



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: www.wicourts.gov

DISTRICT I

March 1, 2022

To:

Hon. Jean M. Kies
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County
Electronic Notice

John D. Flynn
Electronic Notice

Robert Probst
Electronic Notice

Calvin L. Brown 317946
Jackson Correctional Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

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

2021AP362	State of Wisconsin v. Calvin L. Brown (L.C. # 2009CF4830)
2021AP363	State of Wisconsin v. Calvin L. Brown (L.C. # 2009CF4980)

Before Brash, C.J., Donald, P.J., and Dugan, 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).

Calvin L. Brown, *pro se*, appeals an order denying his motion for postconviction relief under WIS. STAT. § 974.06 (2019-20).¹ He claims that his trial counsel was ineffective for failing to ensure his presence at a pretrial hearing and that the circuit court conducted an inadequate plea colloquy. He further claims that his postconviction counsel was ineffective for failing to raise his current allegations in his original postconviction motion. Upon consideration of the briefs

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Brown's claims are procedurally barred, and therefore we summarily affirm.

In 2009, the State charged Brown in two consolidated cases with multiple offenses for his role in a series of robberies. Brown entered pleas of not guilty and special pleas of not guilty by reason of mental disease or defect. Relatedly, he asked the circuit court to appoint a psychiatrist to examine him and assess whether his mental state at the time of the crimes would support his special pleas. The psychiatrist filed a report opining that Brown did not have a major mental illness that would support the special pleas. Soon thereafter, trial counsel appeared on Brown's behalf at a pretrial hearing and advised the circuit court that Brown had reviewed the psychiatrist's report and would be withdrawing his special pleas. At counsel's request, the matters were set for trial.

Brown subsequently resolved the charges with a plea agreement. The circuit court accepted his guilty pleas and found him guilty of three counts of armed robbery, three counts of robbery, and one count of robbery as a party to a crime.

Following sentencing, Brown pursued an unsuccessful postconviction motion and then a direct appeal, both with the assistance of counsel. He claimed that his plea colloquy was defective because the circuit court did not explain the concept of party to a crime liability. We rejected Brown's claim and affirmed the judgment of conviction and the postconviction order. *See State v. Brown (Brown I)*, 2012 WI App 139, 345 Wis. 2d 333, 824 N.W.2d 916.

Brown next filed the postconviction motion underlying the instant appeal. As relevant here, he alleged that: his trial counsel was ineffective for failing to produce him for the pretrial

hearing addressing the psychiatrist’s report; the plea colloquy was deficient because “the trial court failed to adequately inquire into his mental health and his medical condition [of] thyrotoxicosis and its link to psychosis”; and his postconviction counsel was ineffective for failing to raise the foregoing claims in the proceedings underlying *Brown I*.² The circuit court rejected his claims, concluding that they were procedurally barred and that they lacked any merit. Brown appeals.

Pursuant to WIS. STAT. § 974.06(4), a person who wishes to pursue a second or subsequent postconviction motion must demonstrate a sufficient reason for failing to raise or adequately address his or her claims in the first postconviction proceeding. See *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel for failing to raise issues in the original postconviction motion may in some circumstances constitute the sufficient reason required for an additional motion. See *State v. Romero-Georgana*, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. A bare allegation of ineffective assistance of postconviction counsel is not sufficient, however, to satisfy the procedural bar imposed by § 974.06. Rather, a convicted person must “make the case” of counsel’s alleged ineffective assistance. See *State v. Balliette*, 2011 WI 79, ¶67, 336 Wis. 2d 358, 805 N.W.2d 334. Further, the person must demonstrate counsel’s ineffective assistance within the four corners of the postconviction motion, not in a subsequent appellate brief. See *State v. Allen*, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433.

² The postconviction motion also included a claim that Brown’s alleged thyrotoxicosis constituted a new factor warranting sentence modification. The circuit court denied the claim, and Brown does not renew it in his appellate briefs. We deem the claim abandoned and do not discuss it further. See *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (holding that “in order for a party to have an issue considered by this court, it must be raised and argued within its brief”).

We assess claims of ineffective assistance of postconviction counsel by applying the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *Balliette*, 336 Wis.2d 358, ¶28. The test requires that the convicted person show both a deficiency in counsel’s performance and prejudice as a result. See *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.” See *id.* at 688. When—as here—the 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 postconviction counsel pursued. See *Romero-Georgana*, 360 Wis. 2d 522, ¶¶4, 46. 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.” *Strickland*, 466 U.S. at 694. 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. See *id.* at 697.

We begin by considering the deficiency prong, because it is dispositive. To assess whether neglected claims were clearly stronger than those that postconviction counsel pursued, a reviewing court must “compare the issue[s] not raised in relation to the issues that were raised[.]” See *Lee v. Davis*, 328 F.3d 896, 900 (7th Cir. 2003). The burden is on the convicted person to show the reviewing court that he or she has satisfied the “clearly stronger” standard. See *Romero-Georgana*, 360 Wis. 2d 522, ¶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.” See *id.* (citation omitted).

In this case, Brown acknowledged in his postconviction motion that he was required to satisfy the “clearly stronger” standard, but he failed to apply it. He did not examine the specifics of both the current and prior claims and he did not analyze the comparative merits of the original claim in relation to the new claims. He merely stated that his postconviction counsel did not raise his current claims in his original postconviction motion and that his current claims were stronger than the claim pursued in *Brown I*. These conclusory assertions are patently inadequate to carry the burden described by our supreme court in *Romero-Georgana*.

We note that the State’s brief in this court provides a thorough analysis of why Brown’s current claims, if not procedurally barred, should be denied as meritless. We will not review that analysis here. As we have explained, Brown was required to show in his postconviction motion why his current claims are clearly stronger than the claim pursued in *Brown I*. Brown’s failure to conduct the required analysis supports our decision to affirm the circuit court’s order. Further discussion is unwarranted. See *State v. Hughes*, 2011 WI App 87, ¶14, 334 Wis. 2d 445, 799 N.W.2d 504 (explaining that we decide cases on the narrowest possible grounds).

Therefore,

IT IS ORDERED that the postconviction order is summarily affirmed. See WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals