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November 5, 2019

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

2019AP65	State of Wisconsin v. Darnell Scott (L.C. # 2014CF3900)
2019AP66	State of Wisconsin v. Darnell Scott (L.C. # 2014CF4902)

Before Brash, P.J., Kessler and Fitzpatrick, 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).

In these consolidated appeals, Darnell Scott, *pro se*, appeals from a circuit court order denying his WIS. STAT. § 974.06 (2017-18) motion.[1] Based upon our review of the briefs and

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

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

In September 2014, Scott was charged with one count of second-degree sexual assault and one count of strangulation and suffocation after an incident involving a woman with whom he previously had a romantic relationship. Two months later, the State charged Scott with felony intimidation of a witness, by a person charged with a felony, as a repeater, for contacting the alleged victim. The two criminal cases were later consolidated.

In December 2014, Scott's first attorney moved to withdraw because he identified a conflict with a potential witness in the case. A new attorney was appointed for Scott.

In March 2015, Scott entered into a plea agreement with the State pursuant to which he pled guilty as charged, except the second-degree sexual assault charge was amended to third-degree sexual assault. At the plea hearing, the State told the trial court that, in exchange for Scott's guilty pleas, the State agreed to recommend "a prison sentence, with the length left to the court" and to "remain silent as to whether [the sentences] would be concurrent or consecutive to any other sentence." The State explained that Scott was already serving a six-year reconfinement sentence for his prior conviction in Milwaukee County Circuit Court Case No. 2006CF14. The trial court accepted Scott's guilty pleas and found him guilty.[2]

Prior to sentencing, Scott's second attorney moved to withdraw after Scott alleged that trial counsel "coerced" him into entering his guilty pleas. New counsel was appointed for Scott.

[2] The Honorable Timothy G. Dugan accepted Scott's guilty pleas.

The record indicates that, in June 2015, Scott's new counsel notified the trial court that the defense would not be filing a motion to withdraw Scott's guilty pleas and that the case could be scheduled for sentencing.

At sentencing, the trial court imposed three consecutive sentences totaling eleven years of initial confinement and eleven years of extended supervision.[3] It ordered that those sentences be served consecutive to the reconfinement sentence Scott was serving for his prior conviction in Milwaukee County Circuit Court Case No. 2006CF14.

Represented by postconviction counsel, Scott filed a postconviction motion seeking sentence modification. The trial court denied the motion and Scott appealed. We affirmed Scott's convictions and the order denying his postconviction motion. *See* ***State v. Scott***, Nos. 2016AP1261-CR and 2016AP1262-CR, unpublished op. and order (WI App July 18, 2017). The Wisconsin Supreme Court denied Scott's petition for review on November 13, 2017.

In December 2018, Scott filed the postconviction motion that is the subject of this appeal. Scott labeled the motion a "Petition for Habeas Corpus" but also cited WIS. STAT. §§ 982.01, 974.02, 974.06, and 809.50. The motion alleged "ineffective assistance of trial counsel" with respect to Scott's plea agreement, although Scott did not specify which of his three trial attorneys was deficient. Scott further alleged that appellate counsel provided ineffective assistance in Scott's direct appeal by not alleging that trial counsel performed deficiently with respect to Scott's plea. Finally, the motion alleged that the plea agreement violated principles of due

[3] The Honorable Ellen R. Brostrom sentenced Scott and denied his 2016 postconviction motion.

process because the State lacked authority to promise Scott leniency if he waived his right to a revocation hearing concerning his prior criminal case.[4]

The circuit court denied Scott's motion in a written order, without requiring a response from the State.[5] The circuit court construed Scott's filing to be a motion brought pursuant to WIS. STAT. § 974.06. The circuit court concluded that Scott's allegations concerning an offer of leniency in exchange for a waiver of his revocation hearing—allegations upon which all his arguments were based—were insufficient and unsupported. The circuit court explained:

> The defendant does not specify the "leniency consideration" that was offered as part of the plea agreement in this case. Both at the plea hearing and at the sentencing hearing, the prosecutor set forth on the record what the plea negotiations were in these cases, and in each instance the defendant personally confirmed that her statements were correct. There is simply no support for the defendant's claim that he was offered "leniency consideration," whatever that means, or that his plea was anything other than knowingly, voluntarily and intelligently entered…. Moreover, trial counsel could not have negotiated a plea agreement that purported to limit the court's sentencing authority under the law, and therefore, counsel was not ineffective for failing to do so. In sum, the court finds that the defendant has not set forth a viable claim of ineffective assistance of trial or postconviction counsel nor demonstrated that his claims are clearly stronger than the claims postconviction/appellate counsel raised during the direct appeal.

(Citation omitted.) This appeal follows.

