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August 7, 2017

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

2016AP1790 State of Wisconsin v. James A. Lewis
(L.C. #2012CF93)

Before Brennan, P.J., Kessler and Dugan, JJ.

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).

James A. Lewis, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2015-16) motion for postconviction relief.[1] On appeal, Lewis argues the issues he raised in his postconviction motion, and he also asserts that the trial court failed to acknowledge certain documents when it evaluated his motion. In addition, Lewis asks this court to exercise its

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

discretionary power of reversal pursuant to WIS. STAT. § 752.35. We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We affirm.

Lewis was convicted, after a jury trial, of one count of first-degree sexual assault of a person under the age of twelve (sexual intercourse), and three counts of first-degree sexual assault of a person under the age of thirteen (sexual contact), contrary to WIS. STAT. § 948.02(1)(b) and (e) (2011-12). Lewis appealed, asserting that he was entitled to "a discretionary reversal pursuant to WIS. STAT. § 752.35, on grounds 'that the controversy was not fully tried in this case because of errors … concerning jury instructions and verdict forms.'" *See* ***State v. Lewis***, No. 2014AP1824-CR, unpublished slip op. ¶1 (WI App July 7, 2015) (quoting Lewis's appellate brief; ellipses supplied by ***Lewis***). We affirmed the judgment, concluding: "[T]he alleged errors in the jury instructions and verdict forms do not justify a discretionary reversal." *See* ***id.***, ¶20. Lewis's postconviction/appellate counsel filed a petition for review with the Wisconsin Supreme Court, which was denied on November 4, 2015.

On August 3, 2016, Lewis filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. His motion alleged: (1) the trial court should have granted his pretrial request for new trial counsel; (2) Lewis's trial counsel provided ineffective assistance in at least eleven ways; and (3) postconviction/appellate counsel provided ineffective assistance by not alleging that trial counsel performed deficiently in the ways Lewis identified in the motion. Lewis asserted that his motion should not be procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because postconviction/appellate counsel's alleged ineffectiveness is a sufficient reason why these issues were not raised in a postconviction motion or on appeal.

The trial court denied Lewis's motion in a written order, without a hearing. The trial court briefly addressed the merits of Lewis's allegations and concluded that he had "not set forth any viable claims for relief with respect to trial counsel's performance," and, therefore, postconviction/appellate counsel did not perform deficiently by failing to raise those issues. This appeal follows.

Absent "a sufficient reason," a defendant may not bring a claim in a WIS. STAT. § 974.06 motion if that claim "could have been raised on direct appeal or in a [WIS. STAT. §] 974.02 motion." *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185 (italics omitted); *see also* ***State v. Romero-Georgana***, 2014 WI 83, ¶34, 360 Wis. 2d 522, 849 N.W.2d 668. Ineffective assistance from postconviction counsel may constitute a sufficient reason for not raising a claim in an earlier proceeding. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). When postconviction counsel is alleged to be ineffective for failing to raise certain issues in the trial court, the defendant must show that these nonfrivolous issues were "clearly stronger" than the issues postconviction counsel did raise. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶46. This "clearly stronger" test is a way for reviewing courts to assess whether counsel performed deficiently, by comparing arguments now proposed against those previously raised. *See* ***id.***, ¶¶45-46.

To secure a hearing on a WIS. STAT. § 974.06 motion, a defendant must allege sufficient material facts—i.e., who, what, where, when, why, and how—that, if true, would show the defendant was entitled to relief on his or her claims. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶30; ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. "'[I]f 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 (citation omitted). "Sufficiency of the motion is a question of law, which we review *de novo*." ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334 (italics added).

With those standards in mind, we have reviewed Lewis's WIS. STAT. § 974.06 motion. We conclude that Lewis was not entitled to an evidentiary hearing on his motion because Lewis did not sufficiently allege how his unraised issues are clearly stronger than those postconviction/appellate counsel chose to pursue. Instead, he presented "'only conclusory allegations'" as to that issue, so it was within the trial court's discretion to deny the motion without a hearing. *See* ***Burton***, 349 Wis. 2d 1, ¶38 (citation omitted).

