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DISTRICT I

December 21, 2021

To:

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Circuit Court Judge
Electronic Notice

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

2020AP845	State of Wisconsin v. Brian A. Barwick (L.C. # 2014CM4275)
2020AP846	State of Wisconsin v. Brian A. Barwick (L.C. # 2015CF1521)
2020AP847	State of Wisconsin v. Brian A. Barwick (L.C. # 2015CF3082)
2020AP848	State of Wisconsin v. Brian A. Barwick (L.C. # 2015CF4127)

Before Brash, C.J., Donald, P.J., and White, 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).

Brian A. Barwick, *pro se*, appeals an order denying his motion for postconviction relief under WIS. STAT. § 974.06 (2019-20).[1] Following a joint trial of four consolidated cases, a jury found Barwick guilty of eleven crimes that all involved use of a computer or telephone for prohibited purposes. With the assistance of counsel, he pursued postconviction relief and a

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

direct appeal under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30. We affirmed. *See* ***State v. Barwick*** (***Barwick I***), Nos. 2017AP958-CR, 2017AP959-CR, 2017AP960-CR, and 2017AP961-CR, unpublished slip op. (WI App Sept. 5, 2018). Barwick now claims that his trial counsel was ineffective for failing to: pursue a defense grounded on his First Amendment right to free speech;[2] present an expert witness; or allege prosecutorial vindictiveness. He claims that his postconviction counsel was ineffective in turn for failing to challenge trial counsel's effectiveness on those grounds. The circuit court rejected his claims without a hearing, ruling that they lacked merit and were procedurally barred. Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

The facts underlying Barwick's convictions are set out in ***Barwick I*** and need not be repeated here. In the original postconviction motion and direct appeal, Barwick raised three challenges to the sufficiency of the evidence; challenged the validity of several search warrants; claimed that police unlawfully seized items from his home; alleged that he was denied the right to present a defense; challenged the denial of severance; raised multiple claims of ineffective assistance of counsel; and claimed that the plain error doctrine required a new trial. *See* ***id.***, Nos. 2017AP958-CR, 2017AP959-CR, 2017AP960-CR, and 2017AP961-CR, ¶15. We rejected his claims. Barwick next filed the postconviction motion underlying this appeal.

[2] As relevant here, the First Amendment to the United States Constitution provides: "Congress shall make no law ... abridging the freedom of speech[.]" *See* U.S. CONST. amend. I.

WISCONSIN STAT. § 974.06 permits a prisoner such as Barwick to raise constitutional claims after the time for a direct appeal has passed. *See* § 974.06(1). The statute, however, contains a limitation, because "[w]e need finality in our litigation." *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A convicted prisoner is therefore procedurally barred from bringing claims under § 974.06 if the prisoner could have raised the claims in a previous postconviction motion or on direct appeal unless the prisoner states a '"sufficient reason"' for failing to raise those issues previously. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82 (citing § 974.06(4)).

In this case, Barwick claims that his reason for serial litigation is the ineffective assistance of his postconviction counsel, who did not pursue the claims that Barwick raises now. Ineffective assistance of postconviction counsel for failing to raise claims in the defendant's original postconviction motion may constitute the sufficient reason required for an additional motion. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. To prevail, however, the defendant must demonstrate that postconviction counsel was in fact ineffective. *See* ***id.***

We assess claims of ineffective assistance of counsel by applying the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***State v. Balliette***, 2011 WI 79, ¶28, 336 Wis. 2d 358, 805 N.W.2d 334. The test requires that the convicted person show both a deficiency in counsel's performance and prejudice as a result. *See* ***Strickland***, 466 U.S. at 687. A reviewing court may consider either prong of the analysis first, and if the person fails to make an adequate showing as to one prong, the court need not address the other. *See* ***id.*** at 697.

