relief he seeks." ***Id.*** (citation omitted).

In this case, Thornton acknowledged in his postconviction motion that he must satisfy the "clearly stronger" standard, but he made no effort to do so. While he offered conclusory assertions that his new claims were "clearly stronger" than the issue that his counsel raised in the proceedings underlying ***Thornton I***, he failed to examine the specifics of the current and prior claims. He did not set forth any facts showing why his new claims were clearly stronger than those that his counsel pursued, and he did not analyze the comparative merits of the new claims in relation to the original claim. As the circuit court explained, Thornton appeared "to mistakenly believe that simply because the claim raised on direct appeal did not succeed, the issues he ... raise[d under WIS. STAT. § 974.06] should automatically be deemed 'clearly stronger'" than his original claims. Thornton's postconviction motion therefore was insufficient.

See ***Romero-Georgana***, 360 Wis. 2d 522, ¶62 (explaining that a convicted person fails to demonstrate postconviction counsel's ineffectiveness merely by showing that counsel did not pursue a particular claim and that courts "will not assume ineffective assistance from a conclusory assertion").

On appeal, Thornton again states that his current claims are "clearly stronger" than the claim that his counsel raised, and Thornton again offers no analysis in support of that position. He merely describes the nature of the current claims and concludes that he has made a sufficient showing to warrant relief. He therefore fails to show that his postconviction counsel performed deficiently by not raising his current claims. ***Id.***, ¶¶4, 46. Consequently, he fails to show that he has a sufficient reason for serial litigation. ***Id.***, ¶36.

Because Thornton failed to satisfy the deficient performance prong of the ***Strickland*** analysis, we need not consider the prejudice prong. ***Strickland***, 466 U.S. at 697. For the sake of completeness, we elect to explain why Thornton also did not satisfy that aspect of the analysis.

Thornton argued that when assessing prejudice, "it is the cumulative effect of all of the errors that must be considered, [and] the newly discovered evidence discussed [i]n Thornton's direct appeal ... must be taken into account as well." Thornton, however, did not identify any errors in his case, let alone an accumulation of errors.

The claim of newly discovered evidence is barred because Thornton unsuccessfully pursued that claim on direct appeal in ***Thornton I***, and he cannot raise that claim again. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). The claims that Thornton asserted in his WIS. STAT. § 974.06

motion are barred because he has not demonstrated that they are clearly stronger than the claim that counsel litigated on his behalf in ***Thornton I***. ***Romero-Georgana***, 360 Wis. 2d 522, ¶46. Accordingly, Thornton cannot prevail on his allegation of cumulative prejudice: "Zero plus zero equals zero." ***State v. Brown***, 85 Wis. 2d 341, 353, 270 N.W.2d 87 (Ct. App. 1978) (citation omitted).

We conclude that Thornton failed to satisfy both the deficiency prong and the prejudice prong of the ***Strickland*** analysis. The circuit court therefore properly denied his postconviction motion without a hearing. Accordingly, we affirm.

IT IS ORDERED that the circuit court's 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