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DISTRICT III

July 13, 2021

To:

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Circuit Court Judge
Marathon County Courthouse
Electronic Notice

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Clerk of Circuit Court
Marathon County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2020AP701 State of Wisconsin v. Praveen Kharb (L. C. No. 2014CF388)

Before Stark, P.J., Hruz and Seidl, 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).

Praveen Kharb, pro se, appeals from an order denying his WIS. STAT. § 974.06 (2019-20)[1] postconviction motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition and affirm the order. *See* WIS. STAT. RULE 809.21.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

The State charged Kharb with first-degree sexual assault of a child under age thirteen and use of a computer to facilitate a child sex crime. The charges stemmed from an online relationship Kharb developed with a twelve-year-old female. During the course of the relationship, Kharb mailed the victim a sex toy, and they exchanged sexually explicit photos, including one of the victim using the toy Kharb sent to her. After months of talking online, Kharb traveled from Washington state to Wausau, Wisconsin, and had sexual intercourse with the victim.

An amended Information added seven counts of possession of child pornography and seven counts of sexual exploitation of a child. In exchange for his no-contest pleas to one count of sexual assault of a child under age thirteen and seven counts of possession of child pornography, the State agreed to recommend dismissal of the remaining counts with a read-in at sentencing, cap its sentence recommendation at seven years' initial confinement and twenty years' extended supervision, and refrain from filing or pursuing any other charges related to the present investigation into Kharb's interaction with the victim. Additionally, authorities in Washington agreed that they would not pursue charges related to images found on Kharb's computer. As part of the plea agreement, Kharb also agreed to withdraw all previously filed motions, to waive his right to appeal, and not to contest any deportation proceedings. The circuit court ultimately sentenced Kharb to fifteen years' initial confinement and fifteen years' extended supervision.

Kharb then moved for postconviction relief, claiming he was entitled to plea withdrawal because: (1) a provision of his plea agreement concerning the waiver of his right to appeal was ambiguous; (2) the circuit court did not conduct an adequate colloquy regarding the appellate waiver provision; and (3) his trial attorneys were ineffective by failing to adequately explain the

appellate waiver provision. Kharb alternatively sought either sentence modification or resentencing based on errors in the presentence investigation report. After a motion hearing, the circuit court denied Kharb's motion for postconviction relief. We affirmed the judgment and order on direct appeal. ***State v. Kharb***, No. 2018AP584-CR, unpublished slip op. (WI App Mar. 12, 2019). Our supreme court denied Kharb's petition for review.

Kharb then filed the underlying pro se WIS. STAT. § 974.06 postconviction motion for plea withdrawal, asserting that his pleas were not knowing, intelligent, and voluntary for several reasons, and alleging that the ineffective assistance of his postconviction counsel was a "sufficient reason" for not raising his claims earlier. The circuit court concluded that Kharb's claims were barred by § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Kharb again appeals.

Kharb asserts he is entitled to plea withdrawal because: (1) his plea to sexual assault was unsupported by a factual basis; (2) he did not understand the "purpose" element of the first-degree sexual assault charge; (3) he did not know the "actual value" of the agreement that he would not be prosecuted in the state of Washington; and (4) his agreement not to contest deportation proceedings violated the Supremacy Clause of the United States Constitution.

We conclude the circuit court properly determined Kharb's claims are procedurally barred by WIS. STAT. § 974.06(4) and ***Escalona-Naranjo***. When, as here, a § 974.06 motion follows a prior postconviction motion, a defendant must show a "sufficient reason" for failing to previously raise the issues in the current motion. ***Escalona-Naranjo***, 185 Wis. 2d at 184-85. Further, a matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the issue is rephrased. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473

N.W.2d 512 (Ct. App. 1991) Ineffective assistance of postconviction counsel may, in some circumstances, be a "sufficient reason" as to why an issue was not raised earlier. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996).

A claim of ineffective assistance of counsel must establish that counsel's performance was deficient and that the defendant was prejudiced by that deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See* ***id.*** at 697. In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. The prejudice inquiry asks whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** When the relief sought is a new trial based upon an allegation that postconviction counsel failed to raise material issues before the circuit court, a defendant must establish that the issues he or she believes counsel should have raised were clearly stronger than the claims counsel pursued on direct review. ***State v. Romero-Georgana***, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.22d 668.

Here, Kharb alleges that his postconviction counsel was ineffective by pursuing only the appeal waiver and sentencing issues based on an erroneous belief that he was precluded from challenging the knowing, intelligent, and voluntary nature of the pleas themselves without first overcoming the waiver of Kharb's appellate rights pursuant to the plea agreement. Kharb properly recognizes that a successful challenge to the pleas as unknowing, involuntary and unintelligent would have invalidated any agreements made under the plea agreement, including

his challenge to the appeal waiver. *See* ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986).

The record shows, however, that counsel was aware of the possibility of challenging the knowing, voluntary, and intelligent nature of the pleas, but he concluded the record did not support such a challenge. In a letter postconviction counsel sent to Kharb outlining his initial impressions on waiver of appeal rights, counsel stated:

> In my opinion, your plea[s] [were] taken and accepted consistent with Wisconsin law. The leading case on this topic is ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). The ***Bangert*** case explains that before a plea may be accepted, the trial court is required to ask you various questions to be certain you understand the charges you are pleading to, the potential penalties for the charges, the rights you give up by entering a plea, your ability to understand the court process, and there are facts to support the charges.
>
> All of this was done by Judge Falstad at the plea hearing in conjunction with the Plea Questionnaire form you signed. I do not find a legal basis to challenge the taking of your plea.

The record thus shows that postconviction counsel did not believe the appellate waiver prevented him from challenging the validity of Kharb's no-contest pleas. Thus, counsel's decision to challenge only the appeal waiver and sentencing was not based on any misunderstanding of the law, as Kharb asserts, but was a strategic choice that is virtually unchallengeable. *See* ***Strickland***, 466 U.S at 690. The letter highlights counsel's understanding of the applicable legal standard and the difficulties in challenging the knowing, voluntary, and intelligent nature of the pleas. Because counsel properly determined that Kharb's deficient plea colloquy claim had little merit and chance of success, Kharb cannot show that claim was clearly stronger than those previously made by appellate counsel. Kharb's claim of ineffective

assistance of postconviction counsel is not supported by the record and he has failed to establish a sufficient reason for failing to previously raise his present claims. Accordingly, we affirm.

Upon the foregoing,

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.

Sheila T. Reiff
Clerk of Court of Appeals