Specifically, Lewis's twenty-page motion briefly acknowledged the requirement that he demonstrate that his new issues are clearly stronger, stating: "Lewis was deprived of effective assistance of postconviction/appellate counsel on direct appeal where postconviction counsel … failed to raise any of the issues contained herein, and where they are 'clearly stronger' than those issues which were raised." Lewis then referenced this language from ***Romero-Georgana***:

> [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. However, in evaluating the comparative strength of the claims, reviewing courts should consider any objectives or preferences that the defendant conveyed to his attorney. A claim's strength may be bolstered if a defendant directed his attorney to pursue it.

See ***Romero-Georgana***, 360 Wis. 2d 522, ¶4 (citation omitted). Lewis provided no additional argument or discussion on the "clearly stronger" issue.

Although Lewis's motion briefly acknowledged the requirement that his issues must be clearly stronger than those postconviction/appellate counsel pursued, it offered no analysis of the issues that were pursued on appeal or their "comparative strength" to Lewis's new claims.[2] *See* ***id.*** Lewis's assertion that the new issues are clearly stronger was meaningless without comparison to the issues postconviction/appellate counsel pursued. Because Lewis was not entitled to relief unless the issues he raised were "clearly stronger" than those previously raised, *see* ***id.***, ¶¶45-46, and because he offered "'only conclusory allegations'" on that issue, the trial

[2] The only time Lewis's motion mentioned the specific arguments made on direct appeal was when Lewis summarized the case's procedural history. The motion stated:

> Direct Appeal: During appeal [postconviction/appellate counsel] raised the following issues:
>
> I. The Defendant's constitutional rights under both the United States and Wisconsin Constitutions were violated by failure to achieve a unanimous jury verdict.
>
> A. [Postconviction/appellate counsel] argued that jury unanimity was violated because of lack of proper jury instructions and vague verdict forms. The State argued that this was an ineffective assistance claim. The Appellate Court, in their decision, agreed with the State, and since the defendant did not raise ineffective assistance they could not rule on that issue.
>
> B. [Postconviction/appellate counsel] also argued that the Court of Appeals has discretionary authority to decide these issues raised for the first time on appeal. The Appellate Court ruled that they only used their discretionary powers in extraordinary cases, and that this case did not apply.

(Bolding omitted.)

court had discretion to deny Lewis's motion without a hearing, *see* ***Burton***, 349 Wis. 2d 1, ¶38 (citation omitted).[3]

In summary, having failed to establish postconviction counsel ineffectiveness, Lewis cannot overcome ***Escalona-Naranjo***'s procedural bar on that basis. Lewis asserts other reasons why he believes the procedural bar should not apply. Specifically, Lewis asserts that his motion should not be barred because postconviction counsel could not raise the issue of her own ineffectiveness in earlier litigation. We agree with the State that this conclusory assertion is misplaced. There was no need for postconviction/appellate counsel to allege her own ineffectiveness in a postconviction motion or on direct appeal. She did not represent Lewis at trial and was not barred from alleging that trial counsel was ineffective.

Lewis also briefly complains about his postconviction/appellate counsel's failure to raise other issues on direct appeal, errors in the direct appeal briefs, the lack of a motion for reconsideration after this court's decision was issued, and numerous extensions of time postconviction/appellate counsel sought before and during the direct appeal. Lewis's assertions are conclusory and do not adequately explain, much less demonstrate, how counsel's performance was both deficient and prejudicial. Lewis has not identified a basis to overcome application of the ***Escalona-Naranjo*** bar to his WIS. STAT. § 974.06 motion.

[3] Because we conclude that Lewis was not entitled to a hearing on his motion due to his insufficient presentation of the "clearly stronger" issue, we do not consider the trial court's discussion of the merits of Lewis's arguments or Lewis's appellate argument that the trial court's analysis included misinterpretations of the factual record. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (An appellate court should decide cases "on the narrowest possible ground[s].").

Finally, Lewis asks this court to exercise its power of discretionary reversal under WIS. STAT. § 752.35. He appears to raise the same arguments that were addressed in his direct appeal, where we rejected his request for a discretionary reversal. *See* ***Lewis***, No. 2014AP1824-CR, unpublished slip op. ¶¶15-20. Lewis cannot relitigate issues that were previously decided. *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."). Moreover, nothing Lewis raised in his postconviction motion or in this appeal leads us to conclude a discretionary reversal would be appropriate in this case.

Therefore,

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

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

Diane M. Fremgen
Clerk of Court of Appeals