



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 I

August 22, 2023

To:

Hon. Frederick C. Rosa
Circuit Court Judge
Electronic Notice

Anne Christenson Murphy
Electronic Notice

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

Kelvin D. Kirk 225230
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2022AP442

State of Wisconsin v. Kelvin D. Kirk (L.C. # 2011CF2863)

Before White, 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).

Kelvin D. Kirk, *pro se*, appeals a circuit court order denying his postconviction motion brought pursuant to WIS. STAT. § 974.06 (2021-22).¹ 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. The order is summarily affirmed.

In 2012, Kirk pled no contest to attempted first-degree intentional homicide, as an act of domestic abuse. Following sentencing, Kirk filed a motion for resentencing arguing that the

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

circuit court sentenced him on the basis of inaccurate information because it was not aware that he had been formally diagnosed with a mental illness. Alternatively, he alleged that a new factor—a physician’s report diagnosing him with post-traumatic stress disorder and psychotic disorder—warranted sentence modification. The postconviction court denied the motion, Kirk appealed, and this court affirmed. *See State v. Kirk*, No. 2015AP19-CR, unpublished slip op. (WI App Oct. 27, 2015).

In October 2021, Kirk filed the WIS. STAT. § 974.06 motion underlying this appeal asserting five claims of ineffective assistance of trial counsel. Specifically, Kirk argued that trial counsel was ineffective for: (1) not adequately investigating his mental health history; (2) not challenging the doctor’s report finding him competent to stand trial; (3) not adequately consulting with Kirk about an N.G.I. plea or other defenses; (4) not objecting to the trial court’s “biased remarks” or raising judicial bias; and (5) not asking for another competency evaluation. Kirk argued that his claims were not procedurally barred because his postconviction counsel was ineffective for failing to raise these claims, which Kirk asserted were clearly stronger than the claims postconviction counsel did previously pursue. The postconviction court denied the motion without a hearing, finding that all of Kirk’s ineffective assistance claims were “based upon conclusory and speculative allegations,” that were not “clearly stronger than the issues that postconviction/appellate counsel pursued.” This appeal follows.

“All grounds for relief available to a person under [WIS. STAT. § 974.06] must be raised in his or her original, supplemental or amended motion.” Sec. 974.06(4). A defendant seeking to raise a claim that could have been raised in a prior postconviction motion must show a “sufficient reason” for failing to raise that claim earlier, or the claim is barred. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). “Whether a WIS. STAT.

§ 974.06 motion alleges a sufficient reason for failing to bring available claims earlier is a question of law subject to de novo review.” *State v. Romero-Georgana*, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668.

Ineffective assistance of postconviction counsel may constitute a sufficient reason for why an issue which could have been raised on direct appeal was not. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To demonstrate ineffective assistance of counsel in the postconviction context, a defendant must establish that the claims he or she believes counsel should have raised were “clearly stronger” than the claims that were actually raised. *Romero-Georgana*, 360 Wis. 2d 522, ¶46.

The postconviction court correctly noted that Kirk’s claims were conclusory, speculative, and not clearly stronger than the claims postconviction counsel pursued. Indeed, Kirk made no meaningful comparative analysis of the strength of the issues postconviction counsel actually raised in Kirk’s first postconviction motion and appeal versus the issues Kirk now asserts counsel should have raised instead. Moreover, Kirk’s claims of judicial bias and ineffective assistance of trial counsel for failing to address certain mental health factors were previously litigated. “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Consequently, Kirk has not alleged a sufficient reason to circumvent the *Escalona* procedural bar or to otherwise garner relief.

Therefore,

IT IS ORDERED that the order 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