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

2017AP814 State of Wisconsin v. James R. Washington (L.C. # 2008CF3382)

Before Kessler, P.J., Brash 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 R. Washington, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2015-16) motion for postconviction relief and his motion for reconsideration.[1] Based upon our

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

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.

In 2015, we affirmed Washington's convictions for four counts of first-degree intentional homicide, as a party to a crime, and the denial of his motion for postconviction relief. *See* ***State v. Washington***, No. 2013AP956-CR, unpublished slip op. (WI App Oct. 1, 2015), *review denied* (WI Feb. 3, 2016). In doing so, we addressed the four arguments Washington offered in support of his motion for a new trial, including:

> (1) the jury during *voir dire* was given information that he claims made it more likely for them to convict him; (2) he received ineffective assistance of trial counsel; (3) a key witness recanted his testimony, which Washington asserts constitutes newly discovered evidence warranting a new trial;[2] and (4) the real controversy was not tried.

See ***id.***, ¶1 (italics added; hyphen omitted). The issue concerning ineffective assistance of trial counsel was based on Washington's claim that his trial counsel should have called Detective Richard McKee to testify about computer records of patrons who provided identification to enter a particular nightclub.[3] *See* ***id.***, ¶¶11-19. The Wisconsin Supreme Court denied Washington's petition for review in February 2016.

In March 2017, Washington filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. The motion alleged that trial counsel provided ineffective assistance by

[2] The trial court held an evidentiary hearing on this issue where the key witness testified about the affidavits he signed recanting his testimony. Ultimately, the trial court found that the witness's "recantation was not credible" and denied Washington's postconviction motion seeking a new trial. *See* ***State v. Washington***, No. 2013AP956-CR, unpublished slip op., ¶¶20, 25 (WI App Oct. 1, 2015).

[3] Washington was represented by two lawyers at trial. His postconviction motion alleged that both were ineffective.

failing to call eight specific defense witnesses—including McKee—and by "abandoning" Washington's defense by not presenting witnesses at trial. Washington's motion included summaries of the testimony those eight witnesses would provide,[4] and he also submitted an affidavit discussing his interactions with postconviction counsel and his two trial counsel.

The trial court denied the motions in a written order without a hearing, and it also denied Washington's motion for reconsideration. It concluded that Washington's claims related to the performance of trial counsel were barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), because Washington could have raised those issues in his first postconviction motion. It also noted that Washington's arguments concerning McKee were barred because he could not 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."). This appeal follows.

We begin with the applicable legal standards. 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." ***Escalona-Naranjo***, 185 Wis. 2d at 185. Thus, a defendant who has had a direct appeal or another postconviction motion may not seek collateral review of an issue that was or

[4] Specifically, Washington submitted affidavits signed by him indicating what he believed each potential witness would say.

could have been raised in the earlier proceeding unless there is a "sufficient reason" for failing to raise it earlier. *See* ***id.*** (italics omitted). Postconviction counsel's ineffectiveness may, in some circumstances, constitute a sufficient reason for an additional postconviction motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). However, a defendant may not merely allege that postconviction counsel was ineffective; he or she must instead "make the case of" postconviction counsel's ineffectiveness. *See* ***State v. Balliette***, 2011 WI 79, ¶67, 336 Wis. 2d 358, 805 N.W.2d 334.

The two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), governs claims that postconviction counsel was constitutionally ineffective. *See* ***Balliette***, 336 Wis. 2d 358, ¶¶21, 28. The defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland***, 466 U.S. at 687. A court may consider either deficiency or prejudice first, and if the defendant fails to satisfy one prong, the court need not address the other. *See* ***id.*** at 697. To prove deficiency, a defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

When, as here, a defendant makes claims that postconviction counsel was ineffective for failing to raise claims that the defendant believes were meritorious, the defendant cannot overcome the procedural bar imposed by WIS. STAT. § 974.06, absent a showing that the neglected claims were "clearly stronger than the claims postconviction counsel actually brought." *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶4, 360 Wis. 2d 522, 849 N.W.2d 668. Whether a § 974.06 motion is procedurally barred "presents a question of law [that] we review

de novo." ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997) (italics added). Further when, as here, neglected claims include challenges to trial counsel's effectiveness, the defendant must show that trial counsel was, in fact, ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Claims of trial counsel's ineffectiveness are reviewed using the two-prong ***Strickland*** analysis. *See* ***Balliette***, 336 Wis. 2d 358, ¶21.