[4] Scott also made other allegations, such as asserting that trial counsel provided ineffective assistance by not calling the victim as a witness at the preliminary hearing. He has not pursued those other issues on appeal. Any claims he has not briefed on appeal are deemed abandoned, and we will not address them. *See* ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (holding that issues not briefed are deemed abandoned).

[5] The Honorable Jeffrey A. Wagner denied Scott's motion. In this decision, we will refer to Judge Wagner as the circuit court.

Scott argues that the circuit court erred by denying his motion without allowing the State to respond, by not holding a ***Machner*** hearing,[6] and by not providing impartial due process in its handling of the motion.[7] He also argues that he should be able to obtain $1000 from the circuit court based on its handling of the motion, and that the circuit court was biased because it denied Scott "a fair opportunity … to be heard upon his claims" and violated his statutory and constitutional rights.

We begin our analysis with the applicable legal standards. When, as here, a defendant seeks relief under WIS. STAT. § 974.06 following a prior postconviction motion and appeal, the § 974.06 motion must establish a "sufficient reason" for failing to previously raise any issues that could have been raised in the earlier proceedings. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A claim of ineffective assistance of postconviction counsel may present a "sufficient reason" to overcome the procedural bar. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To establish that postconviction counsel was ineffective, the motion must show that the claims now asserted are clearly stronger than the issues that postconviction counsel chose to pursue. ***State v. Romero-Georgana***, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668.

[6] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[7] Scott refers to his filing as a petition for habeas corpus, although he also cited WIS. STAT. § 974.06 in his filing. As noted, the circuit court construed the filing to be a § 974.06 postconviction motion. Courts are not bound by a *pro se* defendant's choice of labels, *see* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983), and Scott fails to show that the trial court erred by construing the filing as a § 974.06 motion. Therefore, we will refer to Scott's filing as a § 974.06 motion, and we will consider whether the circuit court erred when it denied that § 974.06 motion without an evidentiary hearing.

A defendant is not automatically entitled to an evidentiary hearing on his or her postconviction motion. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). The circuit court must hold an evidentiary hearing only if the defendant alleges "sufficient material facts that, if true, would entitle the defendant to relief," which is a question of law that we review *de novo*. ***State v. Allen***, 2004 WI 106, ¶¶9, 14, 274 Wis. 2d 568, 682 N.W.2d 433. To entitle the defendant to a hearing, the motion must "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how" as to the defendant's claims. ***Id.***, ¶23. If the motion does not set forth sufficient facts or presents only conclusory allegations, or the record establishes conclusively that the defendant is not entitled to relief, the circuit court may grant or deny a hearing at its discretion. ***Id.***, ¶9.

A defendant seeking a hearing on a WIS. STAT. § 974.06 motion must "do more than assert that his postconviction counsel was ineffective for failing to challenge on direct appeal several acts and omissions of trial counsel that he alleges constituted ineffective assistance." ***State v. Balliette***, 2011 WI 79, ¶¶62-63, 336 Wis. 2d 358, 805 N.W.2d 334. The defendant must allege that postconviction counsel's "'performance was deficient' and 'that the deficient performance prejudiced the defense.'" *See* ***id.*** (citation omitted). If the allegations in a postconviction motion fail to establish either prong of an ineffective assistance of counsel claim, we need not address the other prong. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). A defendant must demonstrate within the four corners of the § 974.06 motion that postconviction counsel was ineffective for not raising specific claims of ineffective assistance of trial counsel. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶64 ("We will not read into the § 974.06 motion allegations that are not within the four corners of the motion.").

Applying these standards, we conclude that the circuit court did not erroneously exercise its discretion when it denied Scott's WIS. STAT. § 974.06 motion without a hearing. Specifically, as the circuit court explained in its written order, Scott's motion failed to provide sufficient facts, and offered only conclusory allegations, about the alleged errors of both trial counsel and appellate counsel. Therefore, it was within the circuit court's discretion to deny the motion without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

Specifically, Scott's motion alleged:

> At the same time Scott had these open cases that were eventually consolidated into a plea agreement; he had a revocation of a case in which he was out on supervision. When Scott was about to have a Final Revocation hearing; the prosecutor for Scott's criminal cases 14CF3900 and 14CF4902 offered an agreement that Scott would get leniency consideration within his two criminal cases if he would waive his Final Revocation hearing. This offer was told to Scott's trial attorney and then his trial attorney explained to Scott the offer made by the Milwaukee County District Attorney's Office.
>
> Darnell Scott took the plea agreement and waive[d] his Final Revocation hearing with the understanding he would obtain leniency within criminal cases 14CF3900 and 14CF4902. However, Scott was really never given the leniency that was implied by the prosecution within cases 14CF3900 and 14CF4902.

