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DISTRICT I

March 3, 2026

To:

Hon. Laura Crivello
Circuit Court Judge
Electronic Notice

Eliot M. Held
Electronic Notice

Anna Hodges
Clerk of Circuit Court
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Electronic Notice

Marcus J. Harris, Jr. 511600
Fox Lake Correctional Institution
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You are hereby notified that the Court has entered the following opinion and order:

2024AP1464

State of Wisconsin v. Marcus J. Harris, Jr. (L.C. # 2018CF13)

Before White, C.J., Colón, P.J., and Donald, 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).

Marcus J. Harris, Jr., pro se, appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 postconviction motion without a hearing. He also appeals from the order denying his motion for reconsideration. 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 The orders are summarily affirmed.

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

A jury convicted Harris of armed robbery, first-degree reckless injury with the use of a dangerous weapon, and possession of a firearm by a felon, all as a repeater. He was sentenced to 29 years' imprisonment. With the assistance of counsel, Harris filed a postconviction motion for resentencing, asserting that trial counsel was ineffective for failing to present mitigating facts and arguing that the trial court sentenced him without "complete information about [his] background." The trial court denied the motion.² Harris appealed, arguing that trial counsel had been ineffective for failing to raise or investigate mitigating circumstances for sentencing and that the trial court erroneously exercised its discretion during the trial when it prohibited him from introducing evidence that a victim in a different incident had misidentified him.³ *See State v. Harris*, No. 2021AP789-CR, unpublished slip op., ¶17 (WI App Jan. 10, 2023). We affirmed.

In May 2024, Harris filed the pro se postconviction motion that underlies this appeal. He specified five issues: (1) he did not receive a fair trial because the State "knowingly put witnesses on the stand who would give false impeac[h]able testimony"; (2) he was deprived of due process and equal protection by the State's behavior; (3) trial counsel was ineffective "for not performing above standards [of] professional reasonableness"; (4) "whether appellant [sic] counsel addressed trial counsel's ineffective performance on the misidentification claim"; and (5) cumulative error warrants "a review of the totality of circumstances."

² The Honorable T. Christopher Dee presided over trial, sentencing, and the initial postconviction proceedings and is referred to as the trial court herein. The Honorable Laura Crivello denied the postconviction motion that is the subject of this appeal and is referred to as the circuit court herein.

³ The victim in another robbery had identified Harris as the perpetrator of that robbery from a photo array; one of the victims in this case had also identified Harris as the perpetrator from such an array. However, Harris could not have committed the other robbery because he was in jail on the date it allegedly took place. Thus, Harris wanted to introduce evidence of the misidentification in the other case "to attack the fairness and reliability of photo lineups." *See State v. Harris*, No. 2021AP789-CR, unpublished slip op., ¶¶6-7 (WI App Jan. 10, 2023).

The circuit court denied the motion. First, the court found the motion was “predicated upon conclusory and undeveloped arguments and unsubstantiated claims of prosecutorial misconduct.” Second, the court noted that Harris had failed to show how any of his current arguments were stronger than those raised by appellate counsel, so the motion was procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Finally, the circuit court observed in a footnote that to the extent that Harris was attempting to raise issues already pursued in the first appeal, he was barred from relitigating those issues by *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Harris moved for reconsideration, disputing the circuit court’s conclusions. The circuit court denied reconsideration, unpersuaded that Harris’s issues were clearly stronger than those raised by counsel. Harris appeals.

