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

2016AP2337 State of Wisconsin v. Charles R. Smith (L.C. # 2013CF3861)

Before Brennan, P.J., Kessler and Brash, 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).

Charles R. Smith, *pro se*, appeals from an order denying his postconviction motion, which was brought pursuant to WIS. STAT. § 974.06 (2015-16).[1] We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm the order.

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

Smith entered a plea agreement with the State pursuant to which he agreed to plead guilty to one count of first-degree reckless homicide, and the State agreed to recommend a prison sentence of unspecified length. Smith was convicted and sentenced to twenty-seven years of initial confinement and ten years of extended supervision. Represented by postconviction counsel, Smith filed a postconviction motion seeking to withdraw his guilty plea based on the alleged ineffective assistance of trial counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (To prove ineffective assistance of counsel, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense.). Specifically, Smith alleged that his trial counsel promised him that he would be sentenced to five years of initial confinement and five years of extended supervision, even though there was no such guarantee.

The trial court denied Smith's postconviction motion and we affirmed. *See* ***State v. Smith***, No. 2015AP1216-CR, unpublished slip op. (WI App March 29, 2016). We concluded that Smith was not entitled to a hearing on his postconviction motion for two reasons. First, the motion "did not raise sufficient facts with respect to the advice Smith claims he was given before he pled guilty." *See* ***id.***, ¶15. We explained:

> While the motion begins with the assertion that Smith "entered his plea on the understanding that he was promised a sentence of ten years, consisting of five years [of] incarceration and five years [of] extended supervision," the motion never asserts that trial counsel actually told Smith that a particular sentence was guaranteed. The motion contends that trial counsel's explanation "contained repeated references to 5 years in prison," but that is understandable, given that trial counsel ultimately recommended that Smith serve five years of initial confinement. In order to prove deficient performance, Smith is required to allege facts showing that trial counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***Strickland***, 466 U.S. at 688. The postconviction motion does not adequately allege anything that trial counsel did that would lead a court to conclude that he performed deficiently.

Smith, No. 2015AP1216, ¶15 (footnote omitted; bracketing in original).

The second reason we affirmed the denial of the postconviction motion was "the record conclusively demonstrates that Smith is not entitled to relief." *See* ***id.***, ¶16. We stated:

> Regardless of what trial counsel allegedly told Smith in the bullpen, the State clearly stated at the plea hearing that it would be recommending prison in an amount left to the trial court's discretion and that the plea agreement provided that the victim's family members would be allowed to offer their own sentencing recommendations. Both of those plea terms are clearly inconsistent with Smith being guaranteed a particular sentence. The trial court explicitly asked Smith whether he understood the State's recitation of the plea agreement and Smith said yes….
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> ….
>
> …[T]he record indicates that the terms of the plea agreement were stated in open court at the plea hearing and sentencing hearing, that Smith explicitly acknowledged those terms at the plea hearing, and that Smith did not subsequently say anything about a guaranteed five-year term of initial confinement, despite being given opportunities to do so when he met with the PSI writer and at sentencing. The record conclusively demonstrates that Smith is not entitled to relief.

Id., ¶¶16, 19.

Six months after we affirmed Smith's conviction, he filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. The motion alleged that postconviction counsel provided ineffective assistance when he filed the first postconviction motion by: (1) not including affidavits from Smith's girlfriend and Smith's mother; and (2) not alleging that trial counsel had provided ineffective assistance by "fail[ing] to advise Smith of the potential defense strategy of defense expert opinion testimony." (Bolding and some capitalization omitted.)

The postconviction court denied the motion.[2] As to the first issue, the postconviction court concluded that Smith was barred from relitigating whether he was promised a ten-year sentence, given this court's decision on that issue. *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."). As to the second issue, the postconviction court rejected Smith's claim that he was not advised of the potential to use defense expert opinion testimony, noting that Smith was present for the ***Daubert*** hearing on the admissibility of testimony from the defense's expert, Dr. Fred Anapol. *See* ***Daubert v. Merrell Dow Pharm., Inc***., 509 U.S. 579 (1993). This appeal follows.

WISCONSIN STAT. § 974.06 permits collateral review of a defendant's conviction based on errors of jurisdictional or constitutional dimension. *See* ***State v. Johnson***, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981). However, the statute "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. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). However, a defendant

[2] Although the same judge accepted Smith's plea, sentenced him, and decided both postconviction motions, for clarity's sake we will refer to the "postconviction court" when discussing the court's analysis of the WIS. STAT. § 974.06 motion at issue in this appeal.

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 [or her] 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 Smith's WIS. STAT. § 974.06 motion is procedurally barred.[3] First, he is barred from relitigating issues that were addressed in his direct appeal. *See* ***Witkowski***, 163 Wis. 2d at 990. As detailed above, in Smith's first appeal we rejected his claim that his trial counsel erroneously promised him a ten-year sentence. He cannot relitigate that issue.[4]

[3] We also reject Smith's attempt to raise new issues in his reply brief, such as asserting for the first time that the affidavits he included with his WIS. STAT. § 974.06 motion could be considered newly discovered evidence. *See* ***State v. Chu***, 2002 WI App 98, ¶42 n.5, 253 Wis. 2d 666, 643 N.W.2d 878 (we do not address issues raised by an appellant for the first time in a reply brief).

[4] We also note that, contrary to Smith's assertions, our prior decision did not fault the postconviction motion for not including affidavits supporting its allegations concerning trial counsel's conversations with Smith's girlfriend and Smith's mother. Instead, as explained above, we concluded that the motion failed to adequately explain what Smith's trial counsel said. *See* ***State v. Smith***, No. 2015AP1216-CR, unpublished slip op., ¶15 (WI App March 26, 2016). We also held that "[r]egardless of what trial counsel allegedly told Smith," the record conclusively demonstrated that Smith was not entitled to relief because he never mentioned being promised a ten-year sentence despite being given opportunities to do so at the plea hearing, in his meeting with the presentence investigation writer, and at sentencing. *See* ***id.***, ¶¶16-19.

Smith's WIS. STAT. § 974.06 motion also fails because it did not allege, much less demonstrate, that the issue concerning the viability of using a self-defense expert was clearly stronger than the issues raised in his direct appeal. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶45-46.

In addition, we agree with the postconviction court that the record conclusively demonstrates that *postconviction* counsel was not ineffective for failing to allege that *trial* counsel was ineffective for not advising Smith about the potential of presenting expert opinion testimony to support a self-defense claim. As the postconviction court explained in its order denying Smith's WIS. STAT. § 974.06 motion, trial counsel sought out an expert to support a self-defense claim and litigated the admissibility of that expert's testimony after the State objected to the expert. The trial court considered the parties' written arguments and conducted a hearing on the issue, ultimately concluding that the defense could call the expert as a witness.[5] On appeal, Smith does not discuss that hearing or explain why the postconviction court was wrong to reject Smith's claim that he was not aware of the possibility of using an expert to support a self-defense claim. Because Smith has not demonstrated that his trial counsel failed to advise him about using an expert for a self-defense claim, it follows that postconviction counsel was not ineffective for failing to raise that issue in Smith's first postconviction motion.

[5] The Honorable Timothy G. Dugan presided over the ***Daubert*** hearing on Smith's expert. *See* ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993). Judge Dugan ruled that the expert could not testify about certain opinions offered in his written report, but he said that the expert could express the opinion that the victim's stab wounds were "consistent with the victim … being on top of the defendant."

For the foregoing reasons, Smith has not established a basis to overcome ***Escalona-Naranjo***'s procedural bar. *See* ***id.***, 185 Wis. 2d at 185. Therefore, we affirm the order denying Smith's WIS. STAT. § 974.06 motion.

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
Acting Clerk of Court of Appeals