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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

October 3, 2023

To:

Hon. Dennis P. Moroney
Reserve Judge

Sonya Bice
Electronic Notice

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

Herbert L. Anderson 489803
Columbia Corr. Inst.
P.O. Box 900
Portage, WI 53901-0900

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

2022AP1104 State of Wisconsin v. Herbert L. Anderson (L.C. # 2014CF1565)

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).

Herbert L. Anderson, *pro se*, appeals from orders of the circuit court that denied his motion for sentence modification and 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. The orders are summarily affirmed.

In August 2014, Anderson pled guilty to two counts of armed robbery; a charge of possession of a firearm by a felon was dismissed and read in. The circuit court imposed two

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

consecutive twelve-year sentences. Anderson appealed. His attorney filed a no-merit report, to which Anderson filed a response. Following our initial review of the case, we directed counsel to file a supplemental report addressing Anderson's claims of ineffective assistance of trial counsel. After the supplemental report was filed, Anderson was permitted to file a supplemental response. Ultimately, we affirmed Anderson's judgment of conviction. *See* ***State v. Anderson***, No. 2015AP533-CRNM, unpublished op. and order (WI App Feb. 10, 2016).

On April 18, 2022, Anderson filed a *pro se* motion for sentence modification based on new factors. Anderson's "new factors" were his assertion that determinate sentences are cruel and unusual punishment; the sentencing court did not properly consider sentencing factors or give Anderson credit for remorse; the sentencing court did not allow Anderson to finish allocution; the sentencing court relied on false information in the presentence investigation report; and Anderson had completed "programs and education."

On April 22, 2022, Anderson filed a *pro se* motion under WIS. STAT. § 974.06, alleging that postconviction counsel was ineffective for failing to argue that trial counsel was ineffective for failing to request a ***Miranda/Goodchild*** hearing regarding a statement wherein Anderson confessed to one of the robberies. *See* ***Miranda v. Arizona***, 384 U.S. 436, 444-45 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 264, 133 N.W.2d 753 (1965). Anderson also alleged that there were "a lot of unanswered questions" that trial counsel "should have asked" of one of the police officers testifying at the preliminary hearing regarding his statement.

On May 2, 2022, the circuit court denied Anderson's new factor motion, concluding among other things that nothing Anderson identified constituted a new factor. On May 17, 2022, the circuit court denied Anderson's WIS. STAT. § 974.06 motion without a hearing, explaining

that Anderson had failed to show that the current issues he raised were clearly stronger than issues previously raised; that the allegations in the motion were conclusory; and that the claims were procedurally barred because they had not been raised previously in either the no-merit appeal or in combination with the motion for sentence modification. Anderson appeals.[2]

Although Anderson directly addresses the underlying substantive arguments from his postconviction motion, the threshold question is whether the circuit court erred when it denied his WIS. STAT. § 974.06 postconviction motion without a hearing. To be entitled to a hearing on a postconviction motion, the defendant must allege sufficient material facts which, if true, show the defendant is entitled to relief. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If the motion does not raise such facts, if it presents only conclusory allegations, or if the record reveals that the defendant is not entitled to relief, then the circuit court's decision to grant or deny a hearing is a discretionary one. *See* ***id.***

It is well-settled that WIS. STAT. § 974.06 requires a defendant to raise all grounds for postconviction relief in his or her original, supplemental, or amended motion or appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). Issues that could have been, but were not, raised previously may not be raised in a later motion absent a sufficient reason. *See* ***State v. Tillman***, 2005 WI App 71, ¶1, 281 Wis. 2d 157, 696 N.W.2d 574. This includes cases where the original appeal was a no-merit appeal. *See* ***id.***, ¶27. Although a

[2] Anderson's July 1, 2022 notice of appeal indicated that he was appealing his September 2014 judgment of conviction, but that notice is untimely as to the 2014 judgment. *See* WIS. STAT. § 808.04(3); WIS. STAT. RULE 809.32(2)(a). The July 2022 notice was, however, timely as to both orders denying Anderson's motions. *See* § 808.04(1). On appeal, Anderson does not discuss the order denying his sentence modification motion, so that order is affirmed and we address it no further. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

defendant is not required to respond to a no-merit report, this procedural bar nevertheless applies to issues that the defendant could have raised in response to a no-merit report. *See* ***State v. Allen***, 2010 WI 89, ¶4, 328 Wis. 2d 1, 786 N.W.2d 124.

As noted, Anderson claimed in his motion that his postconviction attorney was ineffective for not raising a claim that trial counsel was ineffective for failing to raise the ***Miranda/Goodchild*** issue regarding his confession, and ineffective assistance may sometimes constitute a sufficient reason for not previously raising a claim. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

For a court to conclude an attorney rendered ineffective assistance, the defendant must show both that counsel's performance was deficient and that the deficiency was prejudicial. *See* ***State v. Jeffrey A.W.***, 2010 WI App 29, ¶8, 323 Wis. 2d 541, 780 N.W.2d 231. An attorney's conduct is deficient when it falls below an objective standard of reasonableness. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). An attorney's deficient performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. When an ineffective assistance claim against postconviction counsel is premised on a failure to raise ineffective assistance of trial counsel, the defendant must first establish that trial counsel actually was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

As the circuit court concluded, Anderson's claim that trial counsel was ineffective for not requesting a ***Miranda/Goodchild*** hearing is conclusory. First, Anderson fails to explain how counsel's failure to request a ***Miranda/Goodchild*** hearing was deficient performance. A ***Miranda*** hearing is used to determine whether a defendant properly waived his or her

constitutional rights before giving a statement, *see* ***State v. Woods***, 117 Wis. 2d 701, 714-15, 345 N.W.2d 457 (1984), and a ***Goodchild*** hearing determines the voluntariness of such a statement, *see* ***id.***, 27 Wis. 2d at 264-65. Anderson does not claim he did not understand his ***Miranda*** rights, nor does he claim that he did not waive them; he complains only that the criminal complaint fails to specify if he understood and waived his rights. He further asserts, without elaboration, that his confession was involuntary. However, "police coercion is a necessary prerequisite to finding that a defendant's statement was involuntarily made," and Anderson alleges no such tactics. *See* ***State v. Ward***, 2009 WI 60, ¶33, 318 Wis. 2d 301, 767 N.W.2d 236. While Anderson does assert that trial counsel should have asked more questions about his confession at the preliminary hearing, he does not identify what those questions are, their significance to a ***Miranda/Goodchild*** analysis, or why they should have been asked at the preliminary hearing.[3] Anderson also does not address how he suffered prejudice from any deficient performance.

If trial counsel was not ineffective, then postconviction counsel is not ineffective for failing to raise a claim against the trial attorney. If postconviction counsel was not ineffective, then Anderson has failed to allege a sufficient reason for failing to raise his ***Miranda/Goodchild*** issue in his no-merit response. In fact, Anderson's main brief fails to discuss the circuit court's

[3] The purpose of a preliminary hearing "… is to ensure that there is a 'substantial basis for bringing the prosecution and further denying the accused his right to liberty.'" ***State v. White***, 2008 WI App 96, ¶13, 312 Wis. 2d 799, 754 N.W.2d 214 (citation omitted). It is not the forum for challenging admissibility of the evidence or the validity of a confession.

application of the procedural bar at all.[4] Accordingly, we are unpersuaded that the circuit court erred in denying the motion without a hearing.

Upon the foregoing, therefore,

IT IS ORDERED that the orders are 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

[4] Although Anderson attempts to address the procedural bar in his reply brief, we need not address arguments raised for the first time in the reply. *See* ***State v. Reese***, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396.