Under WIS. STAT. § 974.02(1), an appeal in a criminal case from a judgment of conviction and/or from an order denying a postconviction motion shall be taken in the time and manner provided in WIS. STAT. § 808.04(3) and WIS. STAT. RULE 809.30. Once that time has expired or been exhausted, WIS. STAT. § 974.06 is “the primary method in which a defendant can attack his conviction[.]” *State v. Romero-Georgana*, 2014 WI 83, ¶32, 360 Wis. 2d 522, 849 N.W.2d 668 (quoting *Escalona*, 185 Wis. 2d at 176). A defendant may file a § 974.06 motion at any time after the time for appeal or postconviction remedy provided in § 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.’” *Romero-Georgana*, 360 Wis. 2d 522, ¶34 (citation omitted). Whether a § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier is a question of law that we review de novo. *State v. Kletzien*, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

To move beyond the initial prerequisites of WIS. STAT. § 974.06 and *Escalona-Naranjo* and to adequately raise a claim for relief, a defendant 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.* Whether a § 974.06 motion alleges sufficient facts to require a hearing is also a question of law that we review de novo. *State v. Balliette*, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

The primary problem with Harris’s motion is that it does not offer any reason why the issues in his current motion could not be raised previously. That alone could end our analysis, because lack of a sufficient reason means there is no overcoming the *Escalona-Naranjo* bar. We also agree with the circuit court that Harris’s postconviction motion is conclusory and undeveloped, and therefore insufficient to require a hearing.⁴

However, the circuit court also determined that Harris failed to show that any of the claims in his motion “are clearly stronger than the issues appellate counsel raised on direct appeal,”⁵ and *appellate* counsel’s performance is not reviewable in a WIS. STAT. § 974.06

⁴ Indeed, Harris complains more than once that he should be allowed to have a hearing so as to find evidence in support of his claims. However, Harris must be able to point to concrete evidence in the motion in support; an evidentiary hearing “is not a fishing expedition to discover ineffective assistance[.]” See *State v. Balliette*, 2011 WI 79, ¶68, 336 Wis. 2d 358, 805 N.W.2d 334.

⁵ The State also refers to appellate counsel.

motion.⁶ A claim of ineffective appellate counsel is properly raised by a petition for habeas corpus in the court that heard the direct appeal. *State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 797, 565 N.W.2d 805 (Ct. App. 1997); *State v. Knight*, 168 Wis. 2d 509, 512, 484 N.W.2d 540 (1992). Still, appellate counsel and postconviction counsel are often the same person, *Smalley*, 211 Wis. 2d at 797, and ineffective assistance of postconviction counsel may in some instances be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal, *Romero-Georgana*, 360 Wis. 2d 522, ¶36. Indeed, Harris’s appellate brief asserts, in a single sentence, that the procedural bar should not apply because “his claims are clearly stronger than [what] postconviction counsel raised.” Accordingly, we will assume without deciding that references to appellate counsel in the postconviction motion and circuit court decision may have meant to refer to postconviction counsel.

When a person alleges that they received ineffective assistance of postconviction counsel due to counsel’s failure to raise an issue, the defendant must show that a particular issue is clearly stronger than the issues counsel did present. *Romero-Georgana*, 360 Wis. 2d 522, ¶¶45-46. “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986).

We agree with the circuit court that Harris has failed to show that any of his current claims are clearly stronger than those raised by postconviction counsel. Indeed, Harris’s

⁶ The circuit court did, however, correctly note that because one of the issues appellate counsel did raise on appeal was whether the circuit court erred in forbidding the misidentification testimony, Harris is procedurally barred from relitigating the issue under *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991), regardless of whether other procedural bars apply.

postconviction motion does not acknowledge the clearly stronger burden at all. On appeal, his argument is simply that he has identified five issues compared to the one raised in postconviction counsel's motion. The strength of a claim is not measured in quantities. Accordingly, we are unpersuaded that the circuit court erroneously exercised its discretion in denying an evidentiary hearing on Harris's insufficient claims.

Likewise, we agree with the circuit court's decision to deny Harris's motion for reconsideration. To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. A motion for reconsideration is not a vehicle for making new arguments. See *Lynch v. Crossroads Counseling Ctr., Inc.*, 2004 WI App 114, ¶23, 275 Wis. 2d 171, 684 N.W.2d 141.

Harris's reconsideration motion does not identify any new evidence or establish a manifest error of fact or law but simply makes new arguments. Accordingly, the circuit court did not erroneously exercise its discretion when it denied reconsideration. See *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

Upon the foregoing,

IT IS ORDERED that the orders are 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