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**DISTRICT II**

November 22, 2023

To:

Hon. Angela W. Sutkiewicz  
Circuit Court Judge  
Electronic Notice

Lisa E.F. Kumfer  
Electronic Notice

Chris Koenig  
Clerk of Circuit Court  
Sheboygan County Courthouse  
Electronic Notice

Joshua P. Lemons, #452116  
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:

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2022AP842

State of Wisconsin v. Joshua P. Lemons (L.C. #2016CF145)

Before Gundrum, P.J., Neubauer and Grogan, 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).**

Joshua P. Lemons, pro se, appeals from an order denying his WIS. STAT. § 974.06 (2021-22)<sup>1</sup> motion. Lemons claims that his trial counsel was ineffective and that his postconviction counsel also acted ineffectively because she failed to assert that trial counsel performed ineffectively. 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 affirm.

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

In 2015, police found roommates Brian Glynn deceased and J.J. passed out from heroin overdoses. J.J. survived and told police that he and Glynn had met Benjamin Dehn to buy heroin. Glynn and Dehn went to meet Dehn's supplier, "P," to get the heroin. Police investigation revealed that Lemons's nickname was "P" and that the phone number Dehn used to contact "P" belonged to Lemons. Dehn also identified Lemons as "P" in a lineup.

In March 2016, the State charged both Lemons and Dehn with one count of first-degree reckless homicide as party to a crime for Glynn's death. Dehn entered into a plea bargain with the State and agreed to testify against Lemons. Lemons, represented by an appointed public defender, tried his case to a jury over the course of three days in January 2017. The jury found Lemons guilty, and the circuit court sentenced him to twelve years' initial confinement followed by six years' extended supervision.

The State Public Defender then appointed Attorney Patricia Fitzgerald to represent Lemons for postconviction proceedings. Fitzgerald filed a postconviction motion asserting that Lemons was entitled to 394 days' sentence credit, which the circuit court granted. In April 2018, an amended judgment of conviction reflecting the sentence credit was entered.

In December 2019, Lemons filed a pro se WIS. STAT. § 974.06 motion alleging that his postconviction counsel acted ineffectively for failing to assert that his trial counsel acted ineffectively. Lemons specifically identified three instances of purported ineffective assistance in the beginning of his motion: (1) "Failure to file a claim on trial counsel not filing a motion for suppression of evidence pursuant to *Franks v. Delaware*, 438 U.S. 154 [(1978)]"—regarding the search warrant being based on Dehn's statements; (2) "Failure to file a claim for trial counsels [sic] failure to motion the trial court to impeach the states [sic] witness on issues of credibility

with past crimes”—specifically Dehn, who testified for the State; and (3) “Failure to file a claim for trial counsel not objecting to the trial courts [sic] failure to present the jury with the party to the crime jury instruction.” Although not identified in this initial list at the start of his motion, Lemons also alleged:

- His postconviction counsel was ineffective for failing to allege trial counsel was ineffective for stipulating to the facts that he was known as “P” and that the phone number belonged to him. Lemons argued that this deprived him of his constitutional right to a jury trial because a jury should have decided these two facts;
- He is entitled to an evidentiary hearing; and
- He should get a new trial in the interests of justice.

The circuit court held a hearing on Lemons’s postconviction motion, which it denied.<sup>2</sup> The court commented that: “Attorney Fitzgerald did file a motion for sentence credit after, she noted, a lengthy review of trial counsel’s files, and the court transcripts, and this resulted in a significant amount of credit to the defendant.” The court understood Fitzgerald’s remarks to mean Fitzgerald had concluded that any claim contending that trial counsel provided ineffective assistance was “without merit.” The court also concluded that Lemons’s motion alleged only “legal conclusions, [and] he doesn’t cite specific failures or acts of Attorney Fitzgerald that might be uncovered [at] an evidentiary hearing.”

The circuit court then denied Lemons’s motion by specifically addressing the merits of the three main ineffective assistance assertions Lemons presented. It rejected his claim that the search warrant should have been challenged by explaining that the Record reflected multiple

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<sup>2</sup> Because the circuit court denied the postconviction motion, it did not hold an evidentiary hearing.

bases to support the search warrant—not just Dehn’s statements. It rejected Lemons’s claim that trial counsel failed to impeach Dehn, as the Record explicitly refuted this conclusory allegation. And, it rejected Lemons’s claim about the party-to-a-crime jury instruction—explaining that both sides agreed the instruction was not needed, and Lemons failed to allege how the failure to give it caused him prejudice. The circuit court entered an order denying Lemons’s motion in January 2022. He now appeals.

The dispositive issue in this case is whether Lemons’s WIS. STAT. § 974.06 motion is sufficient on its face to entitle him to an evidentiary hearing on his ineffective assistance of postconviction counsel claim. The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to effective assistance of counsel.<sup>3</sup> *State v. Balliette*, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. A defendant asserting an ineffective assistance claim must prove: (1) that his counsel’s performance was deficient; and (2) that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In reviewing ineffective assistance claims, we strongly presume that counsel rendered “adequate assistance within the bounds of reasonable professional judgment.” *Balliette*, 336 Wis. 2d 358, ¶25. Our supreme court has instructed courts to “be vigilant against the skewed perspective that may result from hindsight” and directed courts to “not second-guess counsel’s performance solely because the defense proved unsuccessful.” *Id.*

Moreover, a defendant claiming he received ineffective assistance of counsel is not automatically entitled to an evidentiary hearing. *Id.*, ¶18. “If the motion raises sufficient facts

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<sup>3</sup> U.S. CONST. amend. VI and U.S. CONST. amend. XIV, respectively. Article I, section 7 of the Wisconsin Constitution also provides these protections.

that, if true, show that the defendant is entitled to relief, the circuit court must hold an evidentiary hearing.” *Id.* “However, if the motion does not raise such facts, ‘or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,’ the grant or denial of the motion is a matter of discretion entrusted to the circuit court.” *Id.* (citation omitted); *see also Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972) (applying the same standard to a motion to withdraw a guilty plea). Whether a postconviction motion is sufficient to warrant a hearing “is a question of law, which we review de novo.” *Balliette*, 336 Wis. 2d 358, ¶18. If the defendant’s “motion fails to allege sufficient facts, the circuit court has the discretion to deny” it, and our review of that decision is deferential. *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996).

