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DISTRICT II

June 12, 2024

To:

Hon. Scott C. Woldt
Circuit Court Judge
Electronic Notice

Hector Salim Al-Homsi
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Anthony G. Meyers, #520337
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Oshkosh, WI 54903-3310

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

2023AP858

State of Wisconsin v. Anthony G. Meyers (L.C. #2009CF205)

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).

Anthony G. Meyers appeals a circuit court order denying his WIS. STAT. § 974.06 (2021-22)¹ motion. The circuit court denied Meyers' motion as procedurally barred. 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.

In 2009, Meyers was charged with first-degree intentional homicide for fatally stabbing his mother's boyfriend. Meyers pled not guilty. After a two-day jury trial, Meyers was

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

convicted of first-degree reckless homicide. The circuit court sentenced Meyers to thirty years' initial confinement and ten years' extended supervision.

In 2011, Meyers filed a postconviction motion pursuant to WIS. STAT. § 809.30 and argued in part that trial counsel was ineffective for failing to request additional lesser-included offense instructions, including the instruction for second-degree reckless homicide. After an evidentiary hearing, the circuit court denied Meyers' motion. As relevant, the circuit court found Meyers "had the conversations" with counsel about seeking instructions on lesser-included offenses, and "although he didn't want to do these lesser included [offenses] he was convinced by his attorneys that it was in his best interest and that is what he chose." The court added, "when the jury verdict came in I thought your attorneys won. I considered it a victory on their part that you got what you got and didn't get first degree intentional homicide."

We affirmed the circuit court's order on the ground that Meyers failed to establish that he was prejudiced by his attorneys' failure to request the lesser-included offense. *See State v. Meyers*, No. 2011AP2230-CR, unpublished slip op., ¶17 (WI App Dec. 19, 2013). We explained that "Meyers has failed to persuade us that, in light of all the evidence regarding his fatal attack on [the victim], an instruction on second-degree reckless homicide would have changed the outcome." *Id.* Meyers petitioned for Wisconsin Supreme Court review; the petition was denied on May 22, 2014.

In 2023, Meyers filed his most recent WIS. STAT. § 974.06 motion. As he did in his direct appeal, Meyers argued trial counsel was ineffective for failing to request the second-degree reckless homicide instruction and offered reasons for why he should not be barred from raising

this claim. The circuit court denied the motion without a hearing on the ground that it was procedurally barred.² Meyers appeals.

“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). Additionally, “without a sufficient reason, a movant may not bring a claim in a [Wis. STAT.] § 974.06 motion if it ‘could have been raised in a previously filed [Wis. STAT. §] 974.02 motion and/or on direct appeal.’” *State v. Romero-Georgana*, 2014 WI 83, ¶34, 360 Wis. 2d 522, 849 N.W.2d 668 (citation omitted). Whether a claim was finally adjudicated in previous litigation is a question of law we review de novo. *State ex rel. Washington v. State*, 2012 WI App 74, ¶27, 343 Wis. 2d 434, 819 N.W.2d 305. Whether a § 974.06 postconviction motion provided a sufficient reason to excuse a defendant’s failure to adequately raise a claim on direct review is a question of law we review de novo. *Romero-Georgana*, 360 Wis. 2d 522, ¶30.

On appeal, Meyers argues his trial counsel was ineffective for failing to request the second-degree reckless homicide instruction. He asserts new case law, *State v. Johnson*, 2021 WI 61, ¶31, 397 Wis. 2d 633, 961 N.W.2d 18,³ establishes that an attorney renders ineffective assistance by failing to request a jury instruction for a lesser-included offense. Because *Johnson*

² The circuit court denied Meyers’ motion the day after it was filed without waiting for a response from the State. On appeal, Meyers argues that because the State never filed a response in the circuit court the State has conceded his arguments. We disagree. The circuit court denied the motion before the State had an opportunity to respond.

³ In *State v. Johnson*, 2021 WI 61, ¶12, 397 Wis. 2d 633, 961 N.W.2d 18, the circuit court denied the defense’s request for the second-degree reckless homicide instruction. On appeal, the court held “Based on [certain evidence from trial], we conclude that the circuit court should have instructed the jury on second-degree reckless homicide.” *Id.*, ¶31.

was decided after his direct appeal, Meyers argues he is permitted to avoid the procedural bar against successive postconviction motions.

The State responds that, even if *Johnson* could be read as broadly as Meyers suggests, the case is not relevant. The State emphasizes that in Meyers' direct appeal we rejected Meyers' ineffective assistance of counsel claim on the prejudice prong, not the deficiency prong. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (To state a claim for ineffective assistance of counsel, the defendant must demonstrate: (1) that his counsel's performance was deficient; and (2) that the deficient performance was prejudicial.). The State argues that because we previously determined Meyers was not prejudiced by counsel's failure to request the second-degree reckless homicide instruction, Meyers cannot now rely on the deficiency prong to avoid the procedural bar.

We agree. Meyers' arguments related to *Johnson* go to the deficiency prong of an ineffective assistance of counsel claim, not the prejudice prong. We previously determined Meyers' trial counsel was not ineffective for failing to request the second-degree reckless homicide instruction because Meyers had not established prejudice. *See Meyers*, No. 2011AP2230-CR, ¶17; *see also Strickland*, 466 U.S. at 697 (we need not address both prongs of the ineffective assistance of counsel test if the defendant does not making a sufficient showing on one). Meyers has not provided a sufficient reason to avoid the procedural bar. *See Romero-Georgana*, 360 Wis. 2d 522, ¶30.

Meyers next argues that he should be permitted to avoid the procedural bar because his original postconviction counsel "failed to establish prejudice on direct appeal" for his ineffective assistance of trial counsel claim. It appears Meyers is asserting that his postconviction counsel

was ineffective in counsel's handling of trial counsel's ineffective assistance claim. However, as the State points out, when a defendant claims ineffective assistance of postconviction counsel, the defendant must assert more than his counsel "fail[ed] to properly establish prejudice" to be entitled to an evidentiary hearing. See *State v. Balliette*, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. Rather, similar to establishing trial counsel was ineffective, a defendant alleging postconviction counsel was ineffective must explain how postconviction counsel's performance was deficient and how that deficient performance prejudiced the defense. *Id.*, ¶¶63, 70.

Meyers' postconviction motion did not meet this standard. He did not explain what his postconviction counsel should have done to establish prejudice on direct appeal. He also did not explain how he would show that his postconviction counsel's actions qualified as deficient performance under *Strickland*. See *Balliette*, 336 Wis. 2d 358, ¶¶64, 68, 79. Therefore, we agree with the State that Meyers' claim is barred because his motion did not set forth a sufficient reason to avoid the procedural bar. See *Romero-Georgana*, 360 Wis. 2d 522, ¶30.

We affirm the circuit court's order denying Meyers' WIS. STAT. § 974.06 motion without a hearing. We have previously considered Meyers' claim that trial counsel was ineffective for failing to request the second-degree reckless homicide instruction. *Meyers*, No. 2011AP2230-CR, ¶17. Meyers has not provided a sufficient reason to avoid the procedural bar.

Upon the foregoing,

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