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DISTRICT IV

June 15, 2023

To:

Hon. Daniel S. Diehn
Circuit Court Judge
Electronic Notice

Jacob J. Wittwer
Electronic Notice

Heather Bravener
Clerk of Circuit Court
Clark County Courthouse
Electronic Notice

Daniel D. Utecht 209056
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Stanley, WI 54768

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

2022AP260

State of Wisconsin v. Daniel D. Utecht

2022AP261

(L.C. ## 2012CF56 and 2012CF57)

Before Kloppenburg, Fitzpatrick, and Graham, 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).

Daniel Utecht, *pro se*, appeals a circuit court order denying his postconviction motion brought pursuant to WIS. STAT. 974.06 (2021-22).¹ Utecht argues that his postconviction counsel rendered constitutionally ineffective assistance by not raising multiple claims of ineffective assistance of trial counsel in Utecht's first postconviction motion. After review of the briefs and record, we conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21. We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version.

Background

In May 2013, Utecht was convicted after a jury trial of two counts of repeated sexual assault of a child. There is nothing in the record suggesting that Utecht filed a timely notice of intent to pursue postconviction relief within twenty days after his sentencing, or at any other time after that. Utecht retained postconviction counsel, who filed a postconviction motion in May 2014 on Utecht's behalf, arguing that Utecht's trial counsel was ineffective on multiple grounds. The circuit court denied Utecht's postconviction motion after a *Machner*² hearing. Utecht, by his retained counsel, appealed. In a per curiam opinion affirming the decision of the circuit court, this court determined that Utecht's motion for postconviction relief was filed under WIS. STAT. § 974.06, despite being labeled on its face as a motion pursuant to WIS. STAT. § 974.02(1) and WIS. STAT. RULE 809.30. See *State v. Utecht*, Nos. 2015AP886 and 2015AP887, unpublished slip op. (WI App May 26, 2016).

In January 2020, Utecht filed two petitions for writ of habeas corpus, alleging that he received ineffective assistance of postconviction or appellate counsel. This court denied the petitions *ex parte*, concluding that “we must reject Utecht's claims because his first postconviction motion and appeal were under WIS. STAT. § 974.06, and a defendant does not have a right to effective assistance of counsel in that type of proceeding.” See *State ex rel. Utecht v. Richardson*, Nos. 2020AP185-W and 2020AP186-W, unpublished slip op. & order at 1 (WI App Oct. 15, 2020).

² *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Utecht filed another two petitions for writ of habeas corpus in July 2021, alleging that appellate counsel was ineffective for failing to raise additional claims of ineffective assistance of trial counsel in Utecht's direct appeal. Utecht contended that his original postconviction motion and appeal should have been recognized as proceedings under WIS. STAT. RULE 809.30, not WIS. STAT. § 974.06. Utecht argued that he timely filed notices of intent, but that the circuit court clerk failed to properly enter them into the docket. Utecht further argued that his appellate counsel was ineffective for failing to mount a challenge to this court's determination that Utecht's first postconviction motion was a § 974.06 proceeding. This court assumed without deciding that Utecht had set forth a basis to reach the merits of his petitions. Nonetheless, we denied the petitions *ex parte*. See *State ex rel. Utecht v. Buesgen*, Nos. 2021AP1131-W and 2021AP1132-W, unpublished slip op. and order (WI App Aug. 12, 2021). We stated:

It appears from Utecht's petition that he is asserting claims of ineffective assistance of trial counsel that his postconviction counsel did not include in the postconviction motion. Because those claims could not have been raised on appeal, appellate counsel was not ineffective for failing to raise them. Rather, the proper forum for Utecht to pursue his claims of ineffective assistance of postconviction counsel for failing to pursue claims of ineffective assistance of trial counsel is in the circuit court under WIS. STAT. § 974.06.

Id. at 4.

Utecht went on to file a second postconviction motion in the circuit court, seeking relief pursuant to WIS. STAT. § 974.06. Utecht labeled the motion as a "Rothering petition," citing *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996) (explaining that § 974.06(4) requires a sufficient reason to raise an issue in a § 974.06 motion that could have been raised on direct appeal or in a motion under WIS. STAT. § 974.02). Utecht alleged claims of ineffective assistance of postconviction or appellate counsel for failure

to raise multiple additional ineffective assistance of trial counsel claims in his direct appeal. The circuit court concluded that Utecht had failed to provide a sufficient basis for the court to determine that his current allegations are clearly stronger than those claims actually brought by postconviction counsel, citing *State v. Romero-Georgana*, 2014 WI 83, ¶35, 360 Wis. 2d 522, 849 N.W.2d 668, and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Utecht appeals.

Discussion

On appeal, Utecht seeks an acquittal or a new trial based on the numerous allegations of ineffective assistance of counsel alleged in his second postconviction motion, which he called a “Rothering petition.” The State contends that all of Utecht’s claims are procedurally barred under *Escalona-Naranjo* because Utecht fails to show that the claims he is making now are clearly stronger than the claims that were raised in his first postconviction motion. The State also argues that Utecht cannot claim ineffective assistance of counsel as a sufficient reason under WIS. STAT. § 974.06(4) for failure to bring the claims earlier because his first postconviction motion was a collateral attack on his conviction pursuant to § 974.06, for which there is no constitutional right to counsel. Utecht disputes this point in the reply brief. Utecht asserts, as he did in his writ petitions filed in July 2021, that his first postconviction motion should have been characterized as a motion filed under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30. We will assume without deciding the issue that Utecht is correct and that he had the right to effective assistance of counsel in the proceedings on his first postconviction motion.

To establish ineffective assistance of counsel, a person must show that counsel performed deficiently and that the deficient performance prejudiced his defense. *Strickland v. Washington*,

466 U.S. 668, 687 (1984). In addition, a person arguing that postconviction/appellate counsel provided ineffective assistance must also show that the claims the person contends should have been raised are clearly stronger than the issues that postconviction counsel chose to pursue. ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶45-46.

Despite the voluminous nature of his appellate filings, Utecht fails to develop any argument showing that the ineffective assistance of trial counsel claims he currently raises are clearly stronger than the arguments that postconviction counsel raised in his first postconviction motion. In the absence of such a showing, we conclude that Utecht's claims are procedurally barred under ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶45-46.

IT IS ORDERED that the order of the circuit court 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