



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 III

October 6, 2020

To:

Hon. David L. Weber
Circuit Court Judge
Door County Justice Center
1209 S. Duluth Ave.
Sturgeon Bay, WI 54233

Connie Defere
Clerk of Circuit Court
Door County Justice Center
1205 S. Duluth Ave.
Sturgeon Bay, WI 54235

Colleen Catherine Nordin
District Attorney
1215 S. Duluth Ave.
Sturgeon Bay, WI 54235

Christine A. Remington
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Ronald L. Kupsky 618624
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2019AP693

State of Wisconsin v. Ronald L. Kupsky (L. C. No. 2014CF17)

Before Stark, P.J., Hruz and Seidl, 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).

Ronald Kupsky, pro se, appeals from an order denying his WIS. STAT. § 974.06 (2017-18)¹ motion for postconviction relief. Based upon our review of the briefs and record, we

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

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

In 2013, the State charged Kupsky with first-degree sexual assault of a child in Outagamie County case No. 2013CF810. While he was released on a cash bond in that case, a twelve-year-old girl alleged that Kupsky touched her breasts and her vagina, and that he also forced her to put her hand on his penis. The girl further alleged that Kupsky used his cell phone camera to take photographs of her vagina, and that he showed her photographs of naked women.

Based on these allegations, the State originally charged Kupsky with felony bail jumping in Door County case No. 2014CF17. After filing multiple amended charging documents, the State ultimately charged Kupsky with one count each of first-degree sexual assault of a child under age thirteen, causing a child under age thirteen to view or listen to sexual activity, felony bail jumping, sexual exploitation of a child—filming, and possession of child pornography. After a two-day trial, a jury acquitted Kupsky on the count of causing a child to view sexual activity and convicted him on the remaining four counts.

Kupsky filed a postconviction motion seeking a new trial on the ground that his trial attorney provided him with ineffective assistance by failing to stipulate that Kupsky had been released on bail for a felony charge.² Following a *Machner*³ hearing, the circuit court denied Kupsky's ineffective assistance claim. Kupsky appealed, raising the same ineffective assistance

² We note that Kupsky's postconviction motion also sought to vacate a child pornography surcharge assessed on his possession of child pornography conviction. For reasons not relevant to this appeal, the circuit court granted that portion of Kupsky's postconviction motion.

³ *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

argument that he did in his postconviction motion. *See State v. Kupsky*, No. 2017AP2146-CR, unpublished slip op. ¶1 (WI App July 24, 2018) (*Kupsky I*). We rejected that argument and affirmed both the judgment of conviction and the order denying postconviction relief. *Id.*

While Kupsky's petition for review of our decision in *Kupsky I* was pending, he filed a pro se WIS. STAT. § 974.06 postconviction motion in the circuit court. The court denied this motion, noting that Kupsky's first appeal was still pending.

Our supreme court ultimately denied Kupsky's petition for review of our decision in *Kupsky I*. Subsequently, Kupsky filed a second pro se WIS. STAT. § 974.06 postconviction motion in the circuit court. In this second § 974.06 motion, Kupsky raised fifteen claims: four claims regarding sufficiency of the evidence presented at trial; one claim that the circuit court erroneously exercised its sentencing discretion; one claim that the circuit court violated WIS. STAT. § 970.02(1)(a) at Kupsky's initial appearance; and nine claims of ineffective assistance of postconviction and trial counsel.

Regarding Kupsky's nine claims of ineffective assistance of postconviction and trial counsel, Kupsky specifically argued that his postconviction counsel performed deficiently by failing to argue that his trial counsel was ineffective by failing to: (1) properly explain the State's pretrial plea agreement offer; (2) explain to Kupsky the possibility of entering a plea of not guilty by reason of mental disease or defect; (3) call an expert witness to rebut a police officer's testimony regarding "the way that photos are saved to modern phones"; (4) show the jury portions of video recordings depicting interviews with State's witnesses that Kupsky believed were favorable to him; (5) argue that the State failed to meet its burden to prove the possession of child pornography count; (6) move to have two jurors struck for cause; (7) present

Kupsky with “formal documentation” of the proposed stipulation which was the subject of appeal in *Kupsky I*; (8) seek admission of the twelve-year-old victim’s “past false claims”; and (9) discover that Kupsky was unaware of the maximum sentences possible on two of the felony charges against him until after trial.

