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**DISTRICT I**

March 25, 2019

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

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2018AP1511 State of Wisconsin v. Quentin L. Rogers (L.C. # 1997CF973998)

Before Brennan, 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).**

Quentin L. Rogers, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2017-18)[1] motion without a hearing. Based upon our review of the briefs and record, we conclude at

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. The order is summarily affirmed.

In 1998, a jury convicted Rogers on one count of attempted armed robbery with the use or threat of force. He was given an indeterminate sentence of twenty years' imprisonment.[2] With the assistance of appointed counsel, Rogers pursued a direct appeal in which he challenged the sufficiency of the evidence and argued that his motion for a mistrial had been erroneously denied. *See* ***State v. Rogers***, No. 1998AP2992-CR, unpublished slip op. (WI App Dec. 21, 1999). We affirmed.

In 2017, Rogers filed a *pro se* motion for sentence modification, arguing that the sentencing court erroneously exercised its discretion and violated his constitutional rights when it considered statements from G.B., the victim of an armed robbery of which Rogers was acquitted. The circuit court denied the motion, noting that the deadlines for challenging the sentencing court's exercise of discretion had long expired and that Rogers' constitutional claims were procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).[3] Rogers did not appeal.

In July 2018, Rogers filed the WIS. STAT. § 974.06 motion underlying this appeal. He asserted that postconviction counsel was ineffective for failing to allege multiple claims of ineffective trial counsel, failing to file a postconviction motion challenging his sentence, and failing to file a motion to extend the time for filing a postconviction motion. The circuit court

[2] Rogers was sentenced by the Honorable Elsa C. Lamelas.

[3] The 2017 motion was denied by the Honorable William S. Pocan.

denied the motion as procedurally barred by ***Escalona*** and noted that "even if the court were to consider the motion, the allegations set forth by the defendant are completely conclusory and do not warrant the requested relief."[4] Rogers appeals.

"A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges such facts is a question of law. *See* ***id.***, ¶9. If the motion raises sufficient material facts, the circuit court must hold a hearing. *See* ***id.*** If the motion does not raise sufficient material facts, if the motion presents only conclusory allegations, or if the record conclusively shows the defendant is not entitled to relief, then the decision to grant or deny a hearing is left to the circuit court's discretion. *See* ***id.*** A circuit court's discretionary decisions are reviewed for an erroneous exercise of that discretion, a deferential standard. *See* ***id.***

Absent a sufficient reason, a defendant may not bring claims in a WIS. STAT. § 974.06 motion if the claims could have been raised in a prior motion or direct appeal. *See* ***Escalona***, 185 Wis. 2d at 185; ***State v. Romero-Georgana***, 2014 WI 83, ¶34, 360 Wis. 2d 522, 849 N.W.2d 668. Certain claims, like claims of ineffective trial counsel, must be preserved by a postconviction motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). Thus, ineffective assistance of postconviction counsel may sometimes constitute a sufficient reason for not raising a claim in an earlier proceeding. *See* ***id.*** at 682. For a court to conclude an attorney rendered ineffective assistance, the defendant must

[4] The 2018 motion was denied by the Honorable David A. Hansher.

show that counsel's performance was deficient and that the deficiency was prejudicial. *See* ***Allen***, 274 Wis. 2d 568, ¶26.

"An allegation that postconviction counsel failed to bring a claim that should have been brought is an allegation that counsel's performance was constitutionally deficient[.]" ***Romero-Georgana***, 360 Wis. 2d 522, ¶43. To prove the deficiency, the defendant must show the unraised issue was clearly stronger than the issues actually pursued by postconviction/appellate counsel. ***Id.***, ¶¶44-45; *see also* ***State v. Starks***, 2013 WI 69, ¶66, 349 Wis. 2d 274, 833 N.W.2d 146. When a claim of ineffective postconviction counsel is based on the failure to raise ineffective assistance of trial counsel, the defendant must also show that trial counsel actually was ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

Rogers previously had a direct appeal and a prior *pro se* postconviction motion,[5] so the circuit court deemed Rogers' latest motion procedurally barred by ***Escalona***. Though Rogers contends the circuit court improperly applied ***Escalona***, because he says his prior motion was not a WIS. STAT. § 974.06 motion, we need not decide whether the circuit court properly invoked the ***Escalona*** bar. The circuit court also determined that Rogers' present motion was "completely conclusory" and did not warrant relief, a conclusion with which we agree entirely.

First, Rogers alleged that postconviction counsel was ineffective for failing to allege that trial counsel was ineffective for failing to: (1) "[g]ather and investigate and present evidence

[5] In its order denying Rogers' WIS. STAT. § 974.06 motion, the circuit court stated that "a prior motion and appeal" had been filed by Rogers' attorney. There is no postconviction motion from counsel in the record before us, though we note that a postconviction motion is not a necessary prerequisite to appeal if the appellate issues are sufficiency of the evidence or an issue previously raised. *See* WIS. STAT. § 974.02(2).

that was available for the defense/counsel"; (2) present evidence about a "20.oz orange soda and bag of cheetos" to "damage the alleged victim's credibility, whom testified Rogers had his hand in his pocket"; (3) "request or file motion for latent fingerprint/D.N.A. testing" on a screwdriver after Rogers told counsel that he did not have a screwdriver; (4) "file a motion to suppress evidence prior to jury trial"; and (5) move to suppress a statement Rogers supposedly made to a police officer at the time of his arrest. This is essentially the extent of Rogers' argument, and it does not suffice.

To obtain an evidentiary hearing, Rogers had to do more than just identify the issues he believes postconviction counsel should have raised. *See* ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. "He needed to show that failing to raise those issues fell below an objective standard of reasonableness[,]" *see* ***id.***, ¶67, and that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different, *see* ***id.***, ¶24. Specifically, allegations of ineffectiveness must satisfy "the five 'w's' and one 'h' test, 'that is, who, what, where, why, why, and how.'" *See* ***id.***, ¶59 (quoting ***Allen***, 274 Wis. 2d 568, ¶23.)

Rogers' postconviction motion utterly fails in this regard, as does his appellant's brief.[6] For example, if there was more evidence for trial counsel to "gather and investigate" beyond the bottle of soda and bag of snacks, Rogers does not tell us what that evidence is nor the role it would have played in this case. He does not tell us what evidence trial counsel should have

[6] Our review, however, is generally limited to the four corners of the postconviction motion, without considering additional allegations in a brief. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. While a court should liberally construe a prisoner's pleadings and look beyond labels, *see* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983), we are not required to abandon our neutrality to conjure an argument from insufficient pleadings, *see* ***State ex rel. Harris v. Smith***, 220 Wis. 2d 158, 164-65, 582 N.W.2d 131 (Ct. App. 1998).

moved to suppress nor demonstrate why such motion would have succeeded. He does not identify the statement he gave to police or indicate whether it was inculpatory, nor does he adequately demonstrate that he would have prevailed on a suppression motion. In short, Rogers does not adequately allege sufficient facts to show trial counsel was deficient, and his claims of prejudice are conclusory. But if trial counsel was not ineffective, then postconviction counsel was not ineffective for failing to challenge the trial attorney's performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 570, 647 N.W.2d 441.

Rogers' other claims of ineffective postconviction counsel are also inadequate. He claims that postconviction counsel was ineffective for failing to file a motion to extend the time for filing a postconviction motion.[7] Such an extension is granted to preserve a defendant's right to pursue postconviction and appellate relief under WIS. STAT. RULE 809.30, but Rogers does not explain why an extension was needed, a significant omission given that counsel did, in fact, pursue a direct appeal for Rogers. This claim of ineffective assistance is also conclusory.

Rogers also claims that postconviction counsel was ineffective for failing to challenge his sentence. Although Rogers' postconviction motion does not so state, his complaint is that the sentencing court erroneously considered victim G.B.'s statement even though Rogers was acquitted of the crime, which Rogers believes to be a double jeopardy violation. Aside from the fact that Rogers' motion is conclusory, this particular issue is also procedurally barred because it is the same sentencing challenge raised in Rogers' 2017 motion for sentence modification.

[7] Our records reflect that one such extension motion actually was filed and granted in October 1998, after which a timely notice of appeal was filed. This is not unusual, as the deadline for filing a postconviction motion and the deadline for filing a notice of appeal initially coincide. *See* WIS. STAT. RULE 809.30(2)(h).

Having litigated this claim and lost, he cannot repackage it as a claim of ineffective postconviction counsel and try again. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). In any event, there is no double jeopardy issue: "A sentencing court may consider … facts related to offenses for which the defendant has been acquitted." *See* ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341.

Additionally, we note that at no point did Rogers attempt to show the issues he thinks postconviction counsel should have pursued were clearly stronger than issues that were pursued. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶44-45; ***Starks***, 349 Wis. 2d 274, ¶66.

Based on the foregoing, we conclude that Rogers' postconviction motion did not allege sufficient material facts and his claims of ineffective assistance were conclusory. Thus, the determination whether to hold an evidentiary hearing on the motion was a matter for the circuit court's discretion, and Rogers has not persuaded us that discretion was erroneously exercised.

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.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*