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**DISTRICT II**

July 26, 2017

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

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2016AP2158

State of Wisconsin v. Gregory D. Basped (L.C. # 2012CF409)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, 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).**

Gregory D. Basped appeals pro se from an order denying his postconviction motion based on ineffective assistance of counsel. He contends that his trial counsel (1) failed to challenge the credibility of the victim, (2) failed to challenge the chain of custody of an evidence bag, and (3) failed to move for suppression of Basped's statement to police. 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> Because Basped's postconviction claims are procedurally barred by WIS. STAT. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), we affirm.

Basped was convicted of second-degree sexual assault of an intoxicated person after a jury found him guilty. The circuit court sentenced him to five years of initial confinement and ten years of extended supervision. His motion for postconviction relief based on insufficient evidence was denied. We affirmed the judgment on appeal. *State v. Basped*, No. 2014AP1460-CR, unpublished op. and order (WI App June 18, 2015).

Basped subsequently filed this pro se WIS. STAT. § 974.06 motion, asserting that his postconviction counsel rendered ineffective assistance by failing to raise three claims of ineffective assistance by his trial counsel. In denying the motion, the circuit court concluded that Basped failed to allege sufficient facts for it to find ineffective assistance of either his trial or postconviction counsel. Basped appeals.

All grounds for relief under WIS. STAT. § 974.06 must be raised in the original motion. Sec. 974.06(4). Successive motions and appeals are barred, unless the defendant can show a “sufficient reason” why the newly alleged errors were not raised previously. See *Escalona-Naranjo*, 185 Wis. 2d at 181. Whether a defendant's motion is procedurally barred is a question of law we review de novo. *State v. Allen*, 2010 WI 89, ¶15, 328 Wis. 2d 1, 786 N.W.2d 124.

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

Because a defendant is entitled to effective assistance of counsel for posttrial motions, ineffective assistance of postconviction counsel can constitute a sufficient reason as to why an issue that could have been raised previously was not. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Like a defendant claiming ineffective assistance of trial counsel, a defendant claiming ineffective assistance of postconviction counsel must allege that (1) counsel’s performance was deficient and that (2) the deficient performance prejudiced the defense. *State v. Balliette*, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. If a defendant fails to meet one prong, we need not address the other prong. *State v. Maday*, 2017 WI 28, ¶54, 374 Wis. 2d 164, 892 N.W.2d 611.

When claiming that counsel was ineffective by failing to have raised issues previously, the deficiency prong requires the defendant to show that a certain nonfrivolous issue was “clearly stronger” than issues that counsel did assert. *State v. Romero-Georgana*, 2014 WI 83, ¶45, 360 Wis. 2d 522, 849 N.W.2d 668. The “clearly stronger” standard is appropriate when counsel raised other issues before the circuit court, making it possible to compare the prior and current issues. *Id.*, ¶46.

In his original postconviction motion, Basped’s counsel argued that the evidence was insufficient as a matter of law for the jury to find that Basped was guilty of sexual intercourse with an intoxicated person. In support of this contention, counsel made the following points. While there was evidence that the victim was acting intoxicated at a bar in the early morning hours, Basped did not see her until almost an hour later at her home. The victim was not so

impaired as to prevent her from providing her home address to the cab driver, paying for the ride home, and preventing the home alarm from sounding. No presence of alcohol or other controlled substances were detected in her blood which was obtained thirty-six hours after the incident. Based on the evidence, Basped's counsel asserted that a reasonable jury could not have concluded that the victim was so intoxicated that she was unable to give consent and that Basped had actual knowledge of such an impairment. As noted, the circuit court rejected these challenges and we affirmed.

In his current motion, Basped argues pro se that his postconviction counsel should have also asserted that his trial counsel was ineffective because he (1) failed to challenge the credibility of the victim, (2) failed to challenge the chain of custody of an evidence bag, and (3) failed to move for suppression of Basped's statement made during police interrogation.