To satisfy the deficiency prong of a ***Strickland*** analysis, the convicted person must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. Additionally, when—as here—the person claims that postconviction counsel was ineffective for failing to raise issues, proof of the deficiency prong requires the person to allege and show that the neglected issues were "clearly stronger" than the claims postconviction counsel pursued. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶4. To satisfy the prejudice prong of ***Strickland***, the convicted person "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.***, 466 U.S. at 694. Whether counsel's performance was deficient and whether any deficiency was prejudicial are both questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

A circuit court is not required to grant a hearing on a claim of ineffective assistance of counsel unless the defendant's postconviction motion contains allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. To satisfy the standard, a defendant should allege, within the four corners of the postconviction motion itself, "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *See* ***id.***, ¶23. Whether the allegations are sufficient to warrant a hearing presents an additional question of law for our independent review. *See* ***id.***, ¶9. If, however, the motion does not include sufficient allegations of material fact that, if true, entitle the defendant to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a

hearing. *See* ***id.*** We review discretionary decisions with deference. *See* ***id.*** With the foregoing principles in mind, we turn to Barwick's claims.

According to Barwick, his postconviction counsel should have argued that his trial counsel was ineffective for not raising First Amendment challenges to his conviction in case No. 2014CM4275, in which the jury convicted him of using a computerized communication system in violation of WIS. STAT. § 947.0125(2)(c) (2013-14).[3] He offers three reasons that this court should reverse the circuit court's order denying him postconviction relief on this issue.

First, Barwick argues that his conviction in case No. 2014CM4275 violates his First Amendment rights because he engaged in protected speech when he sent the second of five emails to K.D., the victim in the case. The State, however, did not charge Barwick with a crime based on his second email to K.D. The charge was based on Barwick's fifth email. *See* ***Barwick I***, Nos. 2017AP958-CR, 2017AP959-CR, 2017AP960-CR, and 2017AP961-CR, ¶3. The second email was merely an item of evidence in the case. Assuming without deciding that the second email was protected speech, the First Amendment does not prevent the use of protected speech as evidence at trial. *See* ***Dressler v. McCaughtry***, 238 F.3d 908, 915 (7th Cir. 2001). Because

[3] WISCONSIN STAT. § 947.0125(2)(c) (2013-14) provides:

> Whoever does any of the following is guilty of a Class B misdemeanor:
>
> ….
>
> (c) With intent to frighten, intimidate, threaten or abuse another person, sends a message to the person on an electronic mail or other computerized communication system and in that message uses any obscene, lewd or profane language or suggests any lewd or lascivious act .

Barwick's claim is meritless, it is not clearly stronger than the claims his postconviction counsel raised on his behalf. Accordingly, the claim is barred. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶4, 36.

Second, Barwick maintains that he suffered a violation of his First Amendment rights because the jury convicted him without any testimony from K.D. that Barwick's emails made K.D. feel intimidated, frightened, threatened or harassed. *Cf.* WIS. STAT. § 947.0125(2)(c) (2013-14). The State responds that this argument merely restates a claim that Barwick pursued on direct appeal, namely, that the State failed to offer sufficient evidence to prove his guilt. In reply, Barwick asserts: "the sufficiency of evidence is stric[t]ly about what the Court allowed in. My claim [involves] whether or not K.D. or the D.A. met the element[s] of the statute."

Barwick misunderstands the applicable law. "The standard for reviewing the sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***State v. Rushing***, 197 Wis. 2d 631, 641, 541 N.W.2d 155 (Ct. App. 1995). Barwick's claim that he was convicted without proof of the statutory elements is thus an allegation that the evidence was insufficient to convict him. In ***Barwick I***, however, this court considered and rejected that claim. *See* ***id.***, No. 2017AP958-CR, 2017AP959-CR, 2017AP960-CR, 2017AP961-CR, ¶¶17-22. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). That rule applies here and bars Barwick's claim.

Third, Barwick argues that the circuit court erred by failing to cite and distinguish the case law that Barwick believes is applicable. As we have explained, however, Barwick's First Amendment claims are meritless and procedurally barred. The circuit court therefore correctly denied relief. Further examination of the specifics of the circuit court's analysis is unnecessary. *See* ***State v. Horn***, 139 Wis. 2d 473, 490, 407 N.W.2d 854 (1987) (reflecting that we will uphold a correct circuit court decision regardless of the circuit court's rationale).

