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DISTRICT I

December 3, 2024

To:

Hon. Ellen R. Brostrom
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Sara Lynn Shaeffer
Electronic Notice

Sean Tywan Tatum 535468
Columbia Corr. Inst.
P.O. Box 900
Portage, WI 53901-0900

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

2022AP2011 State of Wisconsin v. Sean Tywan Tatum (L.C. # 2014CF3098)

Before Donald, P.J., Geenen and Colón, 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).

Sean Tywan Tatum, *pro se*, appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 (2021-22)[1] postconviction motion without a hearing. 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. The order is summarily affirmed.

In January 2015, a jury convicted Tatum of first-degree sexual assault with use of a dangerous weapon as party to a crime. The trial court sentenced him to thirty-five years'

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

imprisonment.[2] Tatum filed a postconviction motion for a new trial, alleging that trial counsel had been ineffective for failing to challenge admission of the DNA analyst's report, which Tatum argued contained inadmissible hearsay. The trial court denied the motion.[3] We affirmed. ***State v. Tatum***, No. 2016AP1418-CR, unpublished op. and order (WI App June 28, 2017).

In September 2022, Tatum filed the WIS. STAT. § 974.06 motion underlying this appeal. He alleged that postconviction counsel was ineffective "for failing to challenge … several acts and omissions of trial counsel that constitute ineffective assistance." The circuit court[4] denied the motion without a hearing, concluding Tatum's allegations were merely conclusory and, thus, the motion was subject to the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Tatum appeals.

Absent a sufficient reason, a defendant may not bring claims in a WIS. STAT. § 974.06 motion if the claims could have been raised in a prior motion or direct appeal. *See* ***Escalona***, 185 Wis. 2d at 185; ***State v. Romero-Georgana***, 2014 WI 83, ¶34, 360 Wis. 2d 522, 849 N.W.2d 668. Certain claims, like claims of ineffective assistance of trial counsel, must be preserved for appeal by a postconviction motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). Thus, ineffective assistance of postconviction counsel for failing to preserve a claim may sometimes constitute a sufficient reason for not raising that claim in an earlier proceeding. *See* ***id.*** at 682.

[2] The Honorable Timothy G. Dugan presided at trial and imposed sentence.

[3] The Honorable Ellen R. Brostrom denied the postconviction motion.

[4] The Honorable David A. Borowski denied the WIS. STAT. § 974.06 motion and will be referred to herein as the circuit court.

In order for Tatum to obtain an evidentiary hearing based on postconviction counsel's alleged ineffectiveness, he must do more than just assert that his postconviction counsel was ineffective for failing to raise certain issues. *See* ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. A defendant alleging that postconviction counsel was ineffective for failing to bring certain claims must demonstrate that the claims he now wishes to bring are clearly stronger than the claims postconviction counsel actually brought. ***Romero-Georgana***, 360 Wis. 2d 522, ¶73.

From Tatum's WIS. STAT. § 974.06 motion and supporting affidavit, the circuit court discerned at least nine issues Tatum thinks postconviction counsel should have raised. The circuit court denied Tatum's motion on grounds that it "fails to discuss, let alone show, why his new claims are clearly stronger than the claim postconviction counsel raised…. Merely acknowledging the 'clearly stronger' standard, as [Tatum] did in his motion, is not sufficient."

On appeal, Tatum renews only two of the claims identified in his motion: a claim that postconviction counsel should have challenged the joinder of Tatum's trial with that of a codefendant, and a claim that Tatum's Fourth and Fifth Amendment rights were violated when police collected a DNA sample without a warrant or ***Miranda***[5] warnings.

[5] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

On appeal, Tatum also asserts that the State "conceded to the claims." This argument appears premised on deficiencies perceived by Tatum in the circuit court's decision. While it is true that "[u]nrefuted arguments are deemed conceded," *see* ***State v. Verhagen***, 2013 WI App 16, ¶38, 346 Wis. 2d 196, 827 N.W.2d 891, we do not impute the circuit court's decision to the State when applying that doctrine.

We agree with the circuit court's analysis. "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Here, Tatum did not allege sufficient material facts to avoid application of the ***Escalona*** procedural bar or otherwise earn relief. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶58.

Therefore,

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

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

Samuel A. Christensen
Clerk of Court of Appeals