Additionally, a defendant challenging the effectiveness of counsel must preserve counsel's testimony in a postconviction hearing. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). A defendant, however, is not automatically entitled to such a hearing. To earn a hearing on a postconviction motion, a defendant is required to allege sufficient material facts that, if true, would entitle the defendant to relief. *See* ***Balliette***, 336 Wis. 2d 358, ¶¶18, 79. "[I]f the motion does not raise such facts, 'or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,'" the trial court may deny the motion without a hearing. ***Id.***, ¶18 (citation omitted). The sufficiency of a postconviction motion is a question of law that we review *de novo*. ***Id.***

Applying those standards here, we need not analyze Washington's allegations of *trial counsel* ineffectiveness because his WIS. STAT. § 974.06 motion failed to adequately allege *postconviction counsel* ineffectiveness. Therefore, Washington was not entitled to an evidentiary hearing or relief from his convictions. *See* ***Balliette***, 336 Wis. 2d 358, ¶18.

Washington's motion acknowledges the issues postconviction counsel raised in the postconviction motion and later pursued on appeal. Washington's motion criticizes postconviction counsel for refusing to argue that trial counsel abandoned Washington's defense.

In addition, Washington's own affidavit describes at length his attempts to convince postconviction counsel to pursue different issues. While Washington's motion and affidavit make clear that he thought postconviction counsel should have pursued other issues in the postconviction motion, they do not adequately explain how postconviction counsel's performance was constitutionally deficient. *See* ***id.***, ¶67 (A postconviction motion brought pursuant to WIS. STAT. § 974.06 must "make the case of [postconviction counsel's] deficient performance," rather than simply "point[ing] to issues that postconviction counsel did not raise."). Most notably, Washington's motion does not explicitly allege—much less adequately explain or demonstrate—that the issues Washington raises in his § 974.06 motion are "clearly stronger" than those postconviction counsel chose to pursue.[5] *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶4. This omission is fatal. *See* ***id.***, ¶62 (Defendant is required to "say why the claim he wanted raised was clearly stronger than the claims actually raised.").

Furthermore, Washington's motion fails to adequately allege that he was prejudiced by postconviction counsel's performance. His motion states: "I state my view that counsel's failure to raise on appeal nonfrivolous constitutional claims upon which his client has insisted must constitute 'cause and prejudice' for any resulting procedural default under state law." This is not a sufficient allegation of prejudice as it does not adequately explain how "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 694. Having failed to adequately allege both

[5] The State points out that although Washington's motion did not mention the phrase "clearly stronger," his affidavit did refer to one of the issues postconviction counsel raised as a "clear lesser [i]ssue." The use of that phrase in Washington's affidavit did not sufficiently allege or demonstrate that Washington's new issues were "clearly stronger" than those raised in his first postconviction motion. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶¶4, 62, 360 Wis. 2d 522, 849 N.W.2d 668.

deficiency and prejudice, Washington was not entitled to an evidentiary hearing on his WIS. STAT. § 974.06 motion. *See* ***Balliette***, 336 Wis. 2d 358, ¶18.

Next, we briefly address concerns Washington's appellate brief raises concerning the trial court's handling of his WIS. STAT. § 974.06 motion. Washington complains that the trial court did not attempt to compare the strength of the issues postconviction counsel raised against the issues raised in Washington's § 974.06 motion, suggesting this was a denial of due process and that the trial court was biased. Washington fails to recognize that it was his obligation to allege and explain how his new issues were clearly stronger than those raised by postconviction counsel in the postconviction proceedings. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶4; ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999) ("A party must do more than simply toss a bunch of concepts into the air with the hope that either the trial court or the opposing party will arrange them into viable and fact-supported legal theories."). It was not the trial court's job to identify, develop, and discuss reasons that Washington's new issues may or may not be clearly stronger than those raised in his first postconviction motion, especially when Washington did not even mention the concept of "clearly stronger" in his motion.[6]

Washington also complains that the trial judge who presided over the jury trial and postconviction proceedings was asked to decide Washington's WIS. STAT. § 974.06 motion even

[6] It was not simply Washington's failure to use the term "clearly stronger" that rendered his motion insufficient. Washington's motion does not adequately discuss the strength of the issues raised by postconviction counsel, such as the trial court's reference to capital punishment during *voir dire* and the defense's presentation of affidavits from the State's key witness, Rosario Fuentez, recanting his trial testimony that he, Washington, and a third man fired guns at the victims.

though that judge was no longer assigned to the felony division. However, it is not uncommon for judges to be asked to handle postconviction motions in cases where they presided over a long trial, as this promotes judicial efficiency. In any event, this court has applied a *de novo* review of the § 974.06 motion, as case law requires and Washington requested. *See* ***Balliette***, 336 Wis. 2d 358, ¶18. Furthermore, to the extent Washington is implying that the trial court was biased, we conclude that Washington has not successfully rebutted the "presumption that [the] judge has acted fairly, impartially, and without prejudice." *See* ***State v. Herrmann***, 2015 WI 84, ¶24, 364 Wis. 2d 336, 867 N.W.2d 772. We reject Washington's arguments with respect to the trial court's handling of his motion.

Upon the foregoing,

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals