OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

September 30, 2019

To:

Hon. Jeffrey A. Conen
821 W. State St.
Milwaukee, WI 53233

John Barrett
821 W. State Street, Rm. G-8
Milwaukee, WI 53233

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

Daniel J. O'Brien
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Charles Wilson 249903
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2018AP95 State of Wisconsin v. Charles Wilson (L.C. # 1999CF5019)

Before Brash, P.J., Kessler 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).

Charles Wilson, *pro se*, appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 (2017-18)[1] postconviction motion without a hearing. 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. The order is summarily affirmed.

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

In May 2000, a jury convicted Wilson on one count of first-degree intentional homicide while armed with a dangerous weapon. He was sentenced to life imprisonment and is eligible for parole beginning in 2043. Wilson, through counsel, filed a postconviction motion raising five issues. The trial court denied the motion without a hearing. Wilson appealed. We affirmed. *See* ***State v. Wilson***, No. 2001AP1028-CR, unpublished slip op. (WI App Jan. 29, 2002).

In October 2017, Wilson filed a *pro se* postconviction motion under WIS. STAT. § 974.06. He identified approximately twenty-four claims of ineffective assistance of trial counsel, twenty claims of prosecutorial misconduct, twenty-two claims of trial court error, and six claims of police misconduct. Wilson also asserted that his postconviction attorney was ineffective for failing to raise all of these "objective allegations" in the prior postconviction proceedings. The circuit court[2] denied the motion without a hearing, noting that the claims of ineffective assistance were "merely conclusory assertions that fail to set forth a viable claim for relief" and that Wilson had not demonstrated "that the issues presented in his motion are clearly stronger than those raised in the postconviction motion" filed by postconviction counsel. Wilson appeals.

After the time for postconviction relief under WIS. STAT. § 974.02 and direct appeal have expired, a person in custody under a sentence of the court may bring a motion under WIS. STAT. § 974.06. *See* ***State v. Balliette***, 2011 WI 79, ¶34, 336 Wis. 2d 358, 805 N.W.2d 334. However, a defendant may not bring claims in a § 974.06 motion if the claims could have been raised in a

[2] The Honorable John J. DiMotto presided at trial and over the initial postconviction proceedings; the Honorable Jeffrey A. Conen reviewed and denied the WIS. STAT. § 974.06 motion. In this opinion, we refer to Judge DiMotto as the trial court and Judge Conen as the circuit court.

prior motion or direct appeal, absent a sufficient reason.[3] *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

In some instances, ineffective assistance of postconviction counsel may constitute a sufficient reason for not raising a claim in an earlier proceeding. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To prove ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. "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." ***State v. Romero-Georgana***, 2014 WI 83, ¶43, 360 Wis. 2d 522, 849 N.W.2d 668. To prove the deficiency, the defendant must show the unraised issue was "clearly stronger" than the issues actually pursued by postconviction/appellate counsel. *See* ***id.***, ¶¶44-45. 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. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

Further, "[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." ***Allen***, 274 Wis. 2d 568, ¶14. Whether the motion alleges such facts is a question of law. *See* ***id.***, ¶9. If the motion

[3] The circuit court had also determined that the WIS. STAT. § 974.06 motion was procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because Wilson had previously filed a motion to stop restitution. We question whether that is an appropriate application of the ***Escalona*** bar. *See* ***State v. Starks***, 2013 WI 69, ¶6, 349 Wis. 2d 274, 833 N.W.2d 146 (stating that sentence modification is a distinct procedure from § 974.06 motions). However, we need not discuss this portion of the circuit court's decision any further, because the prior postconviction motion and appeal pursued by counsel are sufficient for invoking ***Escalona***.

raises sufficient material facts, the circuit court must hold a hearing. *See* ***id.*** If the motion does not raise sufficient material facts or if it presents only conclusory allegations, 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. *See* ***id.***

Here, we agree with the circuit court that Wilson's postconviction motion is wholly and fatally conclusory: it is nothing more than an undeveloped list of purported errors. There are insufficient allegations to show that any of the unraised issues are clearly stronger than those actually raised by postconviction counsel.[4] Wilson's conclusory statement in his appellate brief that the issues he has identified are clearly stronger does not suffice.

There are also insufficient allegations to demonstrate that trial counsel actually was ineffective. For example, Wilson alleged that trial counsel was ineffective for "failing to object to the admission of evidence." However, he does not allege what the evidence was, point us to where the evidence was actually admitted, or identify a basis on which an objection would have been successful. Thus, he has not demonstrated that trial counsel was deficient or that the failure to object was prejudicial. *See, e.g.*, ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) (stating that counsel is not ineffective for failing to pursue a meritless motion).

In short, Wilson's motion fails to allege sufficient material facts that, if true, would entitle him to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶14. Attempts to remedy this deficiency by way of the appellate briefs does not suffice, as we review the allegations "within the four corners

[4] To the extent that Wilson identifies issues that postconviction counsel did raise, a matter once litigated cannot be relitigated. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

of the [motion] itself" for sufficiency. *See* ***id.***, ¶23. While Wilson is correct that we are to liberally construe prisoners' pleadings, *see* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983), "there is a limit to our lenience. A reviewing court might avert its eyes from the flaws on the peripheries, but it will not ignore obvious insufficiencies at the center of a motion." ***Romero-Georgana***, 360 Wis. 2d 522, ¶69. The circuit court appropriately determined Wilson was not entitled to an evidentiary hearing on his motion.[5] *See* ***Balliette***, 336 Wis. 2d 358, ¶68 (stating that an evidentiary hearing "is not a fishing expedition to discover ineffective assistance").

IT IS ORDERED that the order appealed from 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

[5] Wilson filed two notices of supplemental authority, *see* WIS. STAT. RULE 809.19(1), both of which direct our attention to ***Flowers v. Mississippi***, 139 S. Ct. 2228 (2019). ***Flowers***, like ***Batson v. Kentucky***, 476 U.S. 79 (1986), deals with the issue of racially discriminatory use of peremptory challenges by the State during jury selection. However, the argument Wilson makes in his postconviction motion is that the trial court only allowed twenty-seven out of thirty-four jurors to be questioned during *voir dire*, and some of the seven not questioned were African-American, so the trial court was "very bias." While we have reviewed the supplemental authority cited, Wilson's allegations in the postconviction motion do not establish a ***Batson*** or a ***Flowers*** issue.