Basped's claim of ineffective assistance of counsel is procedurally barred. He has failed to show why his current claims are "clearly stronger" than the claim raised in his first posttrial motion and appeal. Although Basped describes his ineffective assistance of counsel claims and cites to portions of the record for support, he fails to explain, much less demonstrate, why those claims are clearly stronger than the "insufficient evidence" claim that had been advanced. No comparison of the two sets of claims is made. See *Romero-Georgana*, 360 Wis. 2d 522, ¶46. Without such a comparison, we cannot conclude that his current claims are clearly stronger than his previous claim, and, thus, Basped has not met the "sufficient reason" requirement under WIS. STAT. § 974.06(4). *Escalona-Naranjo*, 185 Wis. 2d at 185.

Although the procedural bar is dispositive, we nonetheless discuss the substance of Basped's claims. Basped contends that the circuit court erred in denying him an evidentiary

hearing on his claims. A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief. *State v. Pinno*, 2014 WI 74, ¶38, 356 Wis. 2d 106, 850 N.W.2d 207. The motion must allege facts that allow the reviewing court to meaningfully assess the defendant's claim. *State v. Allen*, 2004 WI 106, ¶21, 274 Wis. 2d 568, 682 N.W.2d 433. The facts must be material to the issue presented. *Id.*, ¶22. A sufficient postconviction motion alleges the “five ‘w’s’ and one ‘h’; that is, who, what, where, when, why, and how.” *Id.*, ¶23.

We review the question of whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested under a mixed standard of review. *Id.*, ¶9. We determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. *Id.* This is a question of law that is reviewed de novo. *Id.* If the motion raises such facts, the circuit court must hold an evidentiary hearing. *Id.*

But 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 circuit court has the discretion to grant or deny a hearing. *Id.* We review a circuit court's discretionary decision under the deferential erroneous exercise of discretion standard. *Id.*

As noted above, Basped's ineffective assistance of counsel claims are procedurally barred.<sup>2</sup> We further conclude that the circuit court did not err in denying an evidentiary hearing.<sup>3</sup>

Basped argues that his trial counsel failed to challenge the victim's credibility. Trial counsel did, however, challenge her credibility. He highlighted the fact that the victim was unsure as to which breast was injured during the assault. He pointed out that the victim could have sought medical treatment earlier. Trial counsel also impeached the victim's testimony in places where it differed from the statements she gave to police. The victim admitted not remembering telling the police certain things, such as where she lived and how her home alarm system worked. Basped's motion is insufficient to show that trial counsel's performance was deficient with respect to challenging the victim's credibility.

Basped also argues that his trial counsel failed to challenge the chain of custody of an evidence bag with plastic and glass containers inside. A police officer placed the containers into a standard evidence bag, sealed it with white and red tape, and initialed the bag. Because she believed that another officer would also be handling the evidence, she added the second officer's name to a tag on the bag. However, the second officer never handled the evidence. Basped asserts that the chain of custody was broken. We disagree. The reason for the additional name on the bag was explained adequately, and Basped does not suggest how the addition of the name

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<sup>2</sup> We may affirm an order or judgment on grounds that differ from those relied on by the circuit court. *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987).

<sup>3</sup> Basped also argues that the circuit court factually erred when it stated that Basped's motion "failed to raise any additional issues other than those previously addressed" in earlier motions or appeals. Basped apparently took this to mean that the circuit court considered Basped's ineffective assistance of counsel claims to have been previously addressed, which would have been incorrect. This is not, however, what the circuit court meant. To the contrary, the court was saying that there were no issues *in addition to* (or other than) the ineffective assistance of counsel claims that the court had just denied.

could have affected the evidence. While Basped alludes to contamination of the evidence, his motion is conclusory and unsupported.

Finally, Basped argues that trial counsel should have moved to suppress the statement Basped made during interrogation. At trial, the detective who interrogated Basped testified that “a couple times [Basped] mentioned attorney, but he didn’t ask for one.” Basped suggests that this indicates that he asserted his constitutional right to an attorney under *Miranda v. Arizona*, 384 U.S. 436 (1966). We disagree. Before trial, Basped’s trial counsel stated to the court that there were no *Goodchild*<sup>4</sup>/*Miranda* issues with respect to the recorded interrogation. Not only is there no evidence that Basped asked for an attorney, the detective’s testimony that Basped did not request an attorney during the interrogation is undisputed.

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*

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<sup>4</sup> *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965) (establishing safeguards to ensure the voluntariness of a plea).