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August 3, 2017

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

2016AP974 State of Wisconsin v. Cyrus Linton Brooks (L.C. #2011CF1651)

Before Lundsten, P.J., Sherman and Blanchard, 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).

Cyrus Brooks, pro se, appeals an order that denied Brooks' postconviction motion under WIS. STAT. § 974.06 (2015-16).[1] Brooks contends that his trial counsel was ineffective by failing to: (1) object to testimony by a medical examiner as to the victim's cause of death on the ground

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

that the testimony violated Brooks' confrontation rights because a different medical examiner had performed the autopsy of the victim; (2) investigate footprint evidence obtained from the hood of a car at the crime scene; and (3) preserve Brooks' claim that the State presented knowingly false information at Brooks' preliminary hearing. Brooks contends that his postconviction counsel was ineffective by failing to raise those arguments in Brooks' direct postconviction motion. 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. We summarily affirm.

In March 2011, the State charged Brooks with first-degree reckless homicide as a party to the crime for the shooting death of Terry Baker in October 2005. Brooks was convicted following a jury trial. Brooks, by counsel, filed a postconviction motion arguing that: (1) Brooks was denied his constitutional speedy trial rights; (2) Brooks was entitled to a new trial based on newly discovered evidence, in the form of affidavits of individuals claiming knowledge of the shooting and indicating that others were involved and that a State's witness had been paid to implicate Brooks; and (3) Brooks' trial counsel was ineffective by failing to subpoena Michael Henderson to testify at trial, following Henderson's testimony at the preliminary hearing that Henderson witnessed only Brooks' codefendant Maurice Stokes at the scene of the shooting. The circuit court denied the motion, and we affirmed on appeal.

In April 2016, Brooks initiated this action by filing a pro se motion for postconviction relief under WIS. STAT. § 974.06. The circuit court denied the motion without a hearing.

If a WIS. STAT. § 974.06 motion sets forth sufficient material facts that, if true, would entitle the defendant to relief, the defendant is entitled to a hearing on the motion. ***State v.***

Balliette, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. We independently review whether a defendant is entitled to a hearing on a § 974.06 motion. ***Id.*** "[I]f the motion does not raise such facts, 'or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,' the grant or denial of the motion is a matter of discretion entrusted to the circuit court." ***Id.*** (quoted source omitted).

When, as here, a WIS. STAT. § 974.06 motion follows a prior postconviction motion, a defendant must show a "sufficient reason" for failing to previously raise the issues in the current motion. ***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, be a "sufficient reason" as to why an issue was not raised earlier. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To demonstrate ineffective assistance of postconviction counsel, a defendant must show that the issues the defendant believes that counsel should have raised were clearly stronger than the claims counsel pursued in a postconviction motion, "by alleging 'sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle him to the relief he seeks.'" ***State v. Romero-Georgana***, 2014 WI 83, ¶58, 360 Wis. 2d 522, 849 N.W.2d 668 (quoted source omitted). Whether a § 974.06 motion alleges a sufficient reason for failing to raise an issue earlier is a question of law that we review independently. ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

A claim of ineffective assistance of counsel must establish that counsel's performance was deficient and that the defendant was prejudiced by that deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must identify specific acts or omissions of counsel that "were outside the wide range of professionally competent assistance." ***Id.*** at 690. To establish prejudice, a defendant must show that there is "a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. When a defendant alleges that postconviction counsel was ineffective by failing to pursue a claim of ineffective assistance of trial counsel, the defendant must establish that trial counsel was, in fact, ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. A claim that trial counsel was ineffective must set forth the relevant facts as to the "who, what, where, when, why and how" counsel was ineffective. ***State v. Allen***, 2004 WI 106, ¶36, 274 Wis. 2d 568, 682 N.W.2d 433. Moreover, "a defendant who alleges in a [WIS. STAT.] § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought." ***Romero-Georgana***, 360 Wis. 2d 522, ¶4.

Brooks contends that he need not demonstrate that his current issues are "clearly stronger" than the issues his postconviction counsel pursued in order to demonstrate that his postconviction counsel was ineffective. He argues that the "clearly stronger" test is not the only means of establishing ineffective assistance of counsel. In support, Brooks cites federal case law setting forth the standard for overcoming the procedural bar to obtain review in a federal habeas corpus action. *See, e.g.*, ***Freeman v. Lane***, 962 F.2d 1252 (7th Cir. 1992) (petitioner not barred from raising claims in federal habeas corpus action despite failing to raise claims in earlier state appeal; petitioner's direct appeal counsel was ineffective by failing to raise issue in direct state appeal that warranted relief in federal court). We are not persuaded. Our supreme court stated in ***Romero-Georgana*** that the "clearly stronger" standard applies to claims of ineffective assistance of postconviction counsel following a direct postconviction motion. *See* ***Romero-Georgana***, 360

Wis. 2d 522, ¶46 ("The 'clearly stronger' standard is appropriate when postconviction counsel raised other issues before the circuit court, thereby making it possible to compare the arguments now proposed against the arguments previously made."). Nothing in the federal cases that Brooks cites provides a different standard for a WIS. STAT. § 974.06 motion following an earlier direct postconviction motion. Thus, at the outset, Brooks has failed to overcome the ***Escalona-Naranjo*** procedural bar because he has not attempted to demonstrate that the issues he raises now are "clearly stronger" than the issues his postconviction counsel pursued on his behalf. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶46.