Here, Lemons filed a postconviction motion alleging his postconviction counsel provided ineffective assistance because she failed to raise claims that his trial counsel provided ineffective assistance. The circuit court denied Lemons’s ineffective assistance claim without an evidentiary hearing because all of his claims were “baseless.”

The circuit court found the Record conclusively showed there was no merit to Lemons’s claims. With respect to Lemons’s claim that his trial counsel should have challenged the search warrant, the circuit court found: “the search warrant relied on other evidence and witness testimony that corroborates Dehn’s said statements, and provided a sufficient basis for the warrant to be signed by the court commissioner.” The circuit court rejected Lemons’s claim that his trial counsel failed to impeach Dehn, explaining that Lemons ignored the fact that Dehn told the jury he had thirteen prior convictions and was cross-examined about “the details of the plea deal that he had with the State[.]” The circuit court also noted that the Record refuted Lemons’s claim because defense counsel “did cross-examine Dehn, and he did attack his credibility.”

Further, the court found his postconviction motion “provides [only] conclusory statements and does not argue exactly what Dehn -- what the jury should have heard about him.”

With respect to Lemons’s jury instruction complaint, the circuit court noted that although Lemons “asserts that the jury instruction on party to a crime should’ve been provided,” “this was discussed on the record, [and] both parties agreed that the instruction was not needed.” Based on this, the court concluded that Lemons “failed to show how this [not providing the jury instruction] prejudiced him, or how it would’ve changed the outcome of the trial [and that he] ha[d] failed to show how this was prejudicial, or how it was insufficient[.]”

We agree with the circuit court’s analysis.<sup>4</sup> Lemons’s assertions about the search warrant, failure to impeach Dehn, and the jury instruction are all refuted by the Record or are conclusory. Therefore, the circuit court’s decision denying Lemons’s claims without an evidentiary hearing was not erroneous. See *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433 (holding that the circuit court properly denies a postconviction motion without a hearing when “the record conclusively demonstrates that the movant is not entitled to relief” or “if one or more key factual allegations in the motion are conclusory”).

Further, Lemons abandoned many of these alleged ineffective assistance of trial counsel claims by failing to present them in his briefs to this court. See *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491-92, 588 N.W.2d 285 (Ct. App. 1998) (“an issue raised in the trial

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<sup>4</sup> In his brief, Lemons argues he does not need to clear the procedural bar on successive postconviction litigation pursuant to WIS. STAT. § 974.06(4) because his postconviction attorney filed only a sentence credit motion. We need not reach this issue, however, as the circuit court addressed and properly rejected Lemons’s trial-counsel-ineffectiveness claims on the merits. See *Hussey v. Outagamie County*, 201 Wis. 2d 14, 17 n.3, 548 N.W.2d 848 (Ct. App. 1996) (“[i]f a decision on one point disposes of the appeal, we will not consider other issues raised”).

court, but not raised on appeal, is deemed abandoned[,]” and “in order for a party to have an issue considered by this court, it must be raised and argued within its brief”).

The only ineffective assistance of counsel claims Lemons presents in his brief to this court are that the circuit court erred in denying his WIS. STAT. § 974.06 motion without a hearing, his postconviction counsel provided ineffective assistance for failing to identify instances of ineffectiveness by his trial counsel, and that his trial counsel stipulated to certain facts that he claims deprived him of a jury trial. Whether to stipulate to particular facts is a strategic decision about how to conduct the trial that is committed to counsel, not to the defendant. *See State v. Brunette*, 220 Wis. 2d 431, 443, 583 N.W.2d 174 (Ct. App. 1998). Counsel’s decision to stipulate to a fact did not deprive Lemons of a jury trial. Lemons in fact had a three-day jury trial. The Record refutes his claim, and his claim is also conclusory.

Finally, Lemons raises for the first time on appeal a claim that his trial counsel acted ineffectively during defense counsel’s opening statement at trial. Lemons forfeited the right to assert this claim by failing to present it to the circuit court. *See State v. Bollig*, 222 Wis. 2d 558, 564, 587 N.W.2d 908 (Ct. App. 1998) (“Arguments that are raised for the first time on appeal by an appellant are deemed [forfeited].”).<sup>5</sup> Lemons has failed to prove that the circuit court erred when it summarily denied his WIS. STAT. § 974.06 motion alleging that his postconviction counsel provided ineffective assistance by failing to argue that his trial counsel provided ineffective assistance. He was not entitled to an evidentiary hearing on his motion.

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<sup>5</sup> Lemons’s contention that his postconviction counsel provided ineffective assistance for failing to assert that his trial counsel acted ineffectively fails. Because we have rejected each of Lemons’s claims regarding trial counsel’s ineffectiveness, he has no basis upon which to assert his postconviction counsel provided ineffective assistance.

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to  
WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*