

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 5, 2018

Sheila T. Reiff
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. 2017AP116

Cir. Ct. No. 2009CF69

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER L. ROALSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sawyer County:
KENNETH L. KUTZ, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. Christopher Roalson, pro se, appeals an order denying without a hearing his motion for postconviction relief, in which he alleged

he received ineffective assistance from both his trial and appellate counsel. We conclude Roalson's motion did not contain sufficient facts to warrant an evidentiary hearing on his assertion that the ineffective assistance of trial counsel claims he now raises were clearly stronger than the challenges his appellate counsel actually pursued on direct appeal. Accordingly, we conclude Roalson has not demonstrated a sufficient reason for failing to raise those claims on direct appeal, and he is therefore procedurally barred from raising them now.

BACKGROUND

¶2 In 2012, Roalson was tried and convicted upon a jury's verdict of one count of first-degree intentional homicide and burglary with the use of a dangerous weapon. He was sentenced to life in prison without extended supervision eligibility. He pursued a direct appeal, arguing his constitutional confrontation rights were violated when the State failed to produce the DNA analyst who analyzed the evidence, as opposed to an analyst who reviewed the original analysis. See *State v. Roalson*, No. 2013AP1693-CR, unpublished slip op. ¶1 (WI App July 15, 2014). We concluded that, because the analyst who testified at trial had reached her own opinions and was not a mere conduit for the original analyst's opinions, Roalson's confrontation rights were not violated. *Id.*, ¶15. Our supreme court denied Roalson's subsequent petition for review.

¶3 Roalson filed a WIS. STAT. § 974.06¹ motion for postconviction relief in July 2016, seeking a new trial and an evidentiary hearing on his motion. He argued his trial counsel rendered constitutionally ineffective assistance in

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

several respects. As a reason for having failed to raise these issues on direct appeal, Roalson asserted that his appellate counsel “did not believe these issues were viable claims and as such refused to pursue these issues.” Roalson’s memorandum in support of his motion argued “[i]t should go without saying [that] trial counsel’s ineffectiveness makes appellate counsel ineffective for not raising such to determination.”

¶4 In response, the State asserted Roalson was not entitled to an evidentiary hearing because his motion had not presented sufficient facts to demonstrate he was entitled to relief. Specifically, the State observed that *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), required Roalson to demonstrate a sufficient reason for failing to raise the issues regarding his trial counsel’s performance on direct appeal. The State conceded that ineffective assistance of appellate counsel can be a sufficient reason for failing to raise an issue, but it argued that Roalson had failed to substantiate his specific claim in that regard. The State further argued that, like the defendant in *State v. Balliette*, 2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334, Roalson had made the mistake of focusing on his trial attorney’s conduct without also showing that his appellate attorney had ignored issues that were both “obvious and very strong” and that his appellate attorney’s failure to raise them “cannot be explained or justified.” See *id.*, ¶69. In all, the State argued Roalson had failed to allege facts showing that Roalson’s present arguments were “clearly stronger” than the arguments his appellate attorney had raised. See *State v. Romero-Georgana*, 2014 WI 83, ¶45, 360 Wis. 2d 522, 849 N.W.2d 668; *State v. Starks*, 2013 WI 69, ¶73, 349 Wis. 2d 274, 833 N.W.2d 146.

¶5 Following a response from Roalson, the circuit court entered an order denying Roalson’s WIS. STAT. § 974.06 motion without an evidentiary

hearing. The circuit court observed that the confrontation issue Roalson's appellate counsel had raised was not settled law at the time the appeal was filed and that Roalson had failed to follow the proper procedure for challenging the conduct of appellate counsel.² Nonetheless, the court concluded that neither Roalson's trial counsel nor his appellate counsel was arguably ineffective for failing to raise the matters Roalson suggested. Roalson now appeals.

DISCUSSION

¶6 If a WIS. STAT. § 974.06 motion alleges facts sufficient to entitle the movant to relief, a circuit court must hold an evidentiary hearing. *Romero-Georgana*, 360 Wis. 2d 522, ¶30. If the motion does not raise sufficient facts, or if the motion presents only conclusory allegations, it is within the circuit court's discretion to order a hearing. *Id.* Whether a motion alleges sufficient facts to require a hearing is a question of law. *Id.* Similarly, whether the defendant has adequately alleged a sufficient reason for failing to bring available claims earlier is a question of law. *Id.*

¶7 On appeal, Roalson again raises a plethora of issues regarding his trial counsel's performance. He challenges his trial attorney's conduct in failing to move for a mistrial "due to pretrial destruction of *Brady* materials," her failure to

² Because Roalson was challenging the conduct of appellate counsel, he should not have filed a WIS. STAT. § 974.06 motion but should have instead filed in this court a petition for a writ of habeas corpus, known as a *Knight* petition. See *State v. Starks*, 2013 WI 69, ¶35, 349 Wis. 2d 274, 833 N.W.2d 146 (citing *State v. Knight*, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992)). However, because such a mistaken filing affects the circuit court's competency and not its jurisdiction, we may review Roalson's claims. See *Starks*, 349 Wis. 2d 274, ¶¶30, 36-39. In the interests of judicial efficiency, and because the State requests that this court address Roalson's claims as though he had properly filed them in this court, we elect to overlook Roalson's procedural error in this instance.

object to the inclusion of a party-to-the-crime jury instruction, and her failure to object to certain of the prosecutor's closing statements. He argues it was error for the circuit court not to hold an evidentiary hearing on these issues.

¶8 In an “addendum” to his brief-in-chief, Roalson acknowledges that, under *Romero-Georgana