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**DISTRICT I**

April 22, 2025

To:

Hon. Ellen R. Brostrom  
Circuit Court Judge  
Electronic Notice

Anne Christenson Murphy  
Electronic Notice

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

Darnell Scott 338292  
Racine Correctional Inst.  
P.O. Box 900  
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You are hereby notified that the Court has entered the following opinion and order:

2023AP1515

State of Wisconsin v. Darnell Scott (L.C. # 2014CF3900)

2023AP1516

State of Wisconsin v. Darnell Scott (L.C. # 2014CF4902)

Before White, C.J., Donald, P.J., and Colón, 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).**

Darnell Scott, *pro se*, appeals from orders of the circuit court denying his “petition for evidentiary hearing” and from orders denying his motion for reconsideration. Based upon our review of the briefs and record, we conclude at conference that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).<sup>1</sup> The orders are summarily affirmed.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

In 2015, Scott pled guilty to third-degree sexual assault, strangulation and suffocation, and intimidating a witness as a repeater. He filed a postconviction motion to modify the sentence, which was denied. We affirmed the convictions and the order denying the postconviction motion. *See State v. Scott*, Nos. 2016AP1261-62-CR, unpublished op. and order (WI App July 18, 2017).

In 2018, Scott filed a *pro se* “petition for habeas corpus,” which the circuit court construed as a WIS. STAT. § 974.06 postconviction motion. Scott alleged “ineffective assistance of trial counsel as well as ineffective assistance in matters in regard to the plea agreement,” and “ineffective assistance of appeal attorney for not raising the issue of ineffective assistance of trial attorney.” The circuit court denied the motion, concluding that Scott “[had] not set forth a viable claim of ineffective assistance of trial or postconviction counsel nor demonstrated that his claims are clearly stronger than the claims postconviction/appellate counsel raised during the direct appeal.” We affirmed. *See State v. Scott*, Nos. 2019AP65-66, unpublished op. and order (WI App Nov. 5, 2019).

In 2023, Scott filed the “petition for evidentiary hearing” underlying these appeals. He alleged ineffective assistance of trial and postconviction counsel,<sup>2</sup> as well as “abuse of discretion of the trial court failing to consider all sentencing factors and the failure of the trial court to do a

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<sup>2</sup> The motion actually referred to appellate counsel rather than postconviction counsel, but the circuit court cannot review appellate counsel’s performance. *See State ex rel. Warren v. Meisner*, 2020 WI 55, ¶¶33-36, 392 Wis. 2d 1, 944 N.W.2d 588. Thus, the circuit court construed Scott’s motion as referring to postconviction counsel.

proper conduction of the elemental test.”<sup>3</sup> The circuit court construed the petition as a motion for postconviction relief pursuant to WIS. STAT. § 974.06, and denied it as procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Scott moved for reconsideration, which the circuit court also denied. Scott 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. *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. *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. *Id.* at 682.

Even if we assume that ineffective assistance of postconviction counsel explains why the issues in Scott’s 2023 petition were not raised in the original postconviction proceedings, that ineffectiveness does not explain why the issues in the 2023 petition were not raised in the 2018

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<sup>3</sup> Regarding the “elemental test,” Scott references WIS. STAT. § 939.22(34), which is the statutory definition of sexual contact. When a crime is alleged to have happened through sexual contact, as opposed to sexual intercourse, one element of the crime is that the alleged contact must have been for the purpose of degrading or humiliating the victim, or with the intent for the perpetrator to become sexually aroused or gratified. See *State v. Jipson*, 2003 WI App 222, ¶¶9-10, 13, 267 Wis. 2d 467, 671 N.W.2d 18. This element is sometimes missed in plea colloquies with defendants, and that omission can lead to an invalid plea. See *id.* However, Scott pled guilty to an allegation that he had sexual *intercourse* with the victim without her consent; a review of the definition of sexual contact was not necessary.

habeas petition. In fact, Scott offers no reason for his failure to raise his current issues in the 2018 petition. We therefore conclude they are barred by *Escalona*.<sup>4</sup>

Upon the foregoing, therefore,

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*

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<sup>4</sup> To the extent that any of Scott's claims in his 2023 petition overlap with issues in the 2018 petition, those issues are barred by *State v. Witkowski*, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991). "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *Id.* at 990.