



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

December 13, 2022

To:

Hon. Milton L. Childs Sr.
Circuit Court Judge
Electronic Notice

Sonya Bice
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Frederick Bernard Linder Jr. 185708
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2021AP1988

State of Wisconsin v. Frederick Bernard Linder, Jr.
(L.C. # 2016CF3561)

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

Frederick Bernard Linder, Jr., *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 object to an alleged breach of the plea agreement and that his postconviction counsel was ineffective in turn for failing to pursue this issue in postconviction proceedings. Linder further alleges that his postconviction counsel was ineffective for failing to challenge the circuit court's exercise of sentencing discretion. Based upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary

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

disposition. *See* WIS. STAT. RULE 809.21. Because the circuit court correctly determined that Linder's claims are procedurally barred, we summarily affirm.

In 2016, the State charged Linder with second-degree reckless injury and with hit and run causing great bodily injury. Pursuant to a plea agreement, Linder pled guilty as charged. The State, for its part, agreed to recommend a global disposition of six to eight years of initial confinement and five years of extended supervision; to remain silent regarding whether the aggregate sentences should be concurrent or consecutive to the sentence that he was already serving; and to refrain from bringing additional charges for solicitation or for conspiracy to commit either perjury or witness intimidation. At sentencing, the circuit court imposed a concurrent, aggregate twenty-three year term of imprisonment bifurcated as fifteen years of initial confinement and eight years of extended supervision.

Following sentencing, Linder sought postconviction relief in an original and supplemental motion under WIS. STAT. RULE 809.30. First, he requested fifty-six days of sentence credit in addition to the 171 days of credit awarded at sentencing. The circuit court granted that request and awarded him fifty-six days of additional sentence credit. Second, Linder sought postconviction relief on the ground that he had received ineffective assistance of counsel. He claimed that his trial counsel performed deficiently in the plea negotiation process by erroneously advising Linder in regard to the potential additional charges he faced and the sentences that could be imposed if he were convicted of those additional crimes. Linder further alleged that he was prejudiced because he would not have pled guilty but for trial counsel's erroneous advice. The circuit court rejected this claim. Linder appealed the judgment of conviction and the adverse postconviction order. We affirmed. *See State v. Linder (Linder I)*, No. 2019AP1659-CR, unpublished slip op., ¶¶1-2 (WI App. Jan. 5, 2021).

Linder next filed the postconviction motion underlying the instant appeal. He alleged that: (1) his trial counsel was ineffective for failing to object to the State’s sentencing remarks because, he said, they constituted a breach of the plea agreement; (2) his postconviction counsel was ineffective in turn for failing to raise that claim; and (3) his postconviction counsel was also ineffective for failing to challenge the circuit court’s exercise of sentencing discretion. The circuit court rejected his claims, concluding that Linder had failed to overcome the procedural bar to serial litigation. Linder 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 postconviction motion. *See 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 is not sufficient to satisfy the procedural bar imposed by § 974.06. *See id.* 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.

To prove ineffective assistance of postconviction counsel, a convicted person must satisfy 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. 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. See *State v. Reinwand*, 2019 WI 25, ¶18, 385 Wis. 2d 700, 924 N.W.2d 184. 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 *Strickland*, 466 U.S. at 697.

In this case, we begin by considering the deficiency prong. When—as here—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. See *Romero-Georgana*, 360 Wis. 2d 522, ¶¶4, 46. 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, Linder failed to conduct the analysis required to satisfy the “clearly stronger” standard: he did not examine the specifics of both the current and prior claims, and he did not analyze the comparative merits of the original claims in relation to the new claims. Indeed,

Linder failed to allege that the issues he sought to pursue in his second postconviction motion were clearly stronger than the issues that his postconviction counsel pursued on his behalf. Accordingly, he did not carry his burden to show that his postconviction counsel performed deficiently.

Linder acknowledges on appeal that he “in fact did not argue word for word that the issues now raised were clearly stronger” than his original claims, but he contends that he did everything required of a *pro se* litigant because he offered “extensive argument on counsel’s failure to object and raise issues on direct review.” In support of this position, he directs our attention to *bin-Rilla v. Israel*, 113 Wis. 2d 514, 335 N.W.2d 384 (1983). There, our supreme court reminded us that “[n]either a trial nor an appellate court should deny a prisoner’s pleading based on its label rather than on its allegations. If necessary the court should relabel the prisoner’s pleading and proceed from there.” *Id.* at 521 (footnote omitted).

The discussion in *bin-Rilla* does not aid Linder. Neither the circuit court nor this court has denied him relief on the ground that he mislabeled his claim for relief. Rather, the circuit court correctly determined that Linder’s postconviction motion lacked an essential component of a second or subsequent motion filed under WIS. STAT. § 974.06. Specifically, Linder failed to offer an argument comparing his original postconviction claims with his current claims and showing with specificity why the latter claims are clearly stronger than the claims that his postconviction counsel raised originally. As we explained long ago, “[o]ur obligation to liberally construe a *pro se* litigant’s pleading assumes that the litigant has otherwise made a proper argument for relief, albeit under the wrong label. Our obligation does not extend to creating an issue and making an argument for the litigant.” See *State ex rel. Harris v. Smith*, 220 Wis. 2d 158, 164-65, 582 N.W.2d 131 (Ct. App. 1998).

In this case, Linder did not allege or argue that his current claims are clearly stronger than the claims that his postconviction counsel pursued on his behalf in the original postconviction litigation. He therefore failed to satisfy the deficiency prong of his claim that postconviction counsel was ineffective. *See Romero-Georgana*, 360 Wis. 2d 522, ¶46. Accordingly, we need not consider the prejudice prong of the analysis. *See Strickland*, 466 U.S. at 697. For all the foregoing reasons, we affirm.

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