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DISTRICT I

May 31, 2023

To:

Hon. Stephanie Rothstein
Circuit Court Judge
Electronic Notice

Anne Christenson Murphy
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Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Ivy James Carter 206034
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You are hereby notified that the Court has entered the following opinion and order:

2022AP521

State of Wisconsin v. Ivy James Carter (L.C. # 1991CF914165)

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).

Ivy James Carter, *pro se*, appeals from an order of the circuit court denying his WIS. STAT. § 974.06 motion without a hearing. Carter also appeals from the order denying his motion for reconsideration. 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 (2021-22).¹ The order is summarily affirmed.

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

In 1992, a jury convicted Carter of first-degree intentional homicide as a party to a crime. The circuit court sentenced Carter to life in prison with eligibility for parole after forty-five years. By counsel, Carter filed a postconviction motion for a new trial based in part upon a claim that an identifying witness was subject to an impermissibly suggestive out-of-court identification process, which in turn should have barred her in-court identification. Following evidentiary hearings, the circuit court denied Carter's motion by a written order dated April 16, 1993. Carter appealed and this court affirmed the circuit court. *See State v. Carter*, No. 1993AP1639-CR, unpublished slip op. (WI App May 3, 1994).

Carter then filed his first *pro se* WIS. STAT. § 974.06 postconviction motion arguing that he was prejudiced by the addition of the party to a crime to the charge and that the jury instructions related to party to a crime deprived him of a fair trial. The circuit court denied his motion. Carter did not appeal the circuit court's decision; rather, he filed a *pro se* petition for writ of *habeas corpus* with this court, again challenging the jury instructions and alleging ineffective assistance of postconviction/appellate counsel. Specifically, Carter argued that on direct appeal his postconviction/appellate counsel: (1) failed to challenge the addition of the party to a crime charge; and (2) failed to raise ineffective assistance of trial counsel for trial counsel's failure to object to a jury instruction. On February 26, 1997, this court denied Carter's motion and informed him that the proper forum for raising ineffective assistance of trial counsel was the circuit court. *See State ex rel. Carter v. Endicott*, No. 1995AP3079-W, unpublished op. and order (WI App Nov. 17, 1995).

Carter then filed a second WIS. STAT. § 974.06 motion in the circuit court alleging that his postconviction counsel was ineffective for not raising the ineffective assistance of trial counsel issue related to the jury instructions. The circuit court denied the motion, concluding that Carter

was not prejudiced. Carter appealed and this court affirmed. *See State v. Carter*, No. 1998AP106, unpublished op. and order (WI App Apr. 5, 2000).

Over twenty years later, Carter filed the *pro se* WIS. STAT. § 974.06 motion underlying this appeal, alleging that his trial counsel was ineffective related to plea bargaining. Specifically, Carter alleged that because trial counsel did not inform him that an eyewitness had identified him as the shooter, Carter declined the State’s plea offer to amend the charge to first-degree reckless homicide while armed because he thought there were no identifying witnesses. Carter argued that if he had known there was an identifying witness, he would have accepted the offer rather than proceeding to trial. Carter also argued that postconviction counsel was ineffective for failing to previously raise the issue. The circuit court denied Carter’s motion without a hearing, finding that Carter’s claim was procedurally barred and that Carter did not show that his claim was clearly stronger than the claim postconviction counsel actually raised. Carter moved for reconsideration, asking the circuit court to consider his ineffective assistance of trial counsel claim under the plain error doctrine. The circuit court denied the motion. This appeal follows.

On appeal Carter contends that the facts of this case warrant “judicial waiver” of the *Escalona-Naranjo*² bar. Alternatively, he contends that counsels’ errors constitute plain error warranting discretionary reversal in the interest of justice. We disagree.

An issue that could have been raised on direct appeal or in a previous motion is barred absent a sufficient reason for not raising the issue in the earlier proceedings. *See* WIS. STAT. § 974.06; *see also State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157

² *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

(1994). “In some instances, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal.” *State v. Romero-Georgana*, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. A defendant who alleges in a § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought. *See Romero-Georgana*, 360 Wis. 2d 522, ¶¶45-46.

“[T]o adequately raise a claim for relief, a defendant must allege ‘sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle [the defendant] to the relief he seeks.’” *Id.*, 360 Wis. 2d 522, ¶37 (citations omitted; brackets in *Romero-Georgana*). That is, he must allege facts that support every facet of his claim and that, if true, would entitle him to relief. *See id.*, ¶38.

This is Carter’s third WIS. STAT. § 974.06 motion and his fourth postconviction motion; yet, this is the first time he raised the claim that his trial counsel was ineffective for not informing him about a witness’s identification during plea bargaining. As the circuit court noted, whether Carter’s trial counsel told him about the witness identification before the start of trial was “an issue of fact” that Carter “admittedly discovered in 1993 but did not raise in his direct appeal or in his prior § 974.06 motions.” Carter alleges that ineffective assistance of postconviction counsel constitutes a “sufficient reason” for his failure to raise this issue previously, but he makes no meaningful attempt to explain why his current claim of ineffective assistance of trial counsel is “clearly stronger” than the claims his postconviction counsel did previously raise. Accordingly, we agree with the postconviction court that Carter’s claim is procedurally barred.

Alternatively, Carter contends that his ineffective assistance of counsel claims constitute plain error entitling him to discretionary reversal in the interests of justice. Under WIS. STAT. § 752.35, this court may order a new trial “if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]” However, Carter fails to show that this is an “exceptional case” warranting discretionary reversal. See *State v. Schutte*, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469 (“We exercise our authority to reverse in the interest of justice under WIS. STAT. § 752.35 sparingly and only in the most exceptional cases.”). Carter is simply trying to circumvent the procedural bar.

For the foregoing reasons, we affirm.

Upon the foregoing,

IT IS ORDERED that the orders of the circuit court are 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