

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1317

Cir. Ct. No. 2001CF103

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRIN D. GROSSKOPF,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County:
JOHN ULLSVIK, Judge. *Affirmed.*

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Darrin Grosskopf appeals from an order denying his postconviction motion brought under WIS. STAT. § 974.06 (2003-04).¹ We affirm.

¶2 Grosskopf was convicted of first-degree intentional homicide. The basic facts of the trial and Grosskopf's postconviction proceedings under WIS. STAT. RULE 809.30 were described in our opinion affirming the denial of his first postconviction motion, and we do not repeat them here. *See State v. Grosskopf*, No. 2003AP474, unpublished slip op. (WI App. Jan. 22, 2004). Grosskopf, represented by counsel, later filed a postconviction motion under WIS. STAT. § 974.06, which the circuit court also denied. Grosskopf commenced this appeal, but then discharged his attorney and moved for a remand to circuit court to raise additional issues pro se. We granted the request. The circuit court again denied Grosskopf's motion without a hearing, and his appeal now continues.

¶3 Grosskopf's appellate brief states that he is pursuing issues that were raised in his pro se postconviction motion, and is not addressing issues that were only raised in the motion filed by counsel. He argues that trial counsel was ineffective in several respects. Before the merits of those arguments can be addressed, the threshold issue is whether Grosskopf has a sufficient reason for not having raised them in his original postconviction proceedings under WIS. STAT. RULE 809.30. *See* WIS. STAT. § 974.06(4); *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Although the circuit court did not address that threshold issue, and Grosskopf does not address it in his opening brief on appeal, the State's brief raises it. In his reply, Grosskopf appears to misunderstand the State as arguing that the issues in his pro se motion under WIS. STAT. § 974.06 are barred because he did not give a sufficient reason for not raising them in his first postconviction motion, by counsel, under § 974.06. However, the State's argument, which is a correct statement of law, is that the issues in *both* of Grosskopf's motions under § 974.06 are barred unless Grosskopf has a sufficient reason for not raising them in his very first postconviction motion, that is, the one under WIS. STAT. RULE 809.30 that led to the first appeal.

¶5 One reason that may be held a sufficient reason is if the issues were not raised in the original motion because postconviction counsel provided ineffective assistance on the original postconviction motion or appeal. Although Grosskopf has not attempted to explain what sufficient reason there is in this case for him not having raised these issues originally, he does argue that his postconviction counsel was ineffective. Accordingly, we consider that allegation of ineffectiveness to determine whether it shows a sufficient reason.

¶6 Grosskopf argues that his postconviction counsel was ineffective by not arguing that his trial counsel was ineffective for failing to request a jury instruction on the adequate provocation defense. That affirmative defense, if successful, would mitigate first-degree intentional homicide to second-degree intentional homicide. *See* WIS. STAT. § 939.44. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶7 We are satisfied that Grosskopf's allegation of ineffective assistance of postconviction counsel was properly denied without a hearing. The record conclusively shows that he is not entitled to relief on that ground, because the record shows that his trial counsel could reasonably have decided not to seek an adequate provocation instruction. See *State v. Koller*, 2001 WI App 253, ¶8, 248 Wis. 2d 259, 635 N.W.2d 838; *State v. Kimbrough*, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752 (function of a court assessing a claim of deficient performance is to determine whether counsel's performance was objectively reasonable).

¶8 Grosskopf argues that the provocation in this case was the sexual assault that he testified he was being subjected to when he awoke. However, that same alleged assault was the basis for the self-defense and imperfect self-defense instructions that were given at trial. None of these defenses would be successful unless the jury believed the sexual assault occurred. If the jury did so believe, Grosskopf does not explain why his trial counsel should have pursued adequate provocation in addition to or instead of the self-defense instructions. Adequate provocation would require the jury to find that the assault constituted provocation that was sufficient to cause complete lack of self-control in an ordinarily constituted person. WIS. STAT. § 939.44(1). Grosskopf's attorney could reasonably believe that it would be easier to establish self-defense or imperfect self-defense.

¶9 Therefore, because such a decision by trial counsel would not have been considered deficient performance, there is no basis to conclude that postconviction counsel was ineffective by not raising this issue. Because there is no basis for that conclusion, the alleged ineffectiveness of postconviction counsel

does not provide a sufficient reason for Grosskopf to be allowed to raise this claim now under WIS. STAT. § 974.06.

¶10 Grosskopf also asserts that his postconviction counsel was ineffective by not raising the issue regarding selective or discriminatory prosecution, and an issue regarding the sentence enhancer. However, beyond those mere assertions, Grosskopf does not provide facts or sufficient argument, and we reject the claims as inadequately briefed. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶11 The remainder of Grosskopf's arguments, concerning ineffective assistance of trial counsel, are barred by WIS. STAT. § 974.06(4), because he has not shown sufficient reason for not raising them in his original postconviction motion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