Moreover, Brooks has not set forth sufficient material facts that, if true, would entitle him to relief. Brooks contends first that his trial counsel should have objected to testimony by the medical examiner called by the State to testify as to the cause of Baker's death. Brooks asserts that he was denied his constitutional right of confrontation because the medical examiner who testified to Baker's cause of death was not the medical examiner who performed Baker's autopsy. Brooks contends that, before the results of the autopsy could be used against him, he had a constitutional right to confront the medical examiner who performed the autopsy. *See* ***State v. Manuel***, 2005 WI 75, ¶36, 281 Wis. 2d 554, 697 N.W.2d 811 ("'The Confrontation Clauses of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront the witnesses against them.'" (quoted source omitted)). Brooks asserts that the testifying medical examiner merely acted as a conduit for the opinion of the examiner who performed the autopsy and thus violated Brooks' confrontation rights. *See* ***Bullcoming v. New Mexico***, 564 U.S. 647 (2011) (crime lab report admitted through the testimony of an analyst, who played no part in the underlying lab analysis and had no independent opinion about analysis, presented confrontation problem); ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009)

(admission of test results through notarized "certificates of analysis" rather than the performing analyst's testimony violated the Confrontation Clause). Brooks contends that the State did not prove that the medical examiner who performed the autopsy was "unavailable," and thus the testimony by a different medical examiner was impermissible. *See* ***Manuel***, 281 Wis. 2d 554, ¶¶23, 36 ("'[W]here testimonial hearsay evidence is at issue, the Sixth Amendment demands what the common law required: (1) unavailability and (2) a prior opportunity for cross-examination.'" (quoted source omitted; internal quotation marks omitted)). We do not agree with Brooks that his confrontation rights were violated.

In ***State v. Williams***, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, our supreme court held "that the presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion," satisfies a defendant's confrontation rights, "despite the fact that the expert was not the person who performed the mechanics of the original tests." ***Id.***, ¶20. In ***State v. Griep***, 2015 WI 40, ¶¶3, 47-57, 361 Wis. 2d 657, 863 N.W.2d 567, the court reiterated that an expert's testimony as to the expert's independent opinion based on a review of the results of tests performed by another analyst does not violate a defendant's confrontation rights.[2] *See* ***id.***, ¶47 ("[E]xpert testimony based in part on tests conducted by a non-testifying analyst satisfies a defendant's right of confrontation if the expert witness: (1) reviewed the analyst's tests, and (2) formed an independent opinion to which he testified at trial."). Here, the testifying medical examiner explained that she was a forensic pathologist for the Milwaukee

[2] To the extent that Brooks contends that ***State v. Griep***, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567, was wrongly decided, we note that only the supreme court may overrule or modify supreme court opinions. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

County Medical Examiner's Office and had performed about 1,300 autopsies. She testified that she reviewed Baker's file, including the autopsy report and photographs, and had reached an independent opinion concerning Baker's cause of death. She testified that it was her opinion, to a reasonable degree of medical certainty, that Baker's cause of death was gunshot wounds to his chest. Also, while Brooks contends that the medical examiner who performed the autopsy was not "unavailable," the testifying examiner testified that the examiner who performed the autopsy had retired. Brooks has not shown that more was required. Thus, Brooks has not established that he was denied his right to confrontation.

Next, Brooks contends that his trial counsel was ineffective by failing to investigate footprint evidence obtained from the hood of a car at the crime scene. He contends that, had his counsel obtained that evidence, it would have shown that the footprints were not his. *See* ***State v. Thiel***, 2003 WI 111, ¶44, 264 Wis. 2d 571, 665 N.W.2d 305 (counsel's performance is deficient if failure to investigate was unreasonable). However, as the State points out, the evidence at trial was that there were *two* men with guns, Brooks and Stokes, chasing Baker before he was killed. Thus, evidence that the footprints did not belong to Brooks would not have been exculpatory.

Finally, Brooks contends that his trial counsel was ineffective by failing to preserve Brooks' claim that the State presented knowingly false information at Brooks' preliminary hearing. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991) (a defendant claiming error at a preliminary hearing can only obtain relief before trial; a fair and errorless trial essentially cures any defect in the preliminary hearing). Brooks asserts that the State "purchased" the testimony of a witness at the preliminary hearing to state that Brooks admitted his involvement in the shooting. However, the evidence that Brooks relies upon is a letter from the assistant district attorney to an administrative law judge (ALJ) stating that the witness had

cooperated with the State by testifying truthfully at the preliminary hearing, and that the State had promised only to make the ALJ aware of the witness's cooperation. Nothing in the letter indicates that the State presented knowingly false information at the preliminary hearing.

Because Brooks has not demonstrated that the claims in his WIS. STAT. § 974.06 motion were clearly stronger than the issues raised in his first postconviction motion, Brooks has not shown that his postconviction counsel was ineffective. Moreover, the facts set forth in Brooks' motion do not establish that Brooks is entitled to relief. Accordingly, the circuit court properly denied Brooks' motion without a hearing.

Therefore,

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

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

Diane M. Fremgen
Clerk of Court of Appeals