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DISTRICT I

October 3, 2023

To:

Hon. Glenn H. Yamahiro
Circuit Court Judge
Electronic Notice

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

Gregory W. Wiercioch
Electronic Notice

Jacob J. Wittwer
Electronic Notice

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

2022AP1494 State of Wisconsin v. MC Winston (L.C. # 2001CF5455)

Before White, C.J., Donald, P.J., and Dugan, 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).

MC Winston appeals the order of the circuit court denying his postconviction motion filed pursuant to WIS. STAT. § 974.06 (2021-22),[1] and the order denying his motion for reconsideration. 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(1). We dismiss the appeal for lack of jurisdiction.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Winston was convicted in September 2002, after a jury trial, of one count of second-degree sexual assault of a child under the age of sixteen.[2] The jury was comprised of all women. Winston moved for postconviction relief on several grounds, none of which were related to the composition of the jury. That motion was denied by the circuit court, and this court affirmed. *See* ***State v. Winston***, No. 2003AP3412-CR, unpublished slip op. ¶1 (WI App Sept. 8, 2004).

Winston subsequently filed a *pro se* WIS. STAT. § 974.06 motion claiming ineffective assistance of his trial counsel for, among other things, intentionally using peremptory strikes to remove men from the jury, contrary to ***Batson v. Kentucky***, 476 U.S. 79 (1986). The circuit court denied the motion, rejecting that claim specifically because Winston had "failed to allege a prima facie claim that he was convicted by a discriminatorily constituted jury." This court also rejected that claim, stating that Winston had failed to demonstrate prejudice since that jury had acquitted him on a second count of sexual assault of a child. *See* ***State v. Winston***, No. 2005AP1255, unpublished slip op. ¶13 (WI App Feb. 27, 2007). We further concluded that appellate counsel's reason for not raising this claim on direct appeal—that it was a strategic reason based on the belief that female jurors would be more critical of the victim than male jurors—was reasonable under the ***Strickland*** test.[3] *See* ***Winston***, No. 2005AP1255, ¶13.

Winston then filed a habeas petition in federal court. The petition was denied, but the district court granted Winston a "certificate of appealability" limited to the issue of whether trial

[2] Winston was sentenced to a thirty-year term of imprisonment, bifurcated as twenty years of initial confinement and ten years of extended supervision.

[3] *See* ***Strickland v. Washington***, 466 U.S. 668, 690-91 (1984) (stating that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable").

counsel was ineffective in his exercise of peremptory challenges. *See* ***Winston v. Boatwright***, 649 F.3d 618, 624 (7th Cir. 2011). The Seventh Circuit determined that Winston's trial counsel's actions regarding the peremptory strikes constituted deficient performance because counsel's use of the strikes amounted to intentional discrimination based on gender, which is prohibited. ***Id.*** at 630-31. However, the Seventh Circuit found that based on established case law in effect at the time this court decided the appeal of Winston's first WIS. STAT. § 974.06 motion, this court did not err in concluding that Winston had not established prejudice and was thus not entitled to relief.[4] ***Id.*** at 633-34. It therefore affirmed the district court's denial of Winston's habeas petition. ***Id.*** at 634.

Almost eleven years after the Seventh Circuit decision, Winston, by counsel, filed his second WIS. STAT. § 974.06 motion, which underlies this appeal. In that motion, Winston made a direct ***Batson*** claim—as opposed to arguing the issue under the ineffective assistance of counsel rubric—alleging an equal protection violation. The circuit court concluded that the claim was procedurally barred, pursuant to the requirement under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), that a defendant must present a sufficient reason for failing to raise the issue presented in prior postconviction proceedings. ***Id.*** at 181-82. The court further noted that Winston did not allege sufficient facts to demonstrate that his current claim is

[4] In its discussion, the Seventh Circuit referenced a decision by the United States Supreme Court, ***Rivera v. Illinois***, 556 U.S. 148 (2009). In ***Rivera***, the Court recognized a distinction between an erroneous denial of a peremptory challenge, which is subject to a harmless error analysis where prejudice is considered, and a peremptory challenge that involves a constitutional violation—such as discrimination—under ***Batson v. Kentucky***, 476 U.S. 79 (1986), where the remedy is automatic reversal. *See* ***Winston v. Boatwright***, 649 F.3d 618, 629 (7th Cir. 2011). As the Seventh Circuit noted, ***Rivera*** was not decided until 2009, approximately two years after this court rejected Winston's ***Batson***-related ineffective assistance claim in his first WIS. STAT. § 974.06 motion for failing to demonstrate prejudice. *See* ***Winston***, 649 F.3d at 633-34.

clearly stronger than claims raised by his postconviction counsel in his direct appeal, as required in ***State v. Romero-Georgana***, 2014 WI 83, ¶4, 360 Wis. 2d 522, 849 N.W.2d 668, to support his allegation that postconviction counsel should have raised a ***Batson*** claim in his direct appeal.

