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DISTRICT I

October 4, 2022

To:

Hon. Stephanie Rothstein
Circuit Court Judge
Electronic Notice

Robert Probst
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George Christenson
Clerk of Circuit Court
Milwaukee County
Electronic Notice

Marchand Grady 457678
Columbia Correctional Center
P.O. Box 900
Portage, WI 53901-0900

John D. Flynn
Electronic Notice

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

2021AP138

State of Wisconsin v. Marchand Grady (L.C. # 2005CF2809)

Before Donald, P.J., Dugan 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).

Marchand Grady, *pro se*, appeals an order denying his postconviction motion collaterally attacking his conviction. *See* WIS. STAT. § 974.06 (2019-20).¹ Grady argues that he received ineffective assistance of appellate counsel on direct appeal because his appellate counsel should have raised claims of ineffective assistance of trial counsel. Based upon our review of the briefs

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

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

The facts and procedural history of this case were set forth in a prior decision of the Wisconsin Supreme Court and will not be repeated here. *See State v. Grady*, 2009 WI 47, ¶¶4-12, 317 Wis. 2d 344, 766 N.W.2d 729. Suffice it to say that Grady was convicted after a jury trial of first-degree intentional homicide while armed with a dangerous weapon, as a party to a crime; possession of a short-barreled shotgun, as a party to a crime; and unlawfully possessing a firearm after being convicted of a felony. On direct appeal, Grady argued that the circuit court erred in denying his motion to suppress inculpatory statements he made to the police. The Wisconsin Supreme Court rejected his argument that his *Miranda*² rights were violated.

Grady then filed the current postconviction motion *pro se*, arguing that his appellate counsel ineffectively represented him by failing to raise the following arguments: (1) that his trial counsel should have presented evidence at the suppression hearing concerning Grady's mental health issues, which Grady claims rendered his interrogation coercive; (2) that his trial counsel should have called two witnesses at his suppression hearing who would have testified that they heard raised voices while Grady was being interviewed by detectives, thus supporting Grady's claim that the detectives were yelling at him; and (3) that his trial counsel should have impeached Detective Kent Corbett's testimony at trial with Detective Corbett's testimony during the suppression hearing. The circuit court denied the motion as procedurally barred. This appeal follows.

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

To establish ineffective assistance of counsel, a person must show that counsel performed deficiently and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In addition, a person arguing that he or she received ineffective assistance of postconviction/appellate counsel must also show that the claims he or she contends should have been raised 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.

We conclude that Grady's claims are procedurally barred by *Romero-Georgana* because he has not shown that the arguments he currently raises are clearly stronger than the arguments his counsel raised on direct appeal. We agree with the circuit court's analysis of Grady's arguments:

The defendant's claim that his mental health issues rendered his statements involuntary is self-serving and totally lacking in evidentiary support. The defendant has not provided the opinion of a mental health expert about the effect his mental health issues had on the interrogation process or the voluntariness of his statements.... The defendant cannot rely upon patently conclusory allegations [about] what he hopes or expects an expert to prove.

....

The court fails to perceive how additional evidence that the defendant and the detectives were yelling at each other would have changed the outcome of the suppression hearing. The court heard this testimony from the defendant and was not persuaded that his statements were obtained by coercion. Even if counsel had presented Martina Bryant and Jennaro Austin's testimony at the suppression hearing, they were not in the interrogation room and they did not testify about the content of what they heard. Moreover, their testimony is subjective at best. What may sound like yelling or shouting to one person may reasonably be interpreted as loud voices by another. Detective Corbett acknowledged at the suppression hearing and at trial that there might have been "a little raising of the voices" during the interview; that factor by itself would not be sufficient to demonstrate coercion.

The subjective nature of the defendant's postconviction argument shows that this claim is not clearly stronger than the concrete *Miranda* issue appellate counsel raised on appeal. Given the testimony at the suppression hearing and the factors Judge Kahn considered, there is no reasonable probability that subjective third-party evidence of yelling or shouting during the interrogation would have changed his ruling.

The defendant's claim that counsel should have impeached Detective Corbett's [trial testimony] with his suppression hearing testimony is without merit. The detective testified consistently during both proceedings that there may have been "a little raising of the voices." He never denied that. The defendant also argues that counsel should have asked about the difference between "raised voices" and "yelling." That's a subjective question that would have called for a subjective answer. There is no reasonable probability that this line of "impeachment" would have made a difference.

Based upon the foregoing, the court finds that appellate counsel was not ineffective because none of the defendant's claims of trial counsel ineffectiveness are clearly stronger than the issues counsel raised on appeal.

(Emphasis omitted.)

For the reasons explained above, we conclude that Grady has not shown that his current claims are clearly stronger than the claims Grady raised on direct appeal—which were, after all, sufficiently weighty to warrant resolution by the Wisconsin Supreme Court. Therefore, Grady's claims are procedurally barred under *Romero-Georgana*, 360 Wis. 2d 522, ¶¶73-75.

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