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**DISTRICT IV**

December 7, 2023

To:

Hon. Michael A. Haakenson  
Circuit Court Judge  
Electronic Notice

Sara Lynn Shaeffer  
Electronic Notice

Amanda Nelson  
Clerk of Circuit Court  
Rock County Courthouse  
Electronic Notice

Marvin Darrell Greer 253564  
Stanley Correctional Inst.  
100 Corrections Dr.  
Stanley, WI 54768

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

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2022AP1594

State of Wisconsin v. Marvin Darrell Greer (L.C. # 2015CF1190)

Before Kloppenburg, P.J., Blanchard, 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).**

Marvin Greer, pro se, appeals a circuit court order that denied Greer's WIS. STAT. § 974.06 (2021-22)<sup>1</sup> motion without a hearing. 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 summarily affirm.

In December 2016, Greer was convicted of two counts of delivering a controlled substance, following a jury trial. Greer, represented by counsel, pursued a direct postconviction

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

motion. Pertinent to this appeal, Greer’s direct postconviction motion included a claim that his trial counsel was ineffective for failing to file a motion challenging probable cause for his arrest. The circuit court denied the motion without an evidentiary hearing, and we affirmed on appeal. See *State v. Greer*, No. 2019AP265-CR, unpublished slip op. (Dec. 23, 2020).

Greer, represented by new counsel, filed the WIS. STAT. § 974.06 motion underlying this appeal on Greer’s behalf. The postconviction motion filed by new counsel asserts that Greer’s prior postconviction counsel was ineffective by failing to obtain a copy of the preliminary hearing transcript in the direct postconviction proceedings.<sup>2</sup> The circuit court held a hearing on the motion and issued an oral ruling explaining that the motion was insufficient to require an evidentiary hearing. The court then issued a decision denying the motion without an evidentiary hearing.

A defendant is entitled to an evidentiary hearing if the defendant’s postconviction motion alleges “sufficient material facts that, if true, would entitle the defendant to relief.” *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We independently review whether a

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<sup>2</sup> New counsel may also have attempted to raise an issue related to an officer’s testimony identifying Greer’s voice on a recording of the controlled buy. However, the postconviction motion filed by new counsel states only the following on that topic:

Mr. Greer[’s] identification during this case is in question. Reliability is the linchpin in admissibility of identification testimony (*U.S. v. Emanuele*, 51 F.3d 1123 (3rd Cir. 1995)[]). Following the officer testimony in this case, as well as a dismissed case of Mr. Greer. [Sic.] The officer at one point did not testify to identifying Mr. Greer’s voice from a recording. However, at a later time, the same officer testified that he did recognize Mr. Greer’s voice in all the recordings.

Any argument new counsel may have meant to make on this topic is wholly undeveloped and we therefore do not discuss it further.

postconviction motion is sufficient to entitle the defendant to an evidentiary hearing. *Id.* If the motion is insufficient, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may exercise its discretion in deciding whether to grant a hearing. *Id.* We review discretionary decisions under the erroneous exercise of discretion standard. *Id.*

Greer argues that the circuit court erred by denying his motion without an evidentiary hearing. He contends that the court in effect determined that Greer's motion was sufficient to warrant an evidentiary hearing by scheduling a motion hearing, and that the court was then required to allow Greer to present evidence at the hearing. Greer also contends that the court erroneously exercised its discretion by denying the postconviction motion without sufficient explanation. We are not persuaded.

Greer cites no authority for the proposition that, if a circuit court schedules a motion hearing, the court is then required to allow a defendant to present evidence at the hearing. Moreover, Greer does not cite anything in the record indicating that the court determined that Greer's motion was sufficient to warrant an evidentiary hearing. Rather, the court explained at the motion hearing that it determined that the postconviction motion was insufficient to warrant an evidentiary hearing. Moreover, as explained above, we independently review whether a postconviction motion is sufficient to require an evidentiary hearing.

Turning to the merits of the postconviction motion, we conclude that the motion is not sufficient to require the circuit court to hold an evidentiary hearing. The motion asserts that Greer's prior postconviction counsel was ineffective by failing to obtain the preliminary hearing transcript to support Greer's claim that his trial counsel was ineffective by failing to challenge

probable cause for his arrest. The motion points out that the absence of the preliminary hearing transcript allowed us to assume that the missing transcript would have supported the circuit court's decision. However, the motion fails to set forth any facts that, if true, would establish that Greer was prejudiced by his prior postconviction counsel's failure to obtain the preliminary hearing transcript. That is, the postconviction motion does not set forth the contents of the preliminary hearing transcript or why the transcript would have supported Greer's claim that his trial counsel was ineffective by failing to challenge probable cause for his arrest. Absent those facts, the motion is wholly insufficient to show prejudice. See *State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62 (claim of ineffective assistance of counsel must explain how counsel's alleged deficient performance prejudiced the defense, that is, why the outcome of the proceedings would have been different absent counsel's deficient performance). The court therefore properly exercised its discretion by denying the postconviction motion without an evidentiary hearing and sufficiently explained its decision. See *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996) (if a postconviction motion fails to allege sufficient facts, the circuit court may, in its discretion, deny the motion without a hearing).

Greer also asserts that: (1) his due process rights were violated during trial based on prosecutorial misconduct; and (2) his Fifth Amendment rights were violated when an officer testified that the officer had investigated a possible alibi defense, which Greer asserts was an impermissible comment on Greer's failure to testify at trial. Greer contends that those issues were preserved for appeal because they were raised during trial. However, those claims were not raised in the current postconviction motion, and they are therefore not properly raised in this appeal. See *State v. Romero-Georgana*, 2014 WI 83, ¶64, 360 Wis. 2d 522, 849 N.W.2d 668 (our review of an order denying a WIS. STAT. § 974.06 postconviction motion is limited to the

four corners of the motion submitted to the circuit court). Greer's argument that those claims were preserved in this appeal because they were asserted at trial is misplaced. As stated, our review in a § 974.06 appeal is limited to the claims raised in the postconviction motion. *See id.*

Therefore,

IT IS ORDERED that the order 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*