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DISTRICT II

February 18, 2015

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

2014AP219

State of Wisconsin v. Scott E. Ziegler (L.C. #2008CF120)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Scott E. Ziegler appeals from an order summarily denying his WIS. STAT. § 974.06 (2013-14),¹ postconviction motion for a new trial. 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. Because Ziegler's motion fails to establish a sufficient reason for failing to raise these claims as part of his direct appeal, they are procedurally barred. We affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Following a jury trial, Ziegler was convicted of fourteen counts stemming from allegations that he sexually assaulted four teenage girls. Ziegler appealed and following certification by this court to the Wisconsin Supreme Court, his judgment of conviction was affirmed. *State v. Ziegler*, 2012 WI 73, 342 Wis. 2d 256, 816 N.W.2d 238. Thereafter, Ziegler filed a WIS. STAT. § 974.06 postconviction motion in the trial court alleging, by his own count, “75 issues ... all of which involve ineffective assistance of counsel.”² The trial court denied Ziegler’s motion without holding an evidentiary *Machner*³ hearing, concluding that none of the issues Ziegler presented entitled him to relief.⁴

We conclude that the trial court properly denied Ziegler’s motion without holding an evidentiary hearing because his claims are procedurally barred by WIS. STAT. § 974.06 and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) (successive postconviction motions and appeals are procedurally barred unless a defendant can establish a sufficient reason

² Though Ziegler’s motion was entitled “974.06 Motion and Habeas Corpus Petition,” it was in the form of and was treated by the trial court as a WIS. STAT. § 974.06 motion for postconviction relief. The parties argue about whether the trial court properly ruled on Ziegler’s habeas corpus petition along with his § 974.06 postconviction motion. The appeal as presented arises from the trial court’s denial of Ziegler’s postconviction motion, and the issues presented in the writ petition were identical to and incorporated into those raised via postconviction motion. We will not further address Ziegler’s habeas writ.

³ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

⁴ The trial court specifically addressed the underlying merits of Ziegler’s claims concerning prosecutorial misconduct and alleged violations of Wisconsin’s rape shield law, WIS. STAT. § 972.11(2). Aside from any procedural bar, the trial court determined that Ziegler’s motion failed to set forth sufficient facts to demonstrate that even if his allegations were true, he was entitled to relief.

for failing to previously raise the newly alleged errors).⁵ A defendant must allege “sufficient material facts—e.g., who, what, where, when, why, and how—that, if true, would entitle [the defendant] to the relief he seeks.” *State v. Romero-Georgana*, 2014 WI 83, ¶37, ___ Wis. 2d ___, 849 N.W.2d 668 (citation omitted). Where as here, the ineffective assistance of postconviction counsel is alleged as the sufficient reason, the defendant must set forth with particularity facts that show both that postconviction counsel’s performance was deficient and that the deficiency prejudiced the defense. *State v. Balliette*, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In addition, as part of the pleading requirements, the defendant must assert that his newly raised issues are “clearly stronger” than the issues raised previously. *State v. Starks*, 2013 WI 69, ¶57, 349 Wis. 2d 274, 833 N.W.2d 146 (citation omitted); accord *Romero-Georgana*, 2014 WI 83, ¶¶45-46.

Ziegler’s WIS. STAT. § 974.06 postconviction motion does not provide a sufficient reason explaining why his proffered ineffective assistance of counsel claims were not raised earlier, as part of his direct appeal. Ziegler was required to demonstrate within the four corners of his motion that as a matter of appellate strategy, his postconviction counsel clearly erred by not raising the issues Ziegler now submits. See *Balliette*, 336 Wis. 2d 358, ¶¶65-68, see also *Romero-Georgana*, 2014 WI 83, ¶64 (“We will not read into the § 974.06 motion allegations that are not within the four corners of the motion.”). While Ziegler’s voluminous motion spends

⁵ When a trial court’s decision is correct, this court may affirm “on a theory or on reasoning not presented to the trial court.” *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987). Additionally, whether a WIS. STAT. § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier or alleges sufficient facts requiring a hearing is a question of law subject to de novo review. *State v. Romero-Georgana*, 2014 WI 83, ¶30, ___ Wis. 2d ___, 849 N.W.2d 668.

over forty pages cataloguing the alleged failings of trial counsel, he fails to explain why or how postconviction counsel erred by failing to raise these issues and how he was prejudiced by any alleged errors.⁶ Because Ziegler made no such showing, we are left to guess how each of these purported failings by postconviction counsel amounts to constitutionally ineffective performance. Given the strong presumption that postconviction counsel rendered effective performance, *see Balliette*, 336 Wis.2d 358, ¶¶26, 28, Ziegler’s brief falls far short of establishing a sufficient reason for why these issue were not raised in his direct appeal.

Ziegler argues that he was entitled to a *Machner* hearing because his motion sufficiently alleged the ineffective assistance of postconviction counsel, but that the trial court only looked at “the first 7 of 75 issues....” Having read the totality of Ziegler’s motion and attachments, we disagree. By focusing on the perceived shortcomings of trial counsel, Ziegler completely omitted any explanation of postconviction counsel’s representation or how his newly asserted

⁶ Rather, Ziegler summarily asserts that postconviction counsel “failed to pursue all these issues in postconviction or direct appeal actions.” This does not answer the question of “what” provides the basis for his ineffectiveness claim (for example, whether counsel acted contrary to Ziegler’s directives or failed to advise him), “why” postconviction counsel did not pursue these new claims, or “how” Ziegler would prove his evidentiary claims concerning postconviction counsel. *See Romero-Georgana*, 2014 WI 83, ¶¶60, 62, 63. The mere fact that postconviction counsel did not pursue certain claims does not demonstrate ineffectiveness, and “[w]e will not assume ineffective assistance from a conclusory assertion.” *Id.*, ¶62.

claims are “clearly stronger” than those raised by counsel on direct appeal. The trial court was well within its discretion to deny Ziegler’s motion without an evidentiary hearing.⁷

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

⁷ Ziegler raises other challenges to the trial court’s decision, such as its denial of his request for additional discovery. We are not required to address appellate arguments in the manner in which a party has structured the issues. See *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). To the extent we do not address one of Ziegler’s arguments, that argument is deemed rejected. *Id.* (“An appellate court is not a performing bear, required to dance to each and every tune played on appeal.”).