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**DISTRICT I**

June 26, 2015

To:

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

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2014AP1174

State of Wisconsin v. Antwan D. Robinson (L.C. #2002CF1942)

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

Antwan D. Robinson appeals the circuit court's order denying his motion for postconviction relief under WIS. STAT. § 974.06 (2013-14).<sup>1</sup> He argues that: (1) his trial counsel was constitutionally ineffective because he did not challenge the victim's identification of him in a photo lineup; (2) his trial counsel was constitutionally ineffective because he did not object when the trial court allowed a police officer to testify about a conversation with an unavailable witness; and (3) his postconviction counsel was ineffective for failing to raise these issues during

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

Robinson's direct appeal. After reviewing the briefs and record, we conclude this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

In 2002, Robinson was convicted of three counts of armed robbery with threat of force and one count of false imprisonment with use of a dangerous weapon, all as a party to a crime. After conviction, Robinson filed a postconviction motion to withdraw his no-contest plea. After two hearings on the motion, the circuit court denied it. On appeal, we affirmed the order denying the motion. In 2006, Robinson moved to vacate the DNA surcharge and a portion of the restitution ordered at sentencing. The circuit court denied the motion as to restitution, but granted the motion to vacate the DNA surcharge.

In 2011, Robinson again moved for postconviction relief, arguing that he received ineffective assistance of trial counsel because his lawyer did not challenge the victim's identification of him in a photo lineup made when counsel was not present and did not object when the trial court allowed a police officer to testify during the preliminary hearing about what an unavailable witness told police. Robinson also argued that he received ineffective assistance of postconviction counsel because his lawyer should have argued that he received ineffective assistance of trial counsel during Robinson's direct appeal. The circuit court denied the motion, concluding that Robinson's claims were barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Robinson appealed, but his appeal was dismissed because Robinson did not pay the filing fee or file a petition for waiver of fees.

"A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Robinson is procedurally barred from

raising his current claims because he already raised these exact same issues—in some instances word for word—in his 2011 postconviction motion.

Even if Robinson’s claims were not barred, his claims would fail on the merits. Robinson contends that his trial counsel was ineffective for not objecting to a photo lineup that occurred when counsel was not present. However, Robinson concedes in his appellant’s brief that he “cannot demonstrate that the array may have been unduly suggestive or improper.” Moreover, he presents no cogent argument explaining why counsel was ineffective for not raising a claim that Robinson concedes cannot be proven.

Robinson also argues that his counsel should have objected when the trial court declared a witness unavailable at the preliminary hearing and allowed a police officer to testify about what the witness told him. According to the lawyer for the witness, the witness intended to take the Fifth Amendment and refuse to testify on the grounds that doing so might incriminate him. Robinson fails to adequately explain *why* his lawyer should have objected to the witness being declared unavailable in light of these circumstances. As for Robinson’s claim that his postconviction counsel should have raised the issue of ineffective assistance of trial counsel on direct appeal, failing to raise arguments that do not have merit does not constitute ineffective assistance of counsel. *See State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

IT IS ORDERED that the order of the circuit court is summarily affirmed.

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