



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 IV

December 9, 2015

To:

Hon. Anna L. Becker
Circuit Court Judge
307 Main St
Black River Falls, WI 54615

Gerald R. Fox, District Attorney
Jackson County Courthouse
307 Main St.
Black River Falls, WI 54615-1744

Hon. John J. Perlich
Reserve Judge

Sandra L. Tarver
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Jan Moennig
Clerk of Circuit Court
Jackson County Courthouse
307 Main Street
Black River Falls, WI 54615-1776

Ronnie L. Thums 381472
Columbia Corr. Inst.
P.O. Box 900
Portage, WI 53901-0900

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

2014AP2767

State of Wisconsin v. Ronnie L. Thums (L.C. # 2010CF35)

Before Lundsten, Sherman, and Blanchard, JJ.

Ronnie Thums, pro se, appeals a circuit court order denying Thums' WIS. STAT. § 974.06 (2013-14)¹ motion without a hearing.² 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. We affirm.

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

² The Honorable John J. Perlich denied the initial WIS. STAT. § 974.06 motion. The Honorable Anna L. Becker denied the subsequent postconviction motions and the Motion for Reconsideration.

Thums was convicted, following a jury trial, of solicitation to commit first-degree intentional homicide, conspiracy to commit first-degree intentional homicide, and two counts of conspiracy to commit burglary of a dwelling. Thums was appointed postconviction counsel, who pursued postconviction relief on Thums' behalf. Postconviction counsel argued that Thums had been denied the effective assistance of counsel at trial, that the court erroneously instructed the jury as to the elements of conspiracy, that Thums' convictions were multiplicitous, that the court erred by admitting other acts evidence, and that the court erred by imposing a fine without determining Thums' ability to pay. Thums also filed a pro se motion for a new trial based on his claim that the judge improperly met ex parte with the jury during deliberations. The court denied the arguments in the motion filed by counsel and the pro se motion. Thums pursued an appeal by his appointed counsel, who raised the issues presented in counsel's postconviction motion. We affirmed in part and reversed in part. We rejected each of Thums' arguments, except his argument that the court erred by imposing a fine. We remanded for the court to hold a hearing to determine Thums' ability to pay a fine.

On remand, Thums moved for the judge presiding over the case to disqualify himself due to bias. In the motion, Thums argued that the judge met with the jury twice during juror deliberations, once in the morning and once in the afternoon. At the outset of the remand hearing, the judge rejected Thums' allegation that the judge had met secretly with the jury during deliberations; the judge stated that he had met with the jury only once, after the jury had reached its verdict, to address the jury's concerns prior to reentering the courtroom. The court then heard arguments as to Thums' ability to pay a fine. The circuit court then issued an order determining Thums' ability to pay and imposing a fine.

Thums then filed a WIS. STAT. § 974.06 motion in the circuit court, arguing that the State committed prosecutorial misconduct by introducing knowingly false evidence and making knowingly false statements to the jury; the circuit court erred by meeting ex parte with the jury; Thums' trial counsel was ineffective; and Thums' postconviction counsel was ineffective by failing to raise those arguments on Thums' behalf. The circuit court denied the motion without a hearing, determining that Thums' claims were too conclusory to warrant relief, and that all of the claims were procedurally barred or raised in the wrong forum.

Thums contends that the circuit court erred by denying Thums' motion without a hearing. He argues that he set forth sufficient facts that, if true, would entitle him to relief. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (if a postconviction motion alleges sufficient material facts that would entitle the defendant to relief, the circuit court must hold a hearing on the motion). He contends that his claims are not procedurally barred because he set forth a sufficient reason for failing to raise his current claims previously, specifically, ineffective assistance of postconviction counsel. *See State v. Lo*, 2003 WI 107, ¶15, 264 Wis. 2d 1, 665 N.W.2d 756 (“[C]laims of error that could have been raised on direct appeal ... are barred from being raised in a subsequent [WIS. STAT.] § 974.06 motion, absent a showing of a sufficient reason.”); *State v. Balliette*, 2011 WI 79, ¶37, 336 Wis. 2d 358, 805 N.W.2d 334 (“[I]n some circumstances ineffective postconviction counsel’ may constitute ‘sufficient reason as to why an issue which could have been raised on direct appeal was not.’” (quoting *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996))). We disagree.

