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**DISTRICT II**

May 9, 2018

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

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2017AP168

State of Wisconsin v. Jose A. Vega (L.C. #2006CF21)

Before Reilly, P.J., Gundrum and Hagedorn, 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).**

Jose A. Vega appeals, pro se, from a decision of the circuit court denying his WIS. STAT. § 974.06 (2015-16)<sup>1</sup> motion alleging his postconviction counsel was ineffective for failing to assert on direct appeal that trial counsel was ineffective for not calling R.F. as a witness at his trial. As this ground was not raised on direct appeal, Vega has the burden of showing that this

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

new claim of ineffective assistance of trial counsel was “clearly stronger” than the claim of ineffective assistance of trial counsel Vega brought before this court in 2009. *State v. Romero-Georgana*, 2014 WI 83, ¶4, 360 Wis. 2d 522, 849 N.W.2d 668. 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. We affirm the decision and orders of the circuit court.

In December 1994, William Schipper was bludgeoned to death in the basement of his home. Vega was charged with first-degree intentional homicide as party to a crime and convicted following a jury trial. Vega’s defense was that it was his co-actor who killed Schipper. On direct appeal, Vega alleged that his trial counsel was ineffective for failing to call their fingerprint analyst. We affirmed the circuit court’s decision that Vega’s trial counsel was not ineffective. *State v. Vega*, No. 2008AP2468-CR, unpublished slip op. (WI App Aug. 26, 2009).

In 2016, Vega filed a WIS. STAT. § 974.06 motion that underlies this appeal. Vega now argues that his trial counsel was ineffective for failing to call R.F., a woman who lived upstairs from the crime scene, and that postconviction counsel was ineffective for not raising this claim on direct appeal. Trial counsel told the jury in opening statement that they would hear “crucial evidence” from R.F. as R.F. would testify that she heard the voice of Vega’s co-actor arguing with the victim in the basement at the time of the crime rather than Vega’s voice. At trial, an investigating officer testified that R.F. gave contradictory descriptions of what she had heard coming from the basement, including that she heard a hispanic voice coming from the basement (the co-actor is not Hispanic; Vega is Cuban). Both the defense and the State told the jury in opening statements that they would call R.F. as a witness. Neither did. Defense counsel kept R.F. under subpoena throughout the trial, but did not call her. The circuit court denied Vega’s

§ 974.06 motion on the grounds that Vega failed to allege sufficient facts to support his claim and failed to demonstrate a sufficient reason for not raising this claim on direct appeal.

As noted above, Vega has the burden of showing that his new claim of ineffectiveness of trial counsel was “clearly stronger” than the claim raised on direct appeal. *Romero-Georgana*, 360 Wis. 2d 522, ¶4. In order to receive a *Machner*<sup>2</sup> hearing, Vega is required to allege sufficient material facts which, if true, would entitle him to relief. *State v. Balliette*, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334; *State v. Allen*, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Vega has already had a direct appeal where he was free to bring any meritorious claim. Vega is now required to do more than point to an issue not raised by postconviction counsel on direct appeal, and he must show that both postconviction and trial counsel were ineffective. *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

We start with the presumption that Vega’s trial and postconviction counsel provided effective representation, *Balliette*, 336 Wis. 2d 358, ¶¶25-28, and we further presume that counsel “made all significant decisions in an exercise of reasonable professional judgment,” *State v. Gordon*, 2003 WI 69, ¶22, 262 Wis. 2d 380, 663 N.W.2d 765 (citation omitted). Vega has the responsibility of showing us the “who, what, where, when, why and how” of both trial and postconviction counsels’ ineffectiveness relating to R.F., as well as showing us why the failure to call R.F. was a clearly stronger issue than the claim he brought on direct appeal (failure to call their fingerprint expert). *Allen*, 274 Wis. 2d 568, ¶¶21, 23.

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<sup>2</sup> *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Vega makes a conclusory statement that the failure to call R.F. was a clearly stronger issue than the failure to call the fingerprint expert, but he does not compare the two claims nor does he explain why the failure to call R.F. was a stronger issue than the fingerprint expert issue. *Romero-Georgana*, 360 Wis. 2d 522, ¶¶43-46. R.F. was available at the trial under a subpoena. It is clear from the trial record that what R.F. would testify to, if called, was in question. Vega does not explain why he and his trial counsel decided not to call R.F. Vega also does not explain what conversations he had with postconviction counsel regarding R.F. and why the issue was not raised on direct appeal. Vega's assertion of error without explanation of the circumstances does not overcome the presumption that trial counsel's decision not to call R.F. was reasonable. A movant fails to satisfy their burden of showing an issue was "clearly stronger" by simply saying so; a movant must explain why. The circuit court did not erroneously exercise its discretion in denying a *Machner* hearing and Vega's motion when Vega's claims were conclusory.

As Vega failed to show that the failure to call R.F. was a "clearly stronger" issue, we summarily affirm the orders denying Vega's motion and motion for reconsideration.

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are 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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*Sheila T. Reiff*  
Clerk of Court of Appeals