(Spelling errors corrected.) Scott's motion did not provide sufficient information about the alleged leniency he was promised, such as whether the State was promising to amend the charges, make a specific sentencing recommendation, make no sentencing recommendation, bind the trial court to a specific sentence, or something else. Scott also does not explain why this purported promise was not discussed during the plea hearing or at sentencing if it was, in fact, part of his plea agreement with the State.

Scott's motion also fails to adequately explain the timeline of events and identify which of his three trial attorneys allegedly provided deficient representation. At a December 22, 2014 hearing where his first trial counsel moved to withdraw due to a conflict regarding a potential witness, trial counsel told the trial court that Scott's extended supervision in his prior case had been revoked. Trial counsel also indicated that the parties had been trying to reach a plea agreement and had determined that the case was not "resolvable." Scott's motion did not explain how waiving his revocation hearing could have been part of a plea agreement that had not been reached as of December 2014, when his extended supervision had already been revoked.

The record further indicates that Scott did not reach a plea agreement with the State until March 2015. At a February 12, 2015 scheduling conference, Scott's second trial counsel asked the trial court to schedule a plea hearing. At the scheduled plea hearing on March 6, 2015, trial counsel told the trial court that Scott was "wavering" and needed more time to consider whether to plead guilty. The trial court continued the hearing.

On March 19, 2015, Scott pled guilty to three felonies. As explained above, the State told the trial court: "The [S]tate will remain silent as to whether [the prison sentences] would be concurrent or consecutive to any other sentence." In doing so, the State noted that Scott was "currently sitting [in prison] … for a prior case" for six years after being revoked. Both trial counsel and Scott agreed with the State's summary of the agreement, and neither mentioned anything about promises of leniency or Scott's waiver of the revocation hearing for his prior conviction. Scott's postconviction motion does not explain why he did not say anything at the plea hearing or sentencing hearing about alleged promises of leniency and his decision to waive his revocation hearing.

In summary, Scott's motion failed to adequately "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how" concerning his claims about a promise of leniency, his decision to waive his revocation hearing, and the alleged deficiencies of one or more of the attorneys who represented him before the judgment was entered. *See* ***id.***, ¶23. Similarly, Scott's motion failed to adequately allege how his postconviction counsel performed deficiently. The motion alleged that his postconviction/appellate counsel should have alleged trial counsel ineffectiveness based on the "unconstitutional plea agreement," but the motion provides no details about when and how Scott informed postconviction/appellate counsel that he had been promised leniency in exchange for waiving his revocation hearing. In his appellate brief, Scott baldly asserts: "The issue of leniency was discussed by Scott's appellate attorney during his direct appeal process, but was not brought as a direct issue to be reviewed by the Wisconsin Court of Appeals." Not only is this allegation brought too late, it also lacks the requisite details to warrant an evidentiary hearing. *See* ***id.***

For the forgoing reasons, we conclude that the circuit court did not erroneously exercise its discretion when it denied Scott's motion without an evidentiary hearing. Because Scott did not adequately demonstrate that he was promised some sort of leniency if he waived his revocation hearing, we decline to address Scott's argument that this unspecified agreement was unconstitutional.

We will briefly address Scott's other arguments. Scott argues that the circuit court erred by denying his motion without allowing the State to respond, by not holding a ***Machner*** hearing, and by not providing impartial due process in its handling of the motion. We are not persuaded that Scott is entitled to relief. First, he has not provided any authority for the proposition that the circuit court was required to consider a response from the State before denying Scott's motion.

We decline to develop an argument for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (holding that the court of appeals "may decline to review issues inadequately briefed" and that "[a]rguments unsupported by references to legal authority will not be considered"). Second, we have already concluded that the circuit court did not erroneously exercise its discretion by denying Scott's motion without a hearing, which was within the circuit court's discretion. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Third, we have identified nothing in the circuit court's handling of Scott's motion that supports Scott's "belief" that the circuit court "did not act impartially."

Finally, Scott asserts that he is entitled to $1000 pursuant to WIS. STAT. § 782.09 because the circuit court did not allow the State to respond and did not hold a ***Machner*** hearing or other evidentiary hearing. *See* § 782.09 ("Any judge who refuses to grant a writ of habeas corpus, when legally applied for, is liable to the prisoner in the sum of $1,000."). We agree with the State that Scott has not adequately briefed this issue and has not demonstrated that he is entitled to $1000. *See* ***Pettit***, 171 Wis. 2d at 646. For instance, Scott has not explained whether he can raise his request for $1000 for the first time on appeal and whether he can receive $1000 if he does not prevail on appeal. Also, Scott argues in his reply brief that he is entitled to $1000 because he was denied due process by the circuit court, but we have already rejected his due process claim. We decline to award Scott $1000.

IT IS ORDERED that the circuit court order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the appellant's request for $1000 pursuant to WIS. STAT. § 782.09 is denied.

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

Sheila T. Reiff
Clerk of Court of Appeals