Thums contends that a claim of prosecutorial misconduct was “clearly stronger” than the claims his appointed counsel raised in postconviction proceedings, and thus ineffective assistance of postconviction counsel provides a sufficient reason for Thums' failure to raise this

issue previously. See *State v. Romero-Georgana*, 2014 WI 83, ¶4, 360 Wis. 2d 522, 849 N.W.2d 668 (“[A] defendant who alleges in a [WIS. STAT.] § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought.”). Thums argues that, throughout trial, the State presented false evidence and made false statements and misleading arguments to the jury. However, Thums does not provide sufficient factual allegations to support his argument that the State knowingly submitted false evidence or knowingly made false statements to the jury. Rather, Thums asserts, in conclusory fashion, that the State knew its evidence and statements to the jury were false and that his postconviction counsel was ineffective by failing to pursue that claim. Because Thums does not explain what evidence would support his claim of prosecutorial misconduct and does not explain why that argument was “clearly stronger” than the issues his postconviction counsel chose to pursue, Thums has not established that his postconviction counsel was ineffective by failing to raise that argument. See *id.*, ¶36-47, 58-65 (claim of ineffective assistance of postconviction counsel for failing to raise specific claim must allege sufficient material facts to show that claim was “clearly stronger” than claims counsel did raise). Accordingly, Thums has not overcome the procedural bar to raising a claim of prosecutorial misconduct.

Next, Thums contends that his claim that the circuit court erred by meeting *ex parte* with the jury during *morning* deliberations was raised for the first time in Thums’ current WIS. STAT. § 974.06 motion, and that he could not have previously raised the issue of the morning

communication because he only recently discovered it.³ However, Thums' recusal motion to the circuit court prior to the remand hearing clearly alleged that the circuit court met with the jury twice, both during morning and afternoon deliberations. The judge addressed the allegations, rejected them, and continued to preside over remand proceedings. Because the issue of the circuit court meeting with the jury during deliberations has been previously litigated in postconviction proceedings, Thums may not relitigate the issue in a WIS. STAT. § 974.06 motion. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (an issue litigated in postconviction proceedings "may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue").

Thums also contends that his appellate counsel was ineffective by failing to pursue on appeal Thums' pro se argument that the circuit court erred by meeting ex parte with the jury during afternoon deliberations. However, under *State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992), a claim of ineffective assistance of appellate counsel must be raised by a petition for a writ of habeas corpus in this court. Because a claim of ineffective assistance of appellate counsel is not properly raised in a WIS. STAT. § 974.06 motion, the circuit court properly denied Thums' claim for relief on this ground.⁴

Finally, Thums asserts that his trial counsel was ineffective by failing to object to any ex parte communications between the court and the jury and to any withholding of juror

³ To the extent Thums attempts to raise other issues arising from the circuit court's decision as to the imposition of a fine on remand, we note that Thums did not appeal the circuit court's order imposing the fine. This appeal is limited to review of the circuit court's order denying Thums' WIS. STAT. § 974.06 motion without a hearing.

⁴ To the extent Thums argues his appellate counsel was otherwise ineffective, we similarly conclude that those claims are not properly before us in this appeal.

information; failing to present and develop defense theories at trial; failing to object to jury instructions; failing to move to suppress evidence or to argue effectively to exclude other acts evidence; and failing to object to the number of uniformed guards present during jury voir dire.⁵ To the extent Thums is raising claims of ineffective assistance of counsel that were raised in postconviction proceedings and addressed on appeal, those arguments may not be relitigated here. *See Witkowski*, 163 Wis. 2d at 990. To the extent Thums is seeking to raise new claims of ineffective assistance of counsel, and attempting to overcome the procedural bar on grounds that postconviction counsel was ineffective by failing to pursue those claims, we reject that argument. Thums has not alleged sufficient material facts to show that his allegations of ineffective assistance of trial counsel are “clearly stronger” than the claims his postconviction counsel did pursue. *See Romero-Georgana*, 360 Wis. 2d 522, ¶¶36-47, 58-65. Thus, Thums has not overcome the procedural bar as to this issue. Accordingly, we discern no error in the court’s exercise of discretion by denying Thums’ motion without a hearing. *See id.*, ¶30, 71.

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals

⁵ To the extent Thums attempts to raise any other claims of ineffective assistance of trial counsel, we deem those arguments insufficiently developed.