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**DISTRICT I/II**

July 19, 2017

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

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2016AP569

State of Wisconsin v. Andrew M. Greenwood (L.C. #2009CF2777)

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

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Andrew M. Greenwood appeals pro se from an order denying his motion for postconviction relief. 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 (2015-16).<sup>1</sup> We affirm the order of the circuit court.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version.

In 2010, Greenwood was convicted following a jury trial of felony murder and possession of a firearm by a felon, both as a party to a crime. The circuit court sentenced him to a total of twenty-four years of initial confinement followed by eight years of extended supervision. This court affirmed the judgment of conviction and circuit court order denying Greenwood's WIS. STAT. RULE 809.30 postconviction motion. *See State v. Greenwood*, No. 2013AP706-CR, unpublished slip op. ¶1 (WI App July 8, 2014).

In 2016, Greenwood filed a WIS. STAT. § 974.06 motion that is the subject of this appeal. In it, he alleged that his trial counsel was ineffective for failing to properly impeach two State witnesses. He further alleged that his postconviction counsel was ineffective for failing to raise trial counsel's ineffectiveness. The circuit court denied Greenwood's motion without a hearing. This appeal follows.

To be entitled to a hearing on a postconviction motion, the defendant must allege "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion alleges sufficient facts, a hearing is required. *Id.* If the motion is insufficient, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may exercise its discretion in deciding whether to grant a hearing. *Id.*

A motion brought under WIS. STAT. § 974.06 is typically barred, if filed after a direct appeal, unless the defendant shows a sufficient reason why he or she did not, or could not, raise the issues in a motion preceding the first appeal. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Whether a defendant's claim is procedurally barred presents

a question of law that we review de novo. *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

Claims of ineffective assistance of trial counsel cannot be reviewed on appeal absent a postconviction motion in the circuit court. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). Thus, ineffective assistance of postconviction counsel may sometimes constitute a sufficient reason for not raising an issue on direct appeal. *Id.* at 682. However, “[w]e will not assume ineffective assistance from a conclusory assertion.” *State v. Romero-Georgana*, 2014 WI 83, ¶62, 360 Wis. 2d 522, 849 N.W.2d 668.

With these standards in mind, we turn to Greenwood’s arguments. His primary complaint on appeal is that the circuit court erred in denying his motion without a hearing. He therefore seeks a hearing on his claim of ineffective assistance of trial counsel. Alternatively, he seeks a new trial in the interest of justice.

There are at least two problems with Greenwood’s motion in this case. First, it does not adequately allege a sufficient reason for failing to raise the claim of ineffective assistance of trial counsel earlier. The assertion of ineffective assistance of postconviction counsel is conclusory and does not establish a sufficient reason. Accordingly, the motion is procedurally barred. Second, the motion is insufficient because it fails to explain how Greenwood was prejudiced by his trial counsel’s supposed deficiencies. *See Allen*, 274 Wis. 2d 568, ¶26 (a claim of ineffective assistance of counsel requires a showing of both deficient performance and prejudice). For these reasons, we are satisfied that the circuit court properly denied the motion without a hearing.

As for the request for a new trial in the interest of justice, we will exercise our discretionary power to set aside a conviction only in exceptional cases. *State v. Avery*, 2013 WI

13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60. Here, Greenwood's request for discretionary reversal merely restates the claim that we have rejected in this opinion because it is procedurally barred and insufficient. Under these circumstances, we decline to grant such extraordinary relief.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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