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DISTRICT I

December 6, 2022

To:

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Circuit Court Judge
Electronic Notice

Nicholas DeSantis
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Clerk of Circuit Court
Milwaukee County Safety Building
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Onecimo B. Tobar III 662974
Dodge Correctional Inst.
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You are hereby notified that the Court has entered the following opinion and order:

2021AP2100	State of Wisconsin v. Onecimo B. Tobar, III (L.C. # 2017CF1153)
2021AP2101	State of Wisconsin v. Onecimo B. Tobar, III (L.C. # 2017CF2283)

Before Brash, C.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).

In these consolidated matters, Onecimo B. Tobar III, *pro se*, appeals the order that denied his second postconviction motion, a motion that he filed pursuant to WIS. STAT. § 974.06 (2019-20).¹ In the motion, Tobar alleged that his trial counsel was ineffective in four ways and that his postconviction counsel was ineffective in turn for failing to pursue those four claims in Tobar's original postconviction motion. The circuit court determined that Tobar's claims were procedurally barred. Upon our review of the briefs and records, we conclude at conference that

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

these matters are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

Following a joint trial of two circuit court cases, a jury found Tobar guilty of child enticement, two counts of second-degree sexual assault of a child, and two counts of felony bail jumping. Tobar sought postconviction relief. With the assistance of counsel, he filed an unsuccessful postconviction motion and then pursued consolidated appeals from the adverse order and the judgments of conviction. In those proceedings, he claimed that his trial counsel was ineffective for failing to object when a witness allegedly vouched for the credibility of the victim and when the prosecutor allegedly vouched for the credibility of the victim's mother. Tobar also claimed that his trial counsel was ineffective for failing to object to the introduction of certain evidence on the ground that it was inadmissible "other-acts" evidence under WIS. STAT. § 904.04(1). *See State v. Tobar (Tobar I)*, Nos. 2019AP1517-CR and 2019AP1518-CR, unpublished slip op. (WI App Nov. 24, 2020). We rejected his claims and affirmed his convictions. *See id.*, ¶¶2-3. Our supreme court denied Tobar's petition for review.

Tobar next filed the postconviction motion underlying these appeals. He claimed that his trial counsel was ineffective before and during trial for failing to: (1) retain an expert witness; (2) introduce an audiotape of a statement that the victim's mother made to counsel; (3) impeach the victim's mother with her taped statement; and (4) move for a mistrial based on alleged jury misconduct. He further claimed that his postconviction counsel was ineffective for failing to raise these issues in Tobar's first postconviction motion. The circuit court denied relief, and he appeals.

Pursuant to WIS. STAT. § 974.06(4), a person who wishes to pursue a second or subsequent postconviction motion must demonstrate a sufficient reason for failing to raise or to adequately address the claims at issue in the first postconviction proceeding. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel for failing to raise claims in the original postconviction motion may in some circumstances 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. The convicted person must demonstrate, however, that postconviction counsel was in fact ineffective. *See id.*

We assess allegations of ineffective assistance of postconviction 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. When—as here—the convicted person alleges 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, 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.” *Strickland*, 466 U.S. at 694. We may consider either prong of the analysis first. *See id.* at 697. If the convicted person fails to make an adequate showing as to one prong, we need not address the other. *See id.*

Here, we examine the deficiency prong first because it is dispositive. To assess whether neglected claims were clearly stronger than those that postconviction counsel pursued, a

reviewing court must “compare the issue[s] not raised in relation to the issues that were raised.” *Lee v. Davis*, 328 F.3d 896, 900 (7th Cir. 2003). The burden is on the convicted person to satisfy the “clearly stronger” standard. *See Romero-Georgana*, 360 Wis. 2d 522, ¶¶45-46, 58 (citations omitted). Our case law provides a well-settled methodology for the convicted person to apply, requiring the person to explain and discuss “sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle him to the relief he seeks.” *See id.*, ¶58 (citation omitted).

In this case, although Tobar acknowledged in his postconviction motion that he must satisfy the “clearly stronger” standard, he did not apply it. Instead, as the circuit court explained, Tobar appeared “to mistakenly believe that simply because the claims raised on direct appeal did not succeed, the issues he ... raise[d under WIS. STAT. § 974.06] should automatically be deemed ‘clearly stronger’” than his original claims. The circuit court’s assessment was correct. Tobar stated in his § 974.06 motion that his new claims were “significant, obvious, and clearly stronger than the issues he raised” in *Tobar I*, but he failed to examine the specifics of the current and prior claims. He did not set forth any facts showing why his new claims were clearly stronger than those that his postconviction counsel pursued, and he did not analyze the comparative merits of the new claims in relation to the original claims.

On appeal, Tobar again states that his current claims are “clearly stronger” than the claims raised previously but he offers no analysis in support of that position, asserting only that the current claims “warrant relief.” He thus fails to show that his postconviction counsel performed deficiently by not raising his current claims, and he therefore necessarily fails to show that he has a sufficient reason for serial litigation. *See Romero-Georgana*, 360 Wis. 2d 522, ¶36. Accordingly, we affirm.

IT IS ORDERED that the postconviction 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