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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

July 2, 2025

To:

Hon. Angelina Gabriele
Circuit Court Judge
Electronic Notice

Hector Salim Al-Homsi
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Wayne J. Hart Jr., #100421
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2023AP2292

State of Wisconsin v. Wayne J. Hart, Jr. (L.C. #2004CF1054)

Before Gundrum, P.J., Neubauer, 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).

Wayne J. Hart, Jr. appeals pro se from an order denying his postconviction motion. 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 (2023-24).¹ We affirm.

In 2005, Hart was found guilty of first-degree intentional homicide and theft of a firearm after a jury trial. Prior to trial, Hart pled no contest to two additional counts, possession of a firearm by a felon and misdemeanor bail jumping.

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

Hart, by counsel, appealed his conviction to this court, arguing that: (1) a sample of his DNA should have been suppressed because it was obtained contrary to the Fourth Amendment; (2) the circuit court should have granted his motions for mistrial because of pretrial publicity, the vandalization of the cars of two jurors, a State's witnesses' testimony about a prior theft by Hart; and (3) the State improperly conducted additional forensic testing during the trial without notice to the court or Hart. *State v. Hart*, No. 2006AP3043-CR, unpublished slip. op., ¶1 (WI App Dec. 12, 2007). We rejected Hart's arguments and affirmed his conviction. *Id.*

In June 2009, Hart filed a pro se postconviction motion requesting that the circuit court amend the judgment of conviction to vacate the DNA surcharge, which the court orally denied during a hearing on December 10, 2009.

In 2021, Hart filed in the circuit court a letter he purportedly sent the Wisconsin Department of Justice. In the letter, he contended, among other things, that the State should not have been permitted to use certain DNA evidence at trial, that he was coerced to plead guilty to the possession of a firearm by a felon count, that a police officer committed perjury at trial, and that his counsel on direct appeal failed to raise these facts in his appeal.

In January 2023, Hart filed the postconviction motion at issue under WIS. STAT. § 974.06. Hart alleged, among other things, that: (1) his trial counsel admitted Hart's guilt during opening and closing statements; (2) counsel should have sought a self-defense jury instruction; and

(3) counsel should have sought to admit evidence of Hart’s purported PTSD.² Hart further asserted that his postconviction attorney provided ineffective assistance of counsel for not raising these errors as claims of ineffective assistance of trial counsel.³

The circuit court denied the motion without a hearing. The court based its denial on the procedural bar explained in *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), noting that Hart failed to allege why he did not previously raise his claims, and therefore failed to meet the “sufficient reason” requirement of WIS. STAT. § 974.06(4). It also concluded that Hart failed to “establish, even at a minimal level, that appellate counsel was ineffective or that [his] claims are superior to the claims raised in” Hart’s direct appeal in 2007. The court determined that the record conclusively demonstrated Hart was not entitled to relief.

Hart now appeals the denial of his postconviction motion. He argues that: (1) trial counsel admitted Hart’s guilt during opening and closing statements; (2) counsel should have sought a self-defense jury instruction; and (3) counsel should have sought to admit evidence of Hart’s purported PTSD at his preliminary hearing and sentencing hearing. He also contends that postconviction counsel was ineffective in failing to pursue these issues. The State responds that Hart’s claims are all procedurally barred by *Escalona-Naranjo*. We agree with the State.

² On appeal, Hart has abandoned his contention that he was coerced into pleading guilty to possession of a firearm and bail jumping and his argument that his counsel on direct appeal should have claimed that he was uniquely susceptible to coercion when she argued his Fourth Amendment rights were violated by the taking of his DNA sample.

³ Here, Hart’s postconviction counsel opted to file a direct appeal, and did not challenge ineffective assistance of trial counsel in a postconviction challenge in the circuit court. Failure to raise a claim of ineffective assistance of trial counsel is not a failure of appellate counsel; it is a failure of postconviction counsel. See *State ex rel. Warren v. Meisner*, 2020 WI 55, ¶5, 392 Wis. 2d 1, 944 N.W.2d 588.

“We need finality in our litigation.” *Escalona-Naranjo*, 185 Wis. 2d at 185. Therefore, any claim that could have been raised in a prior postconviction motion or on direct appeal cannot form the basis for a subsequent motion under WIS. STAT. § 974.06 unless the defendant demonstrates a sufficient reason for failing to raise the claim earlier. *Escalona-Naranjo*, 185 Wis. 2d at 185. In some instances, ineffective assistance of postconviction counsel may constitute a sufficient reason for not raising a claim in an earlier proceeding. See *State v. Romero-Georgana*, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668; *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

To prove ineffective assistance of counsel, the defendant must show that counsel’s “performance was deficient and that the deficien[cy] was prejudicial.” *State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. “An allegation that postconviction counsel failed to bring a claim that should have been brought is an allegation that counsel’s performance was constitutionally deficient.” *Romero-Georgana*, 360 Wis. 2d 522, ¶43. However, to prove the deficiency, among other things, the defendant must show the unraised issue was “clearly stronger” than the issues actually pursued by postconviction counsel. See *id.*, ¶¶44-45. When analyzing whether a postconviction motion is sufficiently pled, courts “review only the allegations contained in the four corners of [the] postconviction motion.” *Allen*, 274 Wis. 2d 568, ¶27.

Whether a defendant’s claim is procedurally barred and whether a sufficient reason exists for the failure to previously assert the claim present questions of law we review de novo. *State v. Kletzien*, 2011 WI App 22, ¶¶9, 16, 331 Wis. 2d 640, 794 N.W.2d 920.

Applying these principles to the case at hand, we conclude that Hart’s postconviction motion is procedurally barred. Hart raises claims in his postconviction motion that he could have raised previously in his direct appeal, and his motion fails to assert any reason, let alone a sufficient reason, for failing to raise these claims earlier. *See Escalona-Naranjo*, 185 Wis. 2d at 185. The postconviction court correctly concluded that Hart’s postconviction motion never alleged a sufficient reason as required by WIS. STAT. § 974.06(4).

Moreover, although Hart’s WIS. STAT. § 974.06 motion alleged various instances of ineffective assistance of trial counsel and postconviction counsel for failing to pursue these issues, his motion fails to assert any basis upon which to show that his claims were “clearly stronger” than the claims postconviction counsel pursued in his direct appeal. Hart’s motion fails to identify how or why any of the unraised issues are clearly stronger than those actually raised by postconviction counsel. For example, Hart made no attempt to weigh the quality of the issues he currently raises against the issues raised by counsel in his direct appeal. In fact, he did not even mention the nature of the claims raised in his direct appeal, which is fatal to his pleading. *See Romero-Georgana*, 360 Wis. 2d 522, ¶¶46 (requiring a comparison between the relative merits of the original claims and the claims made in a § 974.06 motion). Rather than explaining how, exactly, his new claims are clearly stronger than the previously raised ones, Hart makes only a conclusory allegation that his new claims are “clearly robust and stronger.” Again, he does not discuss the claims raised on direct appeal, much less actually compare them or otherwise meaningfully analyze their relative strengths and weaknesses. Therefore, the circuit court properly rejected his motion because it is based on nothing more than conclusory allegations. *Romero-Georgana*, 360 Wis. 2d 522, ¶¶62-63 (explaining that a defendant “must say why the claim he wanted raised was clearly stronger than the claims actually raised” and

concluding that defendant's motion was "devoid of any such explanation"). The court did not err in denying Hart's request for postconviction relief.

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to 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