Barwick next seeks relief on the grounds that his trial counsel was ineffective for failing to offer expert testimony that Barwick's computer was hacked or spoofed and that his postconviction counsel was ineffective in turn for failing to challenge trial counsel's effectiveness in this regard. Specifically, Barwick claims that his trial counsel should have presented testimony from "Andy Ohman," whose affidavit Barwick offered in support of his claim.[4] Barwick further contends that his postconviction counsel was ineffective for failing to pursue this issue.

Ohman stated in his supporting affidavit that he had "been [in] the computer business for [twenty] years," and that he did unspecified work on Barwick's computer in mid-October through November of 2014, when some of the charges against Barwick arose. Ohman further averred that Barwick encountered "numerous issues" at that time, leading Ohman "to believe [Barwick] was being hacked."

[4] The Ohman document is in the form of a letter but was apparently signed in the presence of a notary. The circuit court concluded that the document is an affidavit.

Barwick's submission does not satisfy the standard set forth in ***Allen***, namely, the obligation to support a postconviction motion with material facts sufficient to permit meaningful assessment of the claim. *See* ***id.***, 274 Wis. 2d 568, ¶23. Barwick does not explain who Ohman is or why he should be accepted as an expert in hacking or spoofing, or what he may know about those matters. Indeed, the bald statement from Ohman that he had "been [in] the computer business for [twenty] years" does not establish any knowledge of, let alone expertise in, hacking or spoofing. The balance of his submission merely offers anecdotal information about anomalous occurrences that he assumed were caused by hacking.

Moreover, Barwick failed to show that Ohman's testimony would have been relevant, even assuming that Ohman was qualified to testify as an expert. Ohman's affidavit frankly conceded his inability to show that Barwick's computer had been "manipulated" at the time of the incidents in these cases because, as Ohman explained, Barwick had destroyed the hard drive and operating system he was using at that time. Accordingly, Ohman's testimony would have constituted mere speculation that the criminal conduct at issue arose from actions of a third party. Such testimony is improper. Wisconsin law expressly seeks "to prevent the jury from being presented with speculation dressed up as an expert opinion." *See* ***State v. Smith***, 2016 WI App 8, ¶5, 366 Wis. 2d 613, 874 N.W.2d 610.

In sum, a challenge to trial counsel's effectiveness based on failure to call Ohman as an expert witness lacks any merit. A meritless claim is not clearly stronger than the claims that postconviction counsel raised. Therefore, Barwick fails to show that his postconviction counsel performed deficiently by forgoing such a claim, and the claim is barred. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶4, 36.

Last, Barwick asserts that his trial counsel was ineffective for failing to allege prosecutorial vindictiveness and that his postconviction counsel was ineffective in turn for failing to pursue this claim. In support, he describes the prosecutor's actions in seeking circuit court review of a court commissioner's bail decision.

"To establish a claim of prosecutorial vindictiveness, a defendant must show either a 'realistic likelihood of vindictiveness,' therefore raising a rebuttable presumption of vindictiveness, or actual vindictiveness." ***State v. Williams***, 2004 WI App 56, ¶43, 270 Wis. 2d 761, 677 N.W.2d 691 (citation omitted). Actual vindictiveness is established by showing "'objective evidence that a prosecutor acted in order to punish the defendant for standing on his or her legal rights.'" ***Id.*** (citation and brackets omitted).

Here, Barwick shows that the State sought bail in the amount of $20,000 at his initial appearance, and when the court commissioner instead set bail at $500, the prosecutor requested a bail modification, a step permitted under WIS. STAT. § 969.08(1). These facts reflect that the prosecutor acted within the bounds of Wisconsin law to advance the position that the State believed was warranted. Barwick fails to demonstrate how or why the prosecutor's lawful actions in pursuit of the State's objectives were anything other than the zealous advocacy to which all parties are entitled.

Because Barwick fails to demonstrate that his claim of prosecutorial vindictiveness has any merit, he fails to show that the claim is clearly stronger than the claims that his postconviction counsel pursued on his behalf. Accordingly, the claim is barred. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶4, 36. For all the foregoing reasons, we affirm.

IT IS ORDERED that the circuit court's 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