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

December 19, 2019

To:

Hon. David L. Borowski
Circuit Court Judge
901 N. 9th St.
Milwaukee, WI 53233

Timothy C. Samuelson
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John Barrett
Clerk of Circuit Court
821 W. State Street, Rm. 114
Milwaukee, WI 53233

Steven D. Hopgood 442060
Stanley Correctional Inst.
100 Corrections Dr.
Stanley, WI 54768

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

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

2018AP1627 State of Wisconsin v. Steven D. Hopgood (L.C. # 2012CF580)

Before Brash, P.J., Dugan 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).

Steven D. Hopgood, *pro se*, appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 (2017-18)[1] motion and from an order denying reconsideration. Based upon

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

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 orders are summarily affirmed.

In June 2010, Vincent Cort was sitting in his car in a parking lot. He was approached by a man who pointed a gun into the car and said, "Give it up." Cort began to drive away, and the man fired a shot, which struck Cort. Cort later died from the injury. An amended information filed in April 2012 charged Hopgood with felony murder—the underlying offense was attempted armed robbery as a party to a crime—and possession of a firearm by a felon for his role in Cort's death. The State's case relied largely on testimony from Paris Saffold, who claimed to have been present for the planning of the armed robbery by Hopgood and two others. According to Saffold, Hopgood laid claim to the rims of Cort's car and provided the gun. The jury convicted Hopgood of felony murder, and Hopgood was sentenced to twenty-four years' imprisonment and ordered to pay more than $22,000 in restitution.

Hopgood filed a postconviction motion, which was denied. He appealed, raising at least seven issues in the context of ineffective assistance of trial counsel, including an argument that "focuse[d] entirely on the bullet that the State offered as evidence at trial as the one used to kill Cort" and an argument that trial counsel "should have sought to introduce evidence of allegations that any one of three alternative suspects … killed Cort[.]" *See* ***State v. Hopgood***, No. 2014AP2742-CR, unpublished slip op. ¶¶12, 57 (WI App June 2, 2016). We affirmed. *See* ***id.***, ¶2.

Hopgood subsequently filed the *pro se* WIS. STAT. § 974.06 motion underlying this appeal. He claimed that trial counsel was ineffective for: (1) failing to provide an alibi defense; (2) encouraging a stipulation regarding the bullet; and (3) failing "to provide a third party

perpetrator." Hopgood also challenged the imposition of restitution, stating that he did not agree to pay restitution or stipulate to the amount, and arguing the circuit court had failed to consider his financial resources, earning ability, and needs of his dependents when setting restitution. The circuit court denied the motion without a hearing. Hopgood moved for reconsideration, which the circuit court also denied. Hopgood appeals.

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* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). However, 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, 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. To establish deficient performance, Hopgood must show facts from which a court could conclude that counsel's representation fell below objective standards of reasonableness. *See* ***State v. McDougle***, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. When a postconviction attorney is alleged to have been ineffective for failing to raise a particular issue, then as part of proving deficient performance, the defendant must show the unraised issue was clearly stronger than the issues actually raised by that attorney. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶¶44-45, 360 Wis. 2d 522, 849 N.W.2d 668. To establish prejudice, the 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. A reasonable

probability is a probability sufficient to undermine confidence in the outcome.'" *See* ***McDougle***, 347 Wis. 2d 302, ¶13 (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

"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 sufficient material facts is a question of law that we review *de novo*. *See* ***id.***, ¶9. 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.*** We review only the allegations within the four corners of the motion when reviewing the pleadings for sufficiency, not supporting arguments raised in the appellate briefs. *See* ***id.***, ¶27.

Hopgood first claims that trial counsel was ineffective for failing to call Vanessa Telford as an alibi witness. The alibi Telford would offer is her claim that on the night of the incident, Hopgood "was home with her for the entire day/night and they did not go anywhere," have company, or "go outside to hang out with anyone that she recalls." The circuit court noted, among other things, that this information was vague and unspecific when compared to the more detailed testimony from Saffold, so it concluded that Hopgood had failed to demonstrate how this issue is clearly stronger than those that were actually raised in the original postconviction motion. We agree that Hopgood has not shown how failing to call Telford is a clearly stronger issue than any of the multitude previously raised. Additionally, we note that Hopgood does not adequately allege a sufficient reason for failing to raise this issue earlier; the postconviction motion must allege sufficient material facts, but Hopgood concedes it is unknown why postconviction counsel did not pursue this issue.

Hopgood next claims that trial counsel was ineffective for encouraging a stipulation "to the bullet found in [Cort's] car as being the bullet which shot [Cort]." This bullet was not originally recovered in 2010, but was found in January 2012 during a new search of Cort's car. Hopgood asserts he "was unaware of the term 'stipulate' and trial counsel failed to properly advise him as to the effects of stipulating to the authenticity of the bullet." He also complains that "acceptance of the stipulation waived all challenges to the authenticity of the bullet … as being the actual bullet which caused [Cort's] death."

