



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

July 27, 2023

To:

Hon. Stephen E. Ehlke
Circuit Court Judge
Electronic Notice

Reed Cornia
Electronic Notice

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

Erin Hanson
Electronic Notice

Daniel J. O'Brien
Electronic Notice

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

2020AP1801

State of Wisconsin v. Adore A. Thomas (L.C. # 2013CF2326)

Before Blanchard, P.J., Kloppenburg, and Nashold, 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).

Adore A. Thomas appeals an order denying his postconviction motion collaterally attacking his conviction. *See* WIS. STAT. RULE 974.06 (2021-22).¹ Thomas 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 on 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.

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

The facts and procedural history of this case were set forth in a prior decision of this court and will not be repeated here. See *State v. Thomas*, No. 2015AP2363-CR, unpublished slip op. (WI App Dec. 15, 2016). Suffice it to say that Thomas was convicted after a jury trial of three counts of first-degree sexual assault by use of a dangerous weapon, one count of aggravated battery, and one count of strangulation and suffocation. On direct appeal, Thomas argued that the circuit court erred in denying his motion to suppress DNA and other evidence linking him to the crime because police knowingly included a false statement and omitted material facts from the search warrant affidavit.² We rejected his arguments.

Thomas then filed the current postconviction motion, arguing that his appellate counsel ineffectively represented him by failing to raise the following arguments: (1) that his trial counsel should have challenged the voluntariness of his confession because he purportedly asked that a parent be present during questioning; and (2) that his trial counsel should have objected to the trial court's refusal to send the entire Sexual Assault Nurse Examination (SANE) report into the jury room during deliberations. The circuit court denied the motion as procedurally barred. This appeal follows.

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 counsel must also show that the claims he or she contends should

² On direct appeal, Thomas made what is referred to as a *Franks-Mann* challenge to the DNA search warrant. See *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); *State v. Mann*, 123 Wis. 2d 375, 388-89, 367 N.W.2d 209 (1985).

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 Thomas's claims are procedurally barred under *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. In fact, Thomas does not apply the clearly stronger standard and did not file a reply brief with this court to refute the State's arguments that he fails to meet this standard. See *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (we may treat as a concession a proposition asserted in a respondent's brief and not disputed in the reply brief). We agree with the State that Thomas fails to show that the arguments he currently raises are clearly stronger than the *Franks-Mann* issue that his postconviction counsel raised on direct appeal. As the circuit court explained:

In this case, appellate counsel chose what was both legally and tactically the strongest argument on appeal. Although ultimately the court of appeals affirmed my decision on the *Franks-Mann* motion, it was at least plausible or arguable that the court of appeals might overturn it because probable cause is a legal standard when applied to basically undisputed facts. So for a legal reason, I believe and find that appellate counsel chose perhaps its strongest argument.

For the reasons explained above, we conclude that Thomas has failed to establish that his current claims are clearly stronger than the claim he raised on direct appeal. Therefore, Thomas's claims are procedurally barred under *Romero-Georgana*.

Accordingly,

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.

Samuel A. Christensen
Clerk of Court of Appeals