Winston filed a motion for reconsideration of that decision. Winston conceded that he had not addressed ***Romero-Georgana*** in his second WIS. STAT. § 974.06 motion, but argued that the motion did "contain facts showing a sufficient reason [he] did not raise his equal protection claim in his prior § 974.06 motion." The court rejected this argument, observing that Winston's second § 974.06 motion "explicitly addressed postconviction counsel's ineffectiveness[,]" but "completely failed to establish a sufficient reason why its equal protection argument was not raised in [Winston]'s first § 974.06 motion." The court further noted that it does not develop arguments for litigants.

Winston also argued that he had "tried to raise ***Batson***" in his first WIS. STAT. § 974.06 motion, but that the circuit court had "failed to recognize his equal protection claim." The court rejected this argument as well, labeling it "[s]omewhat contradictor[y]" given his argument that he had alleged facts in his second § 974.06 motion to demonstrate a sufficient reason for *not* raising the ***Batson*** issue previously. Moreover, the court stated that if Winston had raised a ***Batson*** argument in his first § 974.06 motion that was not recognized, it must have been "inadequately raised." It further noted that Winston should have filed a motion for reconsideration at that time to obtain a ruling on all the issues presented in his first motion. Therefore, the circuit court denied Winston's motion for reconsideration.

Winston filed a notice of appeal of both orders—the order denying his second WIS. STAT. § 974.06 motion and the order denying his motion for reconsideration—on September 2, 2022.

This court concluded that it did not have jurisdiction to review the order denying Winston's second WIS. STAT. § 974.06 motion, because the notice of appeal was filed more than ninety days after the April 13, 2022 entry of that order, and that deadline cannot be extended. *See* § 974.06(6)-(7); WIS. STAT. § 808.04(1); WIS. STAT. RULE 809.10(1)(e) and 809.82(2)(b). Winston's filing of the motion for reconsideration did not affect that appeal deadline because the reconsideration motion was not filed after a trial to the court or other evidentiary hearing. *See* WIS. STAT. § 805.17(3); ***Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.***, 175 Wis. 2d 527, 535, 499 N.W.2d 282 (Ct. App. 1993).

Furthermore, we questioned whether we had jurisdiction to review the order denying Winston's motion for reconsideration, entered on June 7, 2022. Although the notice of appeal for this order was filed within the ninety-day statutory time frame, an appeal cannot be taken from an order denying a motion for reconsideration which presents the same issues as those determined in the order sought to be reconsidered. *See* ***Silverton Enters., Inc. v. General Cas. Co.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). We ordered the parties to brief this threshold issue, which we now address.

Determining appellate jurisdiction is a question of law that we review *de novo*. ***State v. Scaccio***, 2000 WI App 265, ¶4, 240 Wis. 2d 95, 622 N.W.2d 449. For our review of this issue, we compare the issues raised in Winston's motion for reconsideration with the issues that were disposed of in the order denying his second WIS. STAT. § 974.06 motion. *See* ***Harris v. Reivitz***, 142 Wis. 2d 82, 87, 417 N.W.2d 50 (Ct. App. 1987). This is referred to as the "new issues test," and it is to be liberally applied. *See* ***id.*** at 88.

Ultimately, the "appealability" of the order denying Winston's motion for reconsideration depends on whether the issues raised in that motion could have been reviewed on an appeal from the order denying his second WIS. STAT. § 974.06 motion. *See* ***Ver Hagen v. Gibbons***, 55 Wis. 2d 21, 24, 197 N.W.2d 752 (1972). This is well-established law that "can be a trap for the unwary and at times may be harsh[.]" ***La Crosse Tr. Co. v. Bluske***, 99 Wis. 2d 427, 429, 299 N.W.2d 302 (Ct. App. 1980). However, it is based on the sound policy of "prevent[ing] a party from extending the time to appeal by filing a motion for reconsideration." ***Id.***

We conclude that Winston's motion for reconsideration presented the same issues as those that were denied in his second WIS. STAT. § 974.06 motion. Winston argues that his motion for reconsideration raised the new issue of whether a sufficient reason existed for his failing to sufficiently plead his ***Batson*** claim in his first § 974.06 motion, as required to circumvent the procedural bar of ***Escalona***. However, Winston raised that argument because the circuit court determined that he had failed to "provide, much less establish," a sufficient reason to allow for consideration of the ***Batson*** issue in his second § 974.06 motion. The crux of the reconsideration motion, however, sought the review of Winston's ***Batson*** claim, just as his second § 974.06 motion did. Therefore, because the issues raised in Winston's motion for reconsideration are not "new" when compared to the issues raised in his second § 974.06 motion, this court lacks jurisdiction to review the order denying the motion for reconsideration. *See* ***Harris***, 142 Wis. 2d at 87-88; ***Silverton Enters., Inc.***, 143 Wis. 2d at 665.

In short, we lack jurisdiction to review either of the orders from which Winston seeks relief. Accordingly, this appeal must be dismissed.

Upon the foregoing,

IT IS ORDERED that the appeal is dismissed for lack of jurisdiction.

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

Samuel A. Christensen
Clerk of Court of Appeals