First, the parties did not stipulate that the bullet was the one that shot Cort. Rather, the stipulation states that: (1) the bullet was recovered from Cort's car and transported to the crime lab, where (2) a DNA analyst "attempt[ed] to isolate DNA from the exterior of the bullet but an insufficient amount of DNA for further testing was detected," and (3) a firearms examiner "determined that it was a fired full metal jacket bullet which is .380 caliber." Regardless of whether trial counsel explained the meaning and effects of the stipulation to Hopgood, the record reflects that the circuit court engaged Hopgood in a colloquy in which Hopgood acknowledged that "by stipulating to this, by agreeing to it, that means the State does not have to bring in the Crime Lab analyst or bring in the firearms person to testify to basically the same thing[.]"

Second, Hopgood argued in the direct appeal that trial counsel should not have accepted the professional opinions of the State Crime Lab employees. *See* ***Hopgood***, No. 2014AP2742-CR at ¶¶57-66. It thus appears that his current claim is barred by ***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."). In any event, Hopgood does not establish how this stipulation prevented him from asking other witnesses how the bullet ended up where it did, how

it went undiscovered for eighteen months, or any other questions related to the bullet's discovery. He also does not establish how this stipulation prevented him from calling his own experts to address the State's experts' conclusions. Accordingly, Hopgood has failed to demonstrate that this issue is clearly stronger than any previously raised or that he was prejudiced by the stipulation.

Hopgood next claims that trial counsel "failed to allege[] Saffold as a third party perpetrator[.]" *See* ***State v. Denny***, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984). Alternatively, Hopgood complains that trial counsel failed to properly impeach Saffold with his knowledge of the crime.

Hopgood's motion acknowledged that this argument is "similar to that of challenging the existence of a third party perpetrator in the direct appeal[.]" To the extent that this is simply a rephrasing of the previously raised argument about trial counsel's failure to raise a ***Denny*** defense, it is barred by ***Witkowski***. However, Hopgood asserts that the "supporting facts are markably [sic] different and should not be considered the same issue" because his claim about Saffold "relies on the facts and actions elicited through Saffold's own testimony[.]"[2]

To the extent that ***Witkowski*** does not bar this claim, we note that the postconviction motion fails to sufficiently allege why Saffold was not identified as a potential perpetrator in the original postconviction motion. Additionally, to introduce third-party perpetrator evidence, a

[2] The circuit court appears to have viewed this argument as primarily a challenge to Saffold's credibility as a witness, and it rejected this claim as "nothing more than a great rehashing of the testimony that was previously considered by both the trial and appellate court." *See, e.g.*, ***State v. Hopgood***, No. 2014AP2742-CR, unpublished slip op ¶¶45-49 (WI App June 2, 2016).

defendant must show the third party had motive, opportunity, and a direct connection to the crime. *See* ***State v. Wilson***, 2015 WI 48, ¶3, 362 Wis. 2d 193, 864 N.W.2d 52. We are unpersuaded that Hopgood's motion sufficiently alleges those criteria as to Saffold; at best, Hopgood shows that Saffold was at or near the crime scene and was acquainted with the three co-conspirators, but this is generally insufficient to establish a "direct connection." *See* ***id.***, ¶¶71-72. We are, therefore, further unpersuaded that claiming Saffold as a possible third-party perpetrator is a clearly stronger issue than those previously raised.

Finally, Hopgood complains about the imposition of restitution, claiming he did not agree to pay it, nor did he agree to the amount, and claiming that the circuit court failed to abide by WIS. STAT. § 973.20(13)(a) (listing factors circuit court "shall consider" when determining whether to award restitution). Restitution is a matter committed to the circuit court's discretion. *See* ***State v. Wiskerchen***, 2019 WI 1, ¶18, 385 Wis. 2d 120, 921 N.W.2d 730. However, only issues of constitutional and jurisdiction magnitude can be raised by WIS. STAT. § 974.06 motion. *See* ***State v. Balliette***, 2011 WI 79, ¶34 n.4, 336 Wis. 2d 358, 805 N.W.2d 334. For that reason, Hopgood attempts to claim a due process violation and ineffective assistance of trial counsel for failing "to provide receipts or discuss the issue of restitution prior to or during sentencing."

Hopgood does not allege any reasons why the restitution issue was not previously raised, nor does he attempt to demonstrate why this issue was clearly stronger than any that were raised. Further, restitution is generally required, irrespective of whether Hopgood agreed he should pay it. *See* ***Wiskerchen***, 385 Wis. 2d 120, ¶22; *see also* WIS. STAT. § 973.20(1r). Hopgood does not allege that, had trial counsel prompted the circuit court at sentencing to review Hopgood's financial resources and obligations, the circuit court would have declined to order restitution, nor does he dispute the accuracy or propriety of any of the amounts claimed. Thus, assuming the

restitution issue is properly before this court, Hopgood has failed to demonstrate any prejudice or establish that this issue is clearly stronger than any other issues previously raised.

Based on the foregoing, we are unpersuaded that the circuit court erroneously exercised its discretion when it denied Hopgood's postconviction motion without a hearing and when it denied reconsideration.

Therefore,

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