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DISTRICT I

November 23, 2021

To:

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Circuit Court Judge
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Clerk of Circuit Court
Milwaukee County
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Samterious Gordon 562597
New Lisbon Correctional Inst.
P.O. Box 2000
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You are hereby notified that the Court has entered the following opinion and order:

2021AP149 State of Wisconsin v. Samterious Gordon (L.C. # 2015CF4422)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Samterious Gordon, *pro se*, appeals the circuit court's order denying his postconviction motion brought pursuant to WIS. STAT. § 974.06 (2019-20).[1] Gordon argues that: (1) he received ineffective assistance of counsel; and (2) the circuit court improperly denied his motion for postconviction inspection of the victims' medical records. After review of the briefs and

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

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

After a jury trial, Gordon was found guilty of one count of first-degree reckless injury of C.J. with use of a dangerous weapon, one count of recklessly endangering L.C.'s safety with use of a dangerous weapon, and one count of unlawfully possessing a firearm as a convicted felon. Gordon's counsel filed a postconviction motion for a new trial, arguing that Gordon was denied the right to a fair trial because some jurors fell asleep during important testimony. He also argued that trial counsel was ineffective for failing to take actions relative to the sleeping jurors and that trial counsel elicited prejudicial, false, and inadmissible testimony. The circuit court conducted an evidentiary hearing and denied the motion. Gordon appealed to this court. We affirmed. *See* ***State v. Gordon***, No. 2018AP1772-CR, unpublished slip op. (WI App Jan. 14, 2020).

Gordon then filed the current postconviction motion collaterally attacking his conviction *pro se*. He argued that: (1) the State violated ***Brady v. Maryland***, 373 U.S. 83 (1963), and discovery rules by failing to conduct DNA/ballistics testing and providing the results of that testing to the defense; (2) his right to a speedy trial was violated; (3) the circuit court erroneously exercised its discretion by failing to sanction the State for the discovery violations; (4) trial counsel was ineffective for failing to impeach N.F. with an out-of-court statement and for failing to ask C.J. if he was compensated for his testimony; (5) postconviction counsel was ineffective; and (6) the circuit court erred in denying his request for an *in camera* review of the victims' medical and mental health records. The circuit court denied Gordon's motion without a hearing. This appeal follows.

We conclude that Gordon's first four claims are procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). ***Escalona-Naranjo*** mandates that a person "raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion" unless the person provides a sufficient reason for failing to do so. ***Id.*** Whether claims are barred by ***Escalona-Naranjo*** is a question of law that we review *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

Gordon contends that his reason for failing to previously raise his current issues is that he received ineffective assistance from his postconviction/appellate counsel, Michael S. Holzman. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (stating that a claim of ineffective assistance of postconviction counsel may present a "sufficient reason" to overcome the procedural bar). To establish ineffective assistance of postconviction/appellate counsel, Gordon must show that counsel performed deficiently and that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant must also show that the claims 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.[2]

Gordon contends that he asked Holzman to raise these issues during Gordon's direct appeal, but Holzman refused. Assuming for the sake of argument—but not deciding—that

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[2] Gordon argues that the clearly stronger test set forth by the Wisconsin Supreme Court in ***State v. Romero-Georgana***, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668, is contrary to federal law, citing ***Walker v. Pollard***, No. 18-C-0147, 2019 WL 136694 (E.D. Wis. Jan. 8, 2019). Gordon is wrong. The Seventh Circuit Court of Appeals applied the clearly stronger test articulated by ***Romero-Georgana*** in a decision issued in September of this year. *See* ***Minnick v. Winkleski***, 15 F.4th 460 (7th Cir. 2021).

Attorney Holzman should have raised these issues, Gordon has not provided any argument showing how he was prejudiced or how the arguments Gordon wanted Holzman to raise were clearly stronger than the arguments that Holzman raised. Therefore, we reject Gordon's argument that he received ineffective assistance of postconviction counsel and conclude that the first four issues Gordon raised are subject to the procedural bar of ***Escalona-Naranjo***, 185 Wis. 2d at 185.

Turning to Gordon's final issue, he argues that the circuit court should not have denied his request for an *in camera* review of the victims' medical records to search for exculpatory evidence.[3] To be entitled to *in camera* review of confidential patient records, the defendant must show that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking it; (3) it is material; and (4) it is not cumulative to other evidence. ***State v. Robertson***, 2003 WI App 84, ¶16, 263 Wis. 2d 349, 661 N.W.2d 105. To determine whether the evidence is material, the defendant must "set forth a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information that is necessary to a determination of guilt or innocence." ***Id.***, ¶14.

Gordon did not set forth material facts addressing the four parts of the ***Robertson*** test. Gordon claimed that he was seeking the victims' medical records to determine whether the records show what type of gun caused the victims' injuries, which he argues is relevant to his

[3] The circuit court denied Gordon's motion on the ground that he had not shown a sufficient likelihood that the medical records would contain any consequential evidence. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 308-09, 588 N.W.2d 8 (1999). The circuit court erred in applying ***O'Brien***. It should have applied the test set forth in ***State v. Robertson***, 2003 WI App 84, ¶16, 263 Wis. 2d 349, 661 N.W.2d 105. Even so, we affirm the circuit court's order because it reached the correct result, albeit for the wrong reason. *See* ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶27 n.4, 326 Wis. 2d 729, 786 N.W.2d 78 (we may sustain a lower court's ruling on a theory or reasoning not presented in the lower court).

defense that he was not the shooter. Gordon also claims that the records might show whether the victims had any substance abuse or mental health issues, which may be relevant to whether the victims had a problem with accurately perceiving or remembering events. Gordon's conclusory assertions lack factual support and do not address the elements set forth in ***Robertson***. As such, they do not merit further discussion. ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review issues that are inadequately developed). Moreover, the victims unequivocally identified Gordon so Gordon has not made a showing on how the information he seeks is material.

Upon the foregoing,

IT IS ORDERED that the order of the circuit court 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