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May 15, 2019

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

2017AP2483 State of Wisconsin v. Eric L. Hill (L.C. # 2014CF81)

Before Kessler, P.J., Brennan 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).

Eric L. Hill, *pro se*, appeals the circuit court's order denying his motion for postconviction relief brought pursuant to WIS. STAT. § 974.06 (2017-18).[1] Hill argues: (1) he received ineffective assistance of counsel because his trial attorney, Mark Rosen, did not object to jury instructions on lesser-included offenses; (2) the evidence was insufficient to convict him;

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

(3) the prosecutor's charging decision was vindictive; and (4) he received ineffective assistance of counsel because his postconviction/appellate attorney, Andrew Walter, did not raise the above three issues on direct appeal. We reject these arguments. Accordingly, we affirm.

Hill was convicted after a jury trial of one count of first-degree intentional homicide with a dangerous weapon and one count of attempted armed robbery. Hill pursued a direct appeal. We affirmed the judgment of conviction. Hill then filed a *pro se* motion for postconviction relief collaterally attacking his conviction. The circuit court denied his motion.

We first address Hill's claim that he received ineffective assistance of appellate counsel. A claim of ineffective assistance of appellate counsel will lie only if the defendant shows that the issues he believes counsel should have raised are "clearly stronger" than the issues counsel raised. *See* ***State v. Starks***, 2013 WI 69, ¶¶59-60, 349 Wis. 2d 274, 833 N.W.2d 146 (citation omitted). "A motion claiming ineffective assistance of [appellate] counsel does not automatically trigger a right to a [postconviction] testimonial hearing." ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157. "[N]o hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." ***Id.***

Walter argued on direct appeal that Hill's statement to the police should have been suppressed. Hill asserts that Walter *should have argued* on direct appeal that his trial counsel was ineffective for failing to object to the jury instructions on lesser-included offenses, there was insufficient evidence to support the conviction, and the prosecutor's charging decision was vindictive. However, Hill has not explained *why* the three issues he believes should have been

raised are clearly stronger than the issue Walter did, in fact, raise on direct appeal. *See* ***Starks***, 349 Wis. 2d 274, ¶60. Hill's allegation that he received ineffective assistance of postconviction/appellate counsel is therefore insufficient on its face.

Turning to the other three issues, Hill's arguments are procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Where, as here, a defendant's grounds for relief have been finally adjudicated in a direct appeal of the conviction, the defendant may not raise new issues in a collateral attack on the conviction unless the defendant presents a "sufficient reason" for failing to previously raise the issues. *See* ***id.*** at 181-182 (citation omitted). Hill has not argued that he has a sufficient reason for failing to previously raise these issues. To the extent that Hill's brief could be read to argue that he did not previously raise these issues because Walter provided him with constitutionally ineffective assistance during postconviction and appellate proceedings, we have concluded above that Hill's argument is insufficient on its face. Therefore, Hill has not shown a reason sufficient to overcome the procedural bar of ***Escalona-Naranjo***. In sum then, the circuit court properly exercised its discretion in denying Hill's postconviction motion without a hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

Upon the foregoing,

IT IS ORDERED that the order of the circuit court is 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