**COURT OF APPEALS DECISION DATED AND FILED**

**November 30, 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. 2005AP2712**

**Cir. Ct. No. 2000CF446**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TERRY L. SCHROEDL,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Dane County: DANIEL L. LaROCQUE, Reserve Judge. *Affirmed*.

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

¶1 PER CURIAM. Terry Schroedl appeals an order denying his postconviction motion under WIS. STAT. § 974.06 (2003-04).[1] We affirm for the reasons discussed below.

## BACKGROUND

¶2 In June of 2000, Schroedl was convicted, following a jury trial, of four counts of first-degree sexual assault of a child, two counts of child enticement, and two counts of exposing genitals. The court imposed a forty-year indeterminate sentence on the first sexual assault count, consecutive to another sentence Schroedl received for repeated sexual assault of a different child. The court withheld sentence on the remaining counts, subject to concurrent ten-year terms of probation.

¶3 Counsel filed a postconviction motion on Schroedl's behalf claiming that: (1) evidence relating to the other child Schroedl had assaulted should have been excluded, and its admission prevented the real controversy from being tried; (2) Schroedl should have been allowed to present evidence of the victim's prior sexual knowledge and experience; (3) a juror improperly failed to disclose a friendship with an assistant district attorney not involved in the prosecution of the present case; (4) Schroedl recalled after trial that the victim had previously threatened to accuse him of sexual assault; and (5) trial counsel rendered ineffective assistance by stipulating to Schroedl's assault of the other child, failing to challenge the broad time span set forth in the complaint, and failing to challenge comments made by the prosecutor during closing argument. After this

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

postconviction motion was denied, Schroedl appealed on the grounds that the trial court had improperly allowed the State to present other acts evidence relating to the other child he was separately convicted of assaulting, and had improperly excluded evidence that the other child had made prior false accusations of sexual assault and had prior sexual knowledge and experience. We rejected both of those arguments, denied Schroedl's additional request for a new trial in the interest of justice, and affirmed the judgment of conviction. ***State v. Schroedl***, No. 2001AP1357-CR, unpublished slip op. ¶1 (WI App May 9, 2002).

¶4 On March 17, 2005, Schroedl filed a new postconviction motion under WIS. STAT. § 974.06, acting *pro se*. In this motion, Schroedl alleged that trial counsel was ineffective for: (1) failing to challenge the guilty plea Schroedl had entered in his other sexual assault case without being informed it could be used against him in the present case; (2) failing to obtain a videotaped statement of the victim which might have been used for impeachment purposes; (3) failing to obtain medical and counseling records of the victim; (4) failing to prevent the State from introducing medical records at trial; and (5) giving up the right to cross-examine the victim at trial. Schroedl further claimed that the trial court had erred in denying him a continuance when additional discovery materials were provided shortly before trial and in denying a number of Schroedl's pretrial motions, and he asserted that postconviction counsel had provided ineffective assistance by failing to raise any of these issues in Schroedl's original postconviction motion. The trial court denied the § 974.06 motion, and Schroedl now raises the same issues on appeal.

## DISCUSSION

¶5 As a threshold matter, the State contends that Schroedl is procedurally barred from bringing any of his present claims because he failed to raise them in his original postconviction motion or on his direct appeal. Schroedl acknowledges that any issue that could have been raised on a direct appeal or in a postconviction motion under WIS. STAT. § 974.02 cannot be the basis for a subsequent WIS. STAT. § 974.06 motion unless the court finds there was sufficient reason for failing to raise the issue earlier. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); WIS. STAT. § 974.06(4). He contends, however, that the ineffective assistance of his postconviction counsel in failing to preserve his issues provides just such a sufficient reason.

¶6 After initially asserting that ineffective assistance of postconviction counsel is not a "sufficient reason" for failing to raise an issue in an original postconviction motion or direct appeal, the State has now filed a supplemental brief, pursuant to our request, stating that whether ineffective assistance is a "sufficient reason" is an open question. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (stating that claims of ineffective assistance of postconviction counsel can be raised in a WIS. STAT. § 974.06 motion and suggesting without deciding that such claims may provide sufficient reason to clear the procedural bar of ***Escalona***). The State proceeds to urge this court to hold that ineffective assistance is not a "sufficient reason." But the State does not present an adequately developed argument as to why ineffective assistance should not provide a sufficient reason to avoid application of the procedural bar.

¶7 The State concedes that the issue of ineffective assistance of postconviction counsel may be litigated in a WIS. STAT. § 974.06 motion, but suggests that the only available remedy for a successful claim is the reinstatement of direct appeal rights. In this regard, the State fails to provide a convincing rationale for why a determination that counsel's performance was deficient and prejudicial would not also answer whether the defendant is entitled to relief. Stated differently, if we were to conclude that a defendant has shown both deficient performance and prejudice, what more is there to litigate?

¶8 Because the State's discussion on this topic is unsatisfactory and not fully developed, we will assume, for the sake of argument, that ineffective assistance of postconviction counsel may in some cases provide a sufficient reason for failing to raise an issue in an original postconviction motion or direct appeal. We conclude, however, that Schroedl has failed to make allegations sufficient to warrant a hearing in this case. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433 (in order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought).

¶9 A defendant raising a claim of ineffective assistance of counsel must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12.

> To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both

> components of the test if the defendant fails to make a sufficient showing on one of them.

***Id.*** (citations omitted).

¶10 Postconviction counsel is not obligated to raise all arguably meritorious issues on appeal. Rather, counsel should use his or her professional judgment to evaluate the relative strength of potential appellate issues and to articulate them to the court. *See generally* ***Jones v. Barnes***, 463 U.S. 745, 751-52 (1983). Otherwise, a valid point may be easily lost "in a verbal mound made up of strong and weak contentions." ***Id.*** at 753. Thus, "'only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" ***Smith v. Robbins***, 528 U.S. 259, 288 (2000) (citation omitted). We turn, then, to consider whether it was unreasonable for postconviction counsel not to have raised each of the issues Schroedl is now attempting to raise and, if so, whether Schroedl was prejudiced by the omission.

¶11 Schroedl's primary complaint—that trial counsel should have attempted some sort of collateral challenge in this case to the guilty plea Schroedl had entered in his other sexual assault case—is utterly without merit. The consequence of the plea in the other case of which Schroedl claims to have been unaware—namely, the State's subsequent ability to introduce evidence in the present case about the other victim—was collateral, rather than direct, in nature. Therefore, Schroedl's alleged failure to understand the potential evidentiary value of his plea in the other case did not render that plea invalid and did not provide a basis for a collateral challenge in the present case.

¶12 Schroedl's next two claims—that trial counsel was ineffective for failing to obtain the videotaped statement of the victim and for failing to obtain

medical and counseling records of the victim which might have been used for impeachment purposes—are both directly contradicted by the record. Trial counsel stated at the preliminary hearing that he had viewed the videotape and had specific objections to it, and at trial he introduced into evidence documents from the victim's medical records. It is therefore self-evident that counsel had obtained those materials prior to trial. Because postconviction counsel would have no factual basis to claim that trial counsel had neglected to obtain the discovery materials identified by Schroedl, postconviction counsel could not be deemed ineffective for not doing so.

¶13 Schroedl also argues that "trial counsel was ineffective when he let the State introduce the medical reports to the jury that point to someone else." It appears the item Schroedl is referring to is a medical report noting that the victim's hymen was missing. Schroedl seems to be arguing that the report points to someone else having assaulted the victim. However, assuming the medical report was exculpatory, it was not deficient performance for trial counsel to allow the prosecutor to present it without objection. And, of course, postconviction counsel would have had no reason to raise the issue.

¶14 Schroedl next claims that trial counsel performed ineffectively by agreeing to allow admission of the victim's videotaped deposition, in lieu of having her testify in court. The record shows that the defense agreed to admission of the deposition in exchange for the State's agreement to a continuance of thirty days. Schroedl now asserts that introduction of the deposition prevented him from cross-examining the victim about three prior false allegations of sexual assault that he apparently learned about after the deposition had been taken. Schroedl cannot show that postconviction counsel was ineffective for failing to raise this issue, however, because postconviction counsel *did* argue that the trial court should have

permitted the admission of evidence regarding prior false allegations by the victim. Furthermore, on Schroedl's prior appeal, this court affirmed the trial court's factual finding that Schroedl had failed to present sufficient evidence to establish that the victim had, in fact, ever made any prior false allegations. ***Schroedl***, No. 2001AP1357-CR, ¶¶12, 16. An appellant may not relitigate matters previously decided, no matter how artfully rephrased. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991); *see also* ***State v. Rohl***, 104 Wis. 2d 77, 96, 310 N.W.2d 631 (Ct. App. 1981).

¶15 Schroedl next claims the trial court erred in denying him a continuance after the State turned over additional discovery materials shortly before trial. The record shows, however, that the trial court *granted* defense counsel's request for a continuance by adjourning the trial until the next day. Schroedl also complains that the trial court denied a number of his pretrial motions.[2] The trial court's adverse rulings on several evidentiary motions and the confrontation clause implications of those rulings were already litigated on the prior appeal. As to the remaining motions, Schroedl's allegations are insufficient to show that postconviction counsel performed deficiently in choosing which issues to raise in the prior postconviction motion or on appeal.

¶16 In sum, we agree with the State that Schroedl has not made sufficient allegations to show that he was denied effective assistance of postconviction counsel. Therefore, the issues Schroedl is attempting to raise in this appeal are all procedurally barred.

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[2] Although Schroedl complains that his motions "should have been heard," the record shows that the trial court did hear each of them during a series of hearings. We therefore construe Schroedl's claim to be that the court should have granted his motions.

*By the Court.*—Order affirmed.

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