On April 4, 2019, the circuit court held a nonevidentiary hearing on Kupsky’s second WIS. STAT. § 974.06 postconviction motion. A transcript of this hearing does not appear in the appellate record. Following the hearing, the court entered an order denying Kupsky’s motion “for the reasons set forth in the Court’s oral ruling” at the April 4 hearing. Kupsky now appeals, raising the same fifteen claims that he raised in his second § 974.06 postconviction motion.

Any claims that Kupsky could have raised on his direct appeal are procedurally barred from being raised in this subsequent WIS. STAT. § 974.06 postconviction motion absent a showing of a “sufficient reason” why the claims were not brought previously. See *State v. Lo*, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. “In some instances, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal.” *State v. Romero-Georgana*, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. “[A] defendant who alleges in a § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought.” *Id.*

If a WIS. STAT. § 974.06 postconviction motion alleges facts sufficient to entitle the movant to relief, a circuit court must hold an evidentiary hearing. *Romero-Georgana*, 360 Wis. 2d 522, ¶4. If the motion does not raise sufficient facts, or if the motion presents only

conclusory allegations, it is within the circuit court’s discretion to order a hearing. *Id.*, ¶30. Whether a motion alleges sufficient facts to require a hearing is a question of law subject to our independent review. *Id.* Similarly, whether the defendant has adequately alleged a sufficient reason for failing to bring available claims earlier is a question of law subject to our independent review. *Id.*

We conclude that all fifteen of Kupsky’s claims are procedurally barred. To begin, Kupsky offers no reason why he did not previously raise three of his four claims regarding the sufficiency of the evidence presented at trial. Because of his failure to do so, these three claims are each procedurally barred. *See Lo*, 264 Wis. 2d 1, ¶44.

As to Kupsky’s remaining twelve claims, we conclude that he has not shown a sufficient reason for failing to bring them on direct appeal. To be sure, in his brief-in-chief (as he did in the circuit court), Kupsky offers the same allegedly sufficient reason for failing to raise each of these twelve claims on direct appeal: the ineffective assistance of his counsel. Specifically, Kupsky states that for each of his remaining twelve claims, he “told [his counsel on direct appeal about the claim], and [counsel] should have found the claim. It is the stronger claim due to supporting case law; the claim raised by [counsel on direct appeal] did not meet the *Strickland*⁴ standard.”

Kupsky’s mere assertion that his new claims are each a “stronger claim due to supporting case law” does not meet his burden to show that the claims are clearly stronger than the claim his counsel pursued on direct appeal. *See Romero-Georgana*, 360 Wis. 2d 522, ¶45. Kupsky’s

⁴ *See Strickland v. Washington*, 466 U.S. 668 (1984).

conclusory statement that his new claims are “stronger” than the claim his counsel pursued on direct appeal is meaningless without an actual comparison between the two categories of claims—and Kupsky provides no such comparison.

In fact, Kupsky does not discuss at all the strength of the claim his counsel pursued on direct appeal. Instead, he appears to assume that because we rejected that claim, it necessarily follows that his new claims must be clearly stronger. This assumption is insufficient; to conclude otherwise would render the “clearly stronger” standard superfluous because all a litigant would need to do to clear the procedural bar would be to show that they previously pursued an unsuccessful appeal. Such a conclusion would run afoul of “[t]he purpose behind WIS. STAT. § 974.06 [which] is to avoid successive motions for relief by requiring a defendant to raise all grounds for relief in one motion.” *Romero-Georgana*, 360 Wis. 2d 522, ¶33 (citation omitted).

Consequently, each of the fifteen claims Kupsky raised in his second WIS. STAT. § 974.06 postconviction motion was procedurally barred. The circuit court therefore did not err by denying Kupsky’s motion without holding an evidentiary hearing.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to 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