



OFFICE OF THE CLERK
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 I

May 7, 2024

To:

Hon. David L. Borowski
Circuit Court Judge
Electronic Notice

Sara Lynn Shaeffer
Electronic Notice

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

Antonio Darnell Mays 266902
Green Bay Correctional Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2023AP243

State of Wisconsin v. Antonio Darnell Mays (L.C. # 2018CF1428)

Before Donald, P.J., Geenen and Colón, 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).

Antonio Darnell Mays, *pro se*, appeals an order of the circuit court denying his motion for postconviction relief under WIS. STAT. § 974.06 (2021-22).¹ The circuit court concluded that his claims were procedurally barred. Based upon a review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

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

A jury found Mays guilty of felony murder, first-degree reckless homicide by use of a dangerous weapon as a party to a crime, and two counts of possessing a firearm while a felon. Mays, by postconviction counsel, moved to vacate his conviction for felony murder on the ground that “the charge [did] not allege a crime cognizable under Wisconsin law.” The circuit court denied relief and Mays, again by counsel, pursued an appeal. He argued that the felony murder count “was predicated on Mays entering a building with the intent to commit the felony of second-degree recklessly endangering safety,” but a person “cannot *intend* to commit a reckless crime.” *State v. Mays (Mays I)*, 2022 WI App 24, ¶2, 402 Wis. 2d 162, 975 N.W.2d 649. We rejected his claim and affirmed. *Id.*, ¶3.

Mays, acting on his own behalf, next filed the postconviction motion that underlies this appeal. He alleged that the criminal complaint and information were legally insufficient, the prosecutor engaged in misconduct by presenting false testimony at trial, and that the state crime laboratory personnel “used up” and destroyed DNA evidence. Mays further alleged that his postconviction counsel was ineffective for failing to raise these three claims, which Mays contended were stronger than the claim that postconviction counsel pursued in *Mays I*. The circuit court barred his current claims, and Mays appeals.

WISCONSIN STAT. § 974.06 permits an incarcerated person to raise jurisdictional and constitutional claims in a collateral attack on his or her conviction after the time for a direct appeal has passed. *State v. Henley*, 2010 WI 97, ¶¶52-53, 328 Wis. 2d 544, 787 N.W.2d 350. The opportunity to attack a conviction under § 974.06 is limited, however, because “[w]e need finality in our litigation.” *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, a convicted defendant may not bring postconviction claims under § 974.06 if the defendant could have raised the claims in a previous postconviction motion or on direct

appeal unless the defendant states a “sufficient reason” for failing to raise the claims earlier. *Escalona-Naranjo*, 185 Wis. 2d at 184-85. Whether a defendant presented a sufficient reason to avoid the procedural bar imposed by *Escalona-Naranjo* and § 974.06 is a question of law that we review *de novo*. *State v. Kletzien*, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

Mays suggested in his postconviction motion that he had a sufficient reason for serial litigation, namely, that his postconviction counsel was ineffective for failing to raise the claims that Mays wishes to raise now. Ineffective postconviction counsel can be a sufficient reason in some circumstances for permitting an additional postconviction motion under WIS. STAT. § 974.06. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 683, 556 N.W.2d 136 (Ct. App. 1996). To demonstrate that postconviction counsel was ineffective, however, a convicted person must do more than offer a conclusory assertion that counsel provided ineffective assistance. Rather, the person must satisfy the familiar two-prong test that requires showing both that counsel performed deficiently and that the deficiency prejudiced the defense. *State v. Balliette*, 2011 WI 79, ¶¶21, 63, 336 Wis. 2d 358, 805 N.W.2d 334 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

To prove deficiency, a defendant must demonstrate that counsel’s conduct fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. To prove prejudice, “[t]he defendant must show that 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 reviewing court may consider either the deficiency prong or the prejudice prong first, and if the defendant’s showing on one prong is insufficient, the court need not address the other. *Id.* at 697.

Here, we begin by considering the deficiency prong, because it is dispositive. To prove that postconviction counsel performed deficiently by failing to raise certain claims, the defendant must show that the claims at issue are “clearly stronger” than the claims that postconviction counsel elected to pursue. *State v. Romero-Georgana*, 2014 WI 83, ¶46, 360 Wis. 2d 522, 849 N.W.2d 668. The obligation reflects the rule that counsel “need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.” *Smith v. Robbins*, 528 U.S. 259, 288 (2000). The burden is on the convicted person to satisfy the clearly stronger standard. *Romero-Georgana*, 360 Wis. 2d 522, ¶58. Our case law provides a well-settled methodology for the convicted person to apply, requiring the person to explain and discuss “sufficient material facts—e.g., who, what, where, when, why, and how—that, if true, would entitle him to the relief he seeks.” *Id.* (citation omitted).

In this case, Mays acknowledged the “clearly stronger” standard but did not apply it. His WIS. STAT. § 974.06 motion says nothing substantive about the claim addressed in *Mays I*, even though that litigation was sufficiently significant as to result in a precedential published opinion. *See* WIS. STAT. RULE 809.23(1). Mays did not set forth any facts showing with specificity why his new claims were clearly stronger than the claim that his postconviction counsel pursued in *Mays I*, and Mays did not analyze the comparative legal merits of the new claims in relation to the original claim. Instead, Mays merely asserted that his current claims were stronger than the claim that his counsel pursued. As the circuit court explained, *Mays I* “raised a *strong* postconviction argument that was the subject of substantial litigation in the trial court and the Court of Appeals,” but Mays “fail[ed] to engage in a meaningful comparative analysis of his current claims relative to the claim that postconviction counsel actually raised.”

On appeal, Mays continues to assert that his current claims are “clearly stronger” than the claim that counsel raised in *Mays I*, but Mays’ briefs do not include any analysis in support of that position. Instead, he asserts that if his postconviction counsel “would have raised a strong argument [Mays] would not be sitting here in prison[.]” However, a convicted person cannot demonstrate deficient performance merely by showing that counsel’s approach did not prevail. *See, e.g., State v. Robinson*, 177 Wis. 2d 46, 58, 501 N.W.2d 831 (Ct. App. 1993) (explaining that “[e]ffective representation is not to be equated with a not guilty verdict”).

Because Mays fails to show that his current collateral challenges to his convictions are clearly stronger than the claim that postconviction counsel raised on his behalf, Mays fails to show that his postconviction counsel was ineffective for failing to pursue those challenges. *Romero-Georgana*, 360 Wis. 2d 522, ¶58. Absent a showing that postconviction counsel was ineffective for failing to raise the ignored claims in the original litigation, Mays fails to identify a legally sufficient reason for raising those claims now under WIS. STAT. § 974.06. Accordingly, the claims are barred.

Before we close, we acknowledge Mays’ contention that the circuit court erred in its postconviction order by misidentifying the month in which the jury returned its verdicts in this case. The circuit court’s minor misstatement is insignificant and does not affect our resolution of Mays’ appeal. This court decides independently whether a convicted person has stated a sufficient reason to avoid application of the procedural bar to serial litigation. *Kletzien*, 331 Wis. 2d 640, ¶16. As discussed in this opinion, we have concluded that Mays failed to shoulder the burden imposed by *Escalona-Naranjo* and WIS. STAT. § 974.06. Accordingly, we affirm.

IT IS ORDERED that the postconviction order is summarily affirmed. *See* 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