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DISTRICT I

May 11, 2017

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

2016AP209

State v. Tony Thomas
(L.C. #2000CF1726)

Before Kessler, Brash and Dugan, JJ.

Tony Thomas, *pro se*, appeals from a circuit court order denying his WIS. STAT. § 974.06 (2015-16) postconviction motion without a hearing.¹ We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm.

¹ The Honorable Thomas J. McAdams, who was assigned the case due to judicial rotation, denied the motion at issue on appeal. The Honorable Kitty K. Brennan presided over the jury trial and sentenced Thomas.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

In 2000, a jury found Thomas guilty of two felonies: (1) first-degree reckless homicide by use of a dangerous weapon, as a party to a crime; and (2) felon in possession of a firearm. The trial court imposed a global sentence of thirty-eight years of initial confinement and fifteen years of extended supervision. New counsel was appointed for Thomas and he appealed.²

In our decision affirming Thomas's convictions, we summarized his argument on appeal: "Thomas argues that the State's evidence was insufficient to sustain the jury's verdict that he was a party to first-degree reckless homicide. Thomas specifically contends the evidence suggested 'he was acting alone in his activity, rather than assisting the other shooters.'" *See State v. Thomas*, No. 2001AP2627-CR, unpublished slip op. and order at 2 (WI App Sept. 24, 2002). We rejected Thomas's argument, concluding "that the trial record contained ample evidence supporting the jury's verdict." *See id.* at 3.

Fourteen years later, Thomas filed the *pro se* WIS. STAT. § 974.06 motion that is now before us on appeal.³ In that postconviction motion, he sought a new trial. He argued that the evidence did not support his reckless homicide conviction, that party-to-a-crime liability was unconstitutionally applied in this case, that trial counsel performed deficiently by failing to call an alibi witness and by not effectively advocating at sentencing, and that the restitution ordered was excessive. In addition, on the last page of his twenty-page motion, Thomas asserted that he is not procedurally barred from raising the aforementioned issues in a § 974.06 motion because he has a "'sufficient' reason for not having raised, or for having inadequately raised the issue on a prior motion or appeal." He then continued, *verbatim*:

² In his appellate brief in the current appeal, Thomas asserts for the first time that his postconviction counsel filed a no-merit report in his direct appeal. That is incorrect. As we explain above, postconviction counsel filed a merit appeal challenging the sufficiency of the evidence.

³ To the extent Thomas is presenting new issues on appeal, we decline to consider them because they were not raised in his postconviction motion. *See State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) ("As a general rule, this court will not address issues for the first time on appeal.").

Sufficient Reason On The Post Conviction Ineffectiveness Constitutes Sufficient Reason.

The fact that [postconviction counsel] could not challenge his own ineffectiveness constitutes sufficient reason under § 974.06(4) authorizing Thomas to raise his postconviction ineffectiveness claim now. *State v. Hensley*[,] 221 Wis. 2d 473, 585 N.W.2d 683 (Ct. App. 1998); *State v. Robinson*, 177 [Wis. 2d] 46, 501 N.W.2d 831, 834 (Ct. App. 1993).

For the reasons stated [postconviction counsel] did not act reasonably in failing to raise the identified issues in Thomas[’s] original movant papers and that failure Thomas’s postconviction or appellate relief.

The trial court denied Thomas’s motion without a hearing. The trial court rejected some of Thomas’s arguments on substantive grounds and others on procedural grounds. For instance, the trial court noted that Thomas’s first argument was “nothing more than a rehash of his sufficiency of the evidence claim which was rejected by the Court of Appeals.” The trial court also noted that Thomas had failed to demonstrate that “his claims are clearly stronger than the claims raised by counsel on appeal.” This appeal follows.

At issue is whether the trial court erroneously exercised its discretion when it denied Thomas’s postconviction motion without a hearing. Our supreme court has summarized the applicable legal standards:

Whether a motion alleges sufficient facts that, if true, would entitle a defendant to relief is a question of law that this court reviews *de novo*. The [trial] court must hold an evidentiary hearing if the defendant’s motion raises such facts. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing.

State v. Burton, 2013 WI 61, ¶38, 349 Wis. 2d 1, 832 N.W.2d 611 (italics added; citations and internal quotation marks omitted).

WISCONSIN STAT. § 974.06 permits collateral review of a defendant's conviction based on errors of jurisdictional or constitutional dimension. *State v. Johnson*, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981). However, it “was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later.” *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Thus, a defendant who has had a direct appeal or another postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a “sufficient reason” for failing to raise it earlier. *See id.* A claim of ineffective assistance from postconviction counsel may present a “sufficient reason” to overcome the *Escalona-Naranjo* procedural bar. *See, e.g., State ex rel. Rothering v. McCaughy*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). However, a defendant can overcome the presumption of effective assistance only if he can “show that ‘a particular nonfrivolous issue was clearly stronger than issues that counsel did present.’” *State v. Romero-Georgana*, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668 (applying “clearly stronger” standard to evaluation of § 974.06 motions “when postconviction counsel is accused of ineffective assistance on account of his failure to raise certain material issues before the [trial court]”) (citations, italics, and one set of quotation marks omitted). Whether a procedural bar applies is a question of law. *See State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

Applying those standards here, we conclude that Thomas's WIS. STAT. § 974.06 motion is procedurally barred and, on that basis, we affirm the order. First, he is barred from relitigating issues that were addressed in his direct appeal. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (“A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.”).

Second, Thomas's postconviction motion raised a host of new issues. It was not until the very end of the motion that Thomas suggested the reason he failed to raise those issues in his

direct appeal was the ineffectiveness of postconviction counsel. Thomas’s brief barely asserts and does not adequately demonstrate that his postconviction counsel provided ineffective assistance. Moreover, Thomas’s motion does not even assert, much less demonstrate, that the issues he believes postconviction counsel should have raised are clearly stronger than those that were raised on appeal. *See Romero-Georgana*, 360 Wis. 2d 522, ¶58 (to demonstrate deficiency prong of ineffective assistance of postconviction counsel claim, defendant must show that new claim was “clearly stronger” than claims previously raised by postconviction counsel “by alleging ‘sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle him to the relief he seeks.’”) (citation omitted). Indeed, Thomas does not discuss either the issues raised in his prior appeal or this court’s decision affirming his conviction.

Because Thomas has not demonstrated a “sufficient reason” for failing to previously raise the issues outlined in his WIS. STAT. § 974.06 motion, he is barred from seeking collateral review of those issues. *See Escalona-Naranjo*, 185 Wis. 2d at 185. Therefore, we affirm the circuit court’s order.

For the foregoing reasons,

IT IS ORDERED that the circuit court order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals