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March 13, 2018

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

2016AP2393 State of Wisconsin v. Jermaine F. Ford (L.C. # 2013CF2051)

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).

Jermaine F. Ford, *pro se*, appeals an order denying various forms of postconviction relief that he sought pursuant to a motion filed under WIS. STAT. § 974.06 (2015-16).[1] On appeal, he alleges that the State breached the plea bargain resolving the charges against him and that his trial counsel was ineffective for failing to challenge that breach. He also alleges that his trial

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

counsel was ineffective at sentencing for failing to present positive character evidence. Finally, he alleges that his guilty pleas were invalid due to an insufficient plea colloquy. Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

In 2013, the State charged Ford with nine crimes against a child, N.C.B. He resolved the matter with a plea bargain. Under its terms, Ford agreed to plead guilty to one count of child enticement and two counts of second-degree sexual assault of a child under sixteen. The State agreed that it would move to dismiss the other six charges but read them in for sentencing purposes. The parties also agreed that the State would not prosecute Ford for alleged sexual assaults committed against another child, I.L. Finally, the State agreed to recommend a prison sentence without specifying a recommended length of imprisonment.

The circuit court accepted Ford's guilty pleas to the three crimes described above, and it granted the State's motion to dismiss the remaining charges and read them in for sentencing purposes. The matter proceeded to sentencing, and the State, as agreed, recommended that Ford receive a prison sentence. The circuit court ultimately imposed an aggregate term of imprisonment bifurcated as eighteen years of initial confinement and twelve years of extended supervision. The circuit court also imposed three DNA surcharges.

With the assistance of appointed postconviction counsel, Ford moved the circuit court to vacate the DNA surcharges on the ground that they violated the *ex post facto* clauses of the Wisconsin and Federal Constitutions. The circuit court granted the motion in part and vacated one of the charges. Ford did not pursue a further appeal from the judgment of conviction. Instead, he filed a postconviction motion *pro se* pursuant to WIS. STAT. § 974.06, raising a

variety of claims and alleging that his postconviction counsel was ineffective for failing to pursue those claims on his behalf. The circuit court denied the motion without a hearing, and he appeals.

Pursuant to WIS. STAT. § 974.06(4), a person who wishes to pursue a second or subsequent postconviction motion must demonstrate a sufficient reason for failing in the first postconviction proceeding to raise or adequately address the issues. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel may in some circumstances constitute a sufficient reason for serial litigation. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). A convicted person must do more, however, than identify issues and allege that postconviction counsel was ineffective for failing to raise them. *See* ***State v. Balliette***, 2011 WI 79, ¶65, 336 Wis. 2d 358, 805 N.W.2d 334. The person must allege and show that the neglected claims were "clearly stronger" than the claims postconviction counsel pursued. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶4, 360 Wis. 2d 522, 849 N.W.2d 668.

Ford fails to establish that the claims raised in his *pro se* postconviction motion were clearly stronger than the claim that his postconviction counsel pursued with partial success on his behalf. Indeed, his *pro se* claims lack merit.

Ford asserts as his primary basis for relief that the State breached the plea bargain because, at his sentencing, the prosecutor told the circuit court about uncharged crimes of child sexual assault that Ford committed against N.N. According to Ford, the disclosure constituted a breach because "the plea agreement did not call for a third ... victim [N.N.] ... to be considered by the court." Ford is wrong. The plea bargain said nothing about uncharged crimes that Ford

committed against N.N. The State does not breach a plea bargain at sentencing by addressing matters on which the plea bargain is silent.[2] *See* ***State v. Bowers***, 2005 WI App 72, ¶18, 280 Wis. 2d 534, 696 N.W.2d 255.

Ford next asserts that his trial counsel was ineffective at sentencing for failing to object to the State's alleged breach of the plea bargain. To prevail on a claim of ineffective assistance of counsel, a defendant must make a two-prong showing that counsel's performance was deficient and that the defense was prejudiced as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to make an adequate showing as to one prong, the court need not address the other. ***Id.*** at 697. Ford's claim fails on the first ***Strickland*** prong. Because the State did not breach the plea bargain at sentencing by disclosing uncharged crimes against N.N., trial counsel did not perform deficiently by foregoing an objection to the State's disclosure. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel not ineffective for failing to pursue meritless claims).

Ford asserts next that his trial counsel was ineffective at sentencing because trial counsel neglected to say anything good about Ford's character. Again, Ford shows no deficiency. First, the record reveals that Ford's allegation is simply not true: trial counsel explicitly directed the sentencing court's attention to "the positives" in Ford's life, emphasizing that Ford was an

[2] We observe that Wisconsin public policy bars plea bargains that seek to prevent law enforcement officials from revealing relevant information to the sentencing court, including evidence of unproven offenses involving the defendant. *See* ***State v. McQuay***, 154 Wis. 2d 116, 125-26, 452 N.W.2d 377 (1990). As we have seen, the plea bargain here did not prohibit disclosure of uncharged offenses and thus did not run afoul of this policy.

involved parent who provided care for his children and maintained a good "relationship with the mother of his children for the sake of th[os]e children." Second, Ford fails to identify any other positive characteristics that trial counsel could have discussed or how any such information would have affected his sentences. '"[A] defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding.'" ***State v. Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 681 N.W.2d 272 (citation omitted).

As an additional basis for relief from this court, Ford asserts in his appellate brief that his guilty pleas were invalid because the circuit court did not adequately develop the record to establish his understanding of the nature of the charges. A defendant who believes a guilty plea colloquy was defective may pursue plea withdrawal by filing a postconviction motion that: (1) makes a *prima facie* showing that the circuit court accepted the pleas without completing statutory or other mandatory procedures; and (2) includes an allegation that the defendant in fact did not know or understand the information that should have been provided during the plea colloquy. *See* ***State v. Brown***, 2006 WI 100, ¶¶1-2, 293 Wis. 2d 594, 716 N.W.2d 906. Ford's postconviction motion did not include an allegation either that the circuit court failed to establish his understanding of the nature of the charges or that he lacked knowledge and understanding of the charges at the time of his pleas. Accordingly, he can not pursue any such contentions now. *See* ***State v. Pharm***, 2000 WI App 167, ¶9, 238 Wis. 2d 97, 617 N.W.2d 163 (explaining that reviewing courts normally do not consider arguments advanced for the first time on appeal).

For the sake of completeness, we also touch on two additional matters. First, Ford alleged in his postconviction motion that his guilty pleas were defective because he did not "personally ple[a]d guilty nor did the [circuit] court personally determine the validity of the

tainted guilty plea from the defendant." The circuit court rejected this claim based on the extensive guilty plea colloquy that established Ford's intent to plead guilty.[3] *See* ***State v. Burns***, 226 Wis. 2d 762, 774, 594 N.W.2d 799 (1999) (holding that where the record demonstrates that the defendant intended to plead guilty, the defendant is not required to utter any particular magic words, such as "I plead guilty," to enter a valid plea). Because Ford does not renew this claim on appeal, we deem the issue abandoned and discuss it no further. *See* ***Cosio v. Medical Coll. of Wis., Inc.***, 139 Wis. 2d 241, 242-43, 407 N.W.2d 302 (Ct. App. 1987).

Second, Ford's *pro se* postconviction motion included an allegation that trial counsel was ineffective for failing to pursue a claim that Ford was not guilty of the charges against him due to mental disease or defect. The circuit court rejected the allegation as conclusory and "wholly unsubstantiated by any professional opinion showing that the defendant did not understand the wrongfulness of his actions based on a mental disease or defect." *See* ***State v. Allen***, 2004 WI

[3] The following were among the relevant exchanges demonstrating Ford's intent to plead guilty during the plea colloquy:

> [THE COURT]: Mr. Ford, you're pleading guilty to Count 1, child enticement; Count 2, sexual assault of a child; Count 4, which is also sexual assault of a child under the age of 16; is that correct?
>
> [FORD]: Yes, sir.
>
> ....
>
> [THE COURT]: You're pleading guilty because you are guilty?
>
> [FORD]: Yes sir.
>
> [THE COURT]: You're pleading guilty because it's your decision to plead guilty?
>
> [FORD]: Yes, sir.
>
> [THE COURT]: And admit that you did commit these crimes; is that correct?
>
> [FORD]: Yes, sir.

106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433 (conclusory postconviction motions are insufficient to earn relief). Again, Ford does not renew the claim on appeal, and again, we deem the issue abandoned. *See* ***Cosio***, 139 Wis. 2d at 242-43.

For the foregoing reasons,

IT IS ORDERED that the postconviction order is summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals