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DISTRICT I

May 16, 2023

To:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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John D. Flynn
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1329 State of Wisconsin v. Jermaine Turner (L.C. # 2007CF5540)

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).

Jermaine Turner appeals the order denying his WIS. STAT. § 974.06 (2021-22)[1] motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

This is not Turner's first challenge to his 2009 convictions. On direct appeal, Turner challenged the judgment, entered on a jury's verdicts, convicting him of first-degree reckless homicide as a party to a crime and attempted armed robbery with use of force as a party to a

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

crime. Turner also appealed the trial court's order denying his motion for postconviction relief. He argued that the trial court erred when it denied his motion to suppress statements he made to police and by not interviewing jurors for potential bias when certain information was brought to the court's attention. *See* ***State v. Turner*** (***Turner I***), No. 2010AP3063-CR, unpublished slip op., ¶¶2, 4 (WI App May 31, 2012). We deemed the latter argument forfeited due to the lack of a contemporaneous objection. *See* ***id.***, ¶4. Turner additionally argued that the trial court erred by denying his motion to admit evidence that a third party may have committed the crime. ***Id.***, ¶5. We affirmed, *see* ***id.***, ¶1, and the Wisconsin Supreme Court denied Turner's petition for review.

Nine years after we decided his direct appeal, Turner filed the underlying WIS. STAT. § 974.06 motion. He argued that postconviction counsel[2] was ineffective for not arguing that trial counsel was ineffective for failing to raise a contemporaneous objection to the trial court's refusal to conduct individualized voir dire of the jurors. Turner additionally argued that postconviction counsel was ineffective for failing to raise as an issue the jurors' exposure to extraneous information. The postconviction court denied the motion without a hearing.

Turner renews his postconviction claims on appeal. 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

[2] Throughout his briefs, Turner refers to his claims as being against appellate counsel. However, claims of ineffective assistance of trial counsel must first be preserved for appeal by a postconviction motion, which is the responsibility of postconviction counsel. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). Turner likewise argues that "appellate counsel" failed to raise the issue of the jurors' exposure to extraneous information in a postconviction motion. Because Turner's claims would have required the filing of a postconviction motion, we refer to counsel as postconviction counsel. *See* WIS. STAT. § 974.02(2) (providing that the only times an appellant is *not* required to file a postconviction motion in the trial court prior to an appeal is if the grounds are sufficiency of the evidence or issues previously raised).

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.*** Whether a § 974.06 motion merits an evidentiary hearing is a question of law that we review *de novo*. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶30.

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. 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).

Turner does not even reference, let alone apply, the "clearly stronger" standard in his postconviction motion or in his appellate briefs. He also does not analyze the comparative merits of the new claims in relation to the original claims. Insofar as we previously concluded that Turner's claim that the trial court erred by not questioning each juror was forfeited by trial counsel's lack of a request for the trial court to make such an inquiry, that holding does not mean that trial counsel's failure in this regard was automatically clearly stronger than the previously raised claims. Turner still needed to demonstrate that his new claims met the threshold. He has not done so with regard to either of the claims he pursues on appeal. Accordingly, we need not consider the prejudice prong of the analysis. *See* ***Strickland,*** 466 U.S. at 697.

Because Turner fails to show that he has a sufficient reason for serial litigation, we affirm. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶36.

Therefore,

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