

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2199

Cir. Ct. No. 2000CF4951

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIE L. WINTERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Willie L. Winters, *pro se*, appeals the circuit court order denying his WIS. STAT. § 974.06 motion for postconviction relief. The circuit court determined that the motion was barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirm.

BACKGROUND

¶2 In 2001, Winters pled guilty to one count of first-degree reckless homicide while armed. He was sentenced to thirty-two years of initial confinement and thirteen years of extended supervision.

¶3 A no-merit appeal was initially filed on Winters' behalf; however, Winters' lawyer later concluded that there was an issue that merited postconviction litigation. As such, we dismissed the appeal and gave Winters the opportunity to file a postconviction motion.

¶4 In his postconviction motion, Winters argued that his trial lawyer gave him constitutionally deficient representation by not investigating the circumstances surrounding a statement Winters made to detectives in New Jersey. According to Winters, if his lawyer had investigated, he would have moved to suppress the statement.

¶5 Following a combined *Machner* and *Miranda-Goodchild* hearing, the circuit court denied Winters' postconviction motion.¹

¶6 After various requests by Winters to proceed *pro se*, directed to both the circuit court and this court, this court ultimately allowed him to do so. Consequently, we rejected the no-merit report that was filed by his appointed counsel.

¹ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979); *Miranda v. Arizona*, 384 U.S. 436 (1966); *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

¶7 On direct appeal, Winters, *pro se*, argued that he should be allowed to withdraw his guilty plea because his lawyer gave him constitutionally deficient representation when he advised Winters to enter the plea. We summarily affirmed the judgment of conviction and the order denying Winters’ motion for postconviction relief. *See State v. Winters*, No. 2004AP1412-CR, unpublished slip op. (WI App Mar. 5, 2007). The Wisconsin Supreme Court denied Winters’ petition for review.

¶8 Six years later, relying on WIS. STAT. § 974.06, Winters filed a postconviction motion alleging that his postconviction lawyer gave him constitutionally deficient representation. Winters asserted that his postconviction lawyer should have made the following arguments in his original postconviction motion: (1) there was not a sufficient factual basis for the circuit court to have accepted Winters’ guilty plea; and (2) Winters’ trial lawyer gave him constitutionally deficient representation by “changing the wording in Winters[’s] statement to the police and the court” and by telling Winters that arguing self-defense would not be appropriate.

¶9 The circuit court denied Winters’ motion, concluding it was barred by *Escalona-Naranjo*.

ANALYSIS

¶10 WISCONSIN STAT. § 974.06 is meant to supplement a criminal defendant’s standard appellate and postconviction remedies. *See State v. Starks*, 2013 WI 69, ¶41, 349 Wis. 2d 274, 297, 833 N.W.2d 146, 158. Once a defendant has exhausted his direct remedies, § 974.06 allows him to move to vacate, set aside, or correct a sentence if he contends that the sentence was imposed contrary to the federal or state constitutions; that the sentencing court lacked jurisdiction; or

that the sentence exceeded the maximum allowed by law or is otherwise subject to collateral attack. *Ibid.*

¶11 The ability to seek relief under WIS. STAT. § 974.06 is not unlimited.

All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

§ 974.06(4). That is, “if the defendant’s grounds for relief have been finally adjudicated, waived, or not raised in a prior postconviction motion, they may not become the basis for a sec. 974.06 motion” unless there is a sufficient reason alleged for not including the grounds in the prior motion. *Escalona-Naranjo*, 185 Wis. 2d at 181, 517 N.W.2d at 162. Constitutionally deficient representation of a postconviction lawyer can constitute a sufficient reason. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996).

¶12 It is, however, up to the postconviction lawyer to decide which issues to raise, and the lawyer need not “raise every ‘colorable’ claim suggested by a client.” *Jones v. Barnes*, 463 U.S. 745, 754 (1983). “[I]t is still possible to bring a *Strickland* claim based on [a lawyer’s] failure to raise a particular claim, but it is difficult to demonstrate that [the lawyer] was incompetent” because “[g]enerally, only when ignored issues are clearly stronger than those presented,

will the presumption of effective assistance of counsel be overcome.”² *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citation omitted); *see also Starks*, 2013 WI 69, ¶60, 349 Wis. 2d at 163, 833 N.W.2d at 308 (adopting “clearly stronger” standard for claims that lawyer provided constitutionally deficient representation by failing to raise certain issues).

¶13 First, we note that during the postconviction proceedings leading to Winters’ direct appeal, he sought to proceed *pro se* in the circuit court and expressed his dissatisfaction with the postconviction motion that was filed on his behalf by his postconviction lawyer. In a written order, the circuit court explained to Winters that if he could not agree with his postconviction lawyer over the merits of his appeal or postconviction proceedings, he had the option of asking her to withdraw.

¶14 Winters’ postconviction lawyer later moved to withdraw. Upon learning that the State Public Defender’s office would not be appointing another lawyer for Winters, the circuit court issued an order apprising Winters of the risks of proceeding *pro se*. Specifically, the circuit court advised Winters: “If the defendant decides not to proceed *pro se*, [his postconviction lawyer] is responsible for making strategic decisions related to the defendant’s case and for determining which issues to raise in a postconviction motion or an appeal.” Both Winters and his postconviction lawyer subsequently filed letters advising the circuit court that Winters had decided to move forward with his postconviction lawyer representing him.

² *See Strickland v. Washington*, 466 U.S. 668 (1984).

¶15 Against this backdrop, we agree with the State’s assessment:

Having decided to continue with counsel in the wake of [the circuit court’s] advice [that his postconviction lawyer would be responsible for making strategic decisions], Winters cannot now properly assert a “sufficient reason” for failing to raise his current “grounds for relief” back then: he had the opportunity to so by proceeding *pro se*; he chose, however, to forgo that opportunity....

(Record citation omitted.) Additionally, Winters has not convinced us that the claims he raises in his WIS. STAT. § 974.06 motion are clearly stronger than the claim that his trial lawyer gave him constitutionally deficient representation by not investigating the circumstances surrounding a statement Winters made to detectives in New Jersey, which was raised in his original postconviction motion.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

