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March 23, 2021

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

2019AP414 State of Wisconsin v. Vidal D. Mason (L.C. # 2009CF2809)

Before Dugan, Donald and White, 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).

Vidal D. Mason, *pro se*, appeals the order denying his motion for postconviction relief filed under WIS. STAT. § 974.06 (2017-18).[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

RULE 809.21. Because we previously addressed the issue Mason now pursues, it is barred by ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Therefore, we summarily affirm.

Following his no-contest plea, Mason was convicted of one count of felony murder. The charge stemmed from an attempt by Mason and his cousin, Ronald Xavier Reed, to rob a check-cashing store in June 2009, but a security guard shot each of them, killing Reed.

The Office of the State Public Defender appointed postconviction counsel to represent Mason. Postconviction counsel, however, subsequently moved to withdraw and informed the circuit court that she had reviewed the case and communicated with Mason regarding his postconviction and appellate options, including his right to represent himself on appeal, and that Mason wished to terminate her representation and proceed *pro se*. In response, the circuit court issued an order explaining—among other things—that Mason would be required to raise all grounds for postconviction relief in his original motion or appeal, and failure to do so would preclude him from raising additional issues in a subsequent motion or appeal. Mason, in turn, filed a letter with the circuit court indicating that he understood. The circuit court then issued an order permitting postconviction counsel to withdraw.

Next, Mason, *pro se*, but with the help of a "jailhouse lawyer," filed a postconviction motion alleging ineffective assistance of trial counsel and that the plea colloquy was defective. Specifically, Mason argued that trial counsel's performance was deficient because he "did not implore the court to grant a recess or continu[ance] so that he could assure [sic] Mason was fully aware of the nature of the charge[.]" In the context of his argument that trial counsel's performance was deficient for not challenging the constitutionality of Wisconsin's felony murder

statute, Mason addressed "proximate cause" and its interplay with the felony murder causation requirement. Mason further asserted that the security guard "was an independent intervening force" in the crime. The circuit court denied the motion, and we affirmed. *See* ***State v. Mason***, No. 2012AP1721-CR, unpublished slip op. (WI App Aug. 6, 2013). The Wisconsin Supreme Court denied Mason's petition for review.

Mason, *pro se*, then filed a motion for postconviction relief under WIS. STAT. § 974.06. He argued that he received ineffective assistance from his trial counsel who "erroneously advised him regarding his liability for the crime charge[d] and failed to advise him [of] the proof required to establish the element of causation." Mason then faulted his appointed appellate counsel for failing to identify the issue of trial counsel's ineffectiveness. Additionally, Mason asserted that the circuit court should conclude that his claim was not procedurally barred because Mason's "jailhouse lawyer" was ineffective. The circuit court disagreed and denied Mason's motion as barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

Absent a sufficient reason, a defendant is procedurally barred from raising claims in a WIS. STAT. § 974.06 postconviction motion that could have been raised in a prior postconviction motion or appeal. *See* § 974.06(4); ***Escalona-Naranjo***, 185 Wis. 2d at 181-82, 185-86. Whether a § 974.06 motion alleges the requisite sufficient reason for failing to bring available claims earlier is a question of law that this court independently reviews. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668. "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." ***Id.***, ¶36.

This is the avenue Mason chose in his effort to circumvent the procedural bar. He contends that "[n]ot only was his trial counsel ineffective for failing to counsel him on the immediate flight, proximate/legal cause, and super[s]eding/intervening acts applicable to his case, but appellate counsel was also ineffective for failing to find that issue on appeal." Mason further asserts that a "jailhouse lawyer" defrauded him into waiving his right to counsel, and then the jailhouse lawyer failed to identify the objective evidence necessary to show trial counsel's deficient performance. He is, in essence, arguing that both his appellate counsel and his jailhouse lawyer were ineffective in their roles as postconviction counsel because any issue with trial counsel's performance would have had to first be raised by way of a postconviction motion in the circuit court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Setting aside the alleged ineffective assistance of postconviction counsel, the centerpiece of Mason's claim is his purported confusion about how, under the felony murder statute, he could be held criminally liable for Reed's death. Mason argues that he repeatedly told trial counsel "that he did not understand how he could be found guilty for the death of Reed when Reed was shot in the back running away from the scene of the crime." Mason claims he also expressed his confusion on this point to his appellate counsel.

This is not the first time we have addressed Mason's confusion. On direct appeal, Mason "claim[ed] that his trial counsel was ineffective for failing to ensure that he understood the elements of felony murder, but he admit[ted] that his trial counsel explained the elements and reviewed the jury instructions with him." ***Mason***, No. 2012AP1721-CR, ¶21. In our prior decision, we explained that his allegation amounted to "a conclusory assertion," and further noted:

> To be sure, Mason contends that "he did not, and still do[es] not, understand how he could possibly be guilty of Reed[']s murder when it was [the security guard] who" shot Reed. As the circuit court explained in denying Mason's postconviction motion, however, Mason's assertions are merely professions of "disbelief that a person can be blamed for murder when someone else pulls the trigger." The assertions Mason offers do not reflect any misunderstanding of the charge he faced or any deficiency in his lawyer's explanation of the elements of the offense of felony murder as it is defined in Wisconsin.

Id. (brackets in ***Mason***).

Given that Mason's central challenge—i.e., trial counsel's alleged ineffectiveness for not adequately explaining felony murder—was addressed in his prior appeal, it cannot be relitigated here. *See* ***Witkowski***, 163 Wis. 2d at 990 ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). In his reply brief, Mason again reframes his challenge, this time as "[a] claim that trial counsel failed to investigate facts leading to a defense concerning the element of cause," which he contends "is substantially different from a claim that trial counsel failed to properly counsel Mason concerning the element of causation[.]" We disagree. This too amounts to an artful rephrasing of the issue. *See* ***Witkowski***, 163 Wis. 2d at 990. We, therefore, affirm the circuit court, although based on a slightly different rationale. *See* ***State v. Bembenek***, 2006 WI App 198, ¶10, 296 Wis. 2d 422, 724 N.W.2d 685 (explaining that we may affirm a correct circuit court decision for reasons other than those relied upon by circuit court).

Because Mason is foreclosed from relitigating his issue based on ***Witkowski***, we need not analyze Mason's efforts to circumvent ***Escalona-Naranjo***'s procedural bar. Furthermore, discretionary reversal pursuant to WIS. STAT. § 752.35, which "should be granted only in

exceptional cases," is not warranted here. *See* ***State v. McKellips***, 2016 WI 51, ¶30, 369 Wis. 2d 437, 881 N.W.2d 258 (citation omitted).

IT IS ORDERED that the order 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