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**DISTRICT II**

December 11, 2013

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

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2013AP856

State of Wisconsin v. Dontez R. Morris (L.C. #2007CF129)

Before Brown, C.J., Reilly and Gundrum, JJ.

Dontez R. Morris, pro se, appeals orders denying his petition for a writ of habeas corpus<sup>1</sup> alleging ineffective assistance of postconviction and trial counsel and denying his motion for reconsideration. Based on our review of the briefs and the record, we conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21. We affirm the orders.

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<sup>1</sup> Morris titled his document a petition for a writ of habeas corpus. We construe it as a WIS. STAT. § 974.06 motion, as that statute provides the mechanism for seeking relief from a sentence claimed to be imposed in violation of the constitution. Sec. 974.06(1). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Morris chased and fired a gun at his mother and sister and threatened to kill everyone in the house. A jury found him guilty of felon in possession of a firearm, second-degree reckless endangerment as domestic abuse with a dangerous weapon, disorderly conduct, and misdemeanor bail jumping. By counsel, Morris moved for postconviction relief alleging that trial counsel was ineffective. The trial court ordered Morris's attorney to remedy various defects in the motion. Counsel did not respond. The court denied the motion. Claiming she had not received the order, counsel moved for a postconviction motion hearing. The court granted her ten days to file an amended motion. She again did not; the court denied the postconviction motion.

Morris appealed pro se. This court affirmed his conviction on the merits. Morris filed a second postconviction motion alleging trial counsel ineffectiveness. Morris contended trial counsel failed to move to suppress a child witness's testimony and to challenge alleged hearsay testimony. The trial court denied the motion as untimely.

Morris then filed a pro se petition for a writ of habeas corpus in this court alleging ineffectiveness of postconviction and appellate counsel. As postconviction counsel's performance is not properly before this court and we already had addressed his claims against appellate counsel, we denied the petition ex parte. Morris filed a third postconviction motion. The court denied it without a hearing and summarily denied his ensuing motion for reconsideration. Morris filed a pro se petition for a supervisory writ, which this court denied. This appeal is from the orders denying Morris's postconviction and reconsideration motions.

Morris contends his postconviction counsel ineffectively failed to challenge his trial counsel's ineffectiveness in failing to move to suppress the statement of a child witness or to

challenge the introduction of two witnesses' statements at trial. This court already rejected those claims on the merits on appeal. The doctrine of issue preclusion precludes Morris from relitigating them. Issue preclusion prevents "relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action." *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

To the extent his postconviction motion raised new issues, they still fail. Absent a sufficient reason, claims which could have been raised on direct appeal or in a WIS. STAT. § 974.02 motion cannot later be the basis for a § 974.06 motion. WIS STAT. § 974.06(4); *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

Morris asserts that his postconviction counsel ineffectively failed to challenge trial counsel's assistance. This can be a sufficient reason for failing to raise ineffective assistance of trial counsel in a previous postconviction motion. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To establish ineffectiveness, a petitioner must prove both deficient performance and prejudice. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. Morris's claims fail on one or both prongs. "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." *Allen*, 274 Wis. 2d 568, ¶14.

Morris adequately alleges that postconviction counsel deficiently failed to rectify the deficits in the postconviction motion. He then claims that counsel's failure leaves "no question that [her] action or inaction has prejudiced [his] case and appeal." That assertion is too vague, conclusory, and unsupported by facts to demonstrate prejudice.

Morris also contends postconviction counsel should have challenged trial counsel's failure to object to his mother's and sister's testimony as prejudicial and as hearsay, and to "Jana Morrison's" testimony as prejudicial because she was not on the witness list. Nearly all evidence is prejudicial to the party against whom it is offered. *State v. Murphy*, 188 Wis. 2d 508, 521, 524 N.W.2d 924 (Ct. App. 1994). The concern is *unfair* prejudice, which results when the evidence improperly influences the outcome or causes the jury to base its decision on something other than the established propositions in the case. *State v. Mordica*, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992). The mother and sister testified factually about what they saw and heard. As to Morrison, trial counsel did object. Even so, she was not on the witness list because her testimony became necessary only after another witness changed his testimony. Morris does not establish deficient performance. Nor was the testimony of Morris's mother and sister hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Morris's mother and sister testified about their own observations.

Lastly, Morris indicates that trial counsel's motion for recusal of the trial judge was denied. He does not make at all clear what error he claims or what relief he sought. The record conclusively shows that Morris is not entitled to relief on this or any other claim. Therefore,

IT IS ORDERED that the orders of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

