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 II

June 14, 2023

To:

Hon. Kristin Cafferty
Circuit Court Judge
Electronic Notice

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

Kara Lynn Janson
Electronic Notice

Charles Brown, #624255
Redgranite Correctional Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2022AP383 State of Wisconsin v. Charles Brown (L.C. #2014CF375)

Before Neubauer, Grogan and Lazar, 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).

Charles Brown, pro se, appeals an order denying his WIS. STAT. § 974.06 (2021-22)[1] motion for postconviction relief. He raises a vast array of arguments—primarily ineffective assistance of counsel—challenging the circumstances surrounding the entry of his plea to possession with intent to distribute heroin. Based upon our review of the briefs and Record, we

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.[2]

Brown was convicted upon his guilty plea to possession of more than fifty grams of heroin with intent to distribute, contrary to WIS. STAT. § 961.41(1m)(d)4. He then filed a WIS. STAT. RULE 809.30 motion for postconviction relief alleging that his trial counsel was constitutionally ineffective for failing to file suppression motions challenging "the unwarranted dog sniff and frisk" that occurred following the traffic stop that led to the discovery of the drugs. During the ***Machner*** hearing[3] on the motion, counsel testified he discussed filing a suppression motion with Brown, but Brown wanted to cooperate with law enforcement and be released on bond, so they "did not explore that avenue." The circuit court denied the postconviction motion, finding that the decision not to file suppression motions was animated by strategic considerations. We affirmed this determination and also rejected an additional claim Brown made based on ***Brady v. Maryland***, 373 U.S. 83 (1963). *See* ***State v. Brown***, No. 2019AP102-CR, unpublished op. and order (WI App Mar. 3, 2021).[4]

---

[2] After this appeal was submitted on briefs, Brown filed a motion to stay this appeal and remand to the circuit court for additional proceedings under WIS. STAT. § 808.075(5) and (6). This is his second such motion: he previously filed a motion to stay the appeal and remand for the circuit court to address a sentence modification motion, which we denied. Now, he seeks to raise the issue that one of the officers involved in his arrest manufactured reasonable suspicion to justify the traffic stop by taking his front license plate from his windshield and placing it in his rear seat.

We note that issue was raised in his WIS. STAT. § 974.06 postconviction motion and in his brief-in-chief and as such is part of our consideration of this appeal. Accordingly, we conclude he has not demonstrated good cause for the relief requested, and we deny the motion to stay and remand.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (1979).

[4] In 2018, Brown had filed a second WIS. STAT. RULE 809.30 postconviction motion concerning the ***Brady*** issue, which the circuit court had denied without a hearing.

In January 2022, Brown filed the pro se WIS. STAT. § 974.06 motion that is the subject of this appeal. Among many claims, Brown asserted that his postconviction counsel was constitutionally ineffective for failing to subpoena the deputies that had performed the traffic stop to testify at the ***Machner*** hearing; that his sentence was based on inaccurate information that he possessed 210 grams of heroin when in fact he possessed only 202 grams; that his trial attorney had a conflict of interest as demonstrated by counsel's statements to postconviction counsel that Brown had "puked all over himself" (i.e., made highly inculpatory statements to law enforcement); and that the State had violated ***Brady*** by failing to disclose a police report regarding the pat-down search of Brown. Brown also requested sentence modification. The circuit court denied the motion without a hearing. Brown now appeals.

The State's brief adequately sets forth the law governing review of a WIS. STAT. § 974.06 postconviction motion under circumstances where the defendant has pursued a direct appeal. In summary, all grounds for relief available to a person under § 974.06 must be raised on direct appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 173, 517 N.W.2d 157 (1994). Any grounds for relief that have been finally adjudicated, waived or not raised in a prior postconviction motion may not become the basis for a subsequent § 974.06 motion absent the defendant presenting a sufficient reason for not having earlier raised the matter. ***Escalona-Naranjo***, 185 Wis. 2d at 181.

Ineffective assistance of postconviction counsel may constitute a sufficient reason for why an issue which could have been raised on direct appeal was not. ***State ex rel. Rothering v.***

McCaughtry, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).[5] To demonstrate ineffective assistance of counsel in the postconviction context, a defendant must establish that the claims he or she believes counsel should have raised were "clearly stronger" than the claims that were actually raised. ***State v. Romero-Georgana***, 2014 WI 83, ¶46, 360 Wis. 2d 522, 849 N.W.2d 668.

Brown's assertions that his trial attorney was constitutionally ineffective for failing to file a motion to suppress and for failing to file a ***Brady*** motion were previously litigated and cannot again be pursued. Both claims have been rejected on their merits by this court as part of Brown's last appeal.[6] "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Brown's remaining postconviction claims are procedurally barred under ***Escalona-Naranjo***. He argues that his postconviction attorney was constitutionally ineffective for not bringing to the fore the issues he now desires to raise. But even if we liberally construe his pro se filings, *see* ***Romero-Georgana***, 360 Wis. 2d 522, ¶69, he does not come close to meeting the "sufficient reason" standard for evading the procedural bar. In particular, his

[5] Ineffective assistance of appellate counsel may also constitute a sufficient reason, but here Brown focuses only on the effectiveness of his postconviction counsel for failing to preserve issues for appeal.

[6] Brown raises a plethora of new arguments that he contends would have supported a suppression motion. But this court's prior determination that Brown made a strategic decision to forego suppression in an effort to cooperate with law enforcement renders the purported basis for any suppression motion largely irrelevant. Brown's experienced trial counsel testified at the earlier ***Machner*** hearing that the notion of turning the State's evidence is incompatible with attempts to litigate oneself out of the prosecution.

postconviction motion failed to articulate why the issues he now wishes to raise were clearly stronger than the issues postconviction counsel chose to present. *See* ***id.***, ¶¶45-46. Brown's WIS. STAT. § 974.06 postconviction motion mentioned the "clearly stronger" standard only once in passing; he failed to perform the requisite analytical exercise of comparing the strength of the arguments he now raises with the strength of the arguments his postconviction counsel previously pursued.[7]

Brown's final argument is that he is entitled to sentence modification based on the existence of a new factor, namely the COVID-19 pandemic.[8] The State concedes this type of relief may be pursued at any time, *see* ***State v. Noll***, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895, and it does not argue the ***Escalona-Naranjo*** bar applies to this claim. Nonetheless, the State argues—and we agree—that the COVID-19 pandemic does not constitute a new factor, which is defined as a fact or set of facts highly relevant to the imposition of the sentence, but not known to the judge at the time of the original sentencing, either because it was not then in existence or because it was unknowingly overlooked by the parties. ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828. COVID-19 and similar public health

[7] We do not abandon our neutrality to develop arguments on a party's behalf. ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. Even if we were to overlook Brown's failure to develop any "clearly stronger" argument, it is apparent on the face of his submissions that many of the claims he wishes to raise do not meet this standard.

[8] The World Health Organization declared a global pandemic of Coronavirus Disease 2019 (COVID-19) on March 11, 2020, due to widespread human infection worldwide.

concerns were not highly relevant to Brown's sentence, which was based on his failure to take responsibility for dealing heroin,[9] his criminal record, and the quantity of heroin involved.

Therefore,

IT IS ORDERED that the motion to stay the appeal and remand to the circuit court is denied.

IT IS FURTHER ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals

[9] Despite his plea, Brown maintained to the presentence investigation report author that he was merely transporting the heroin on behalf of a friend that he happened to meet at a mall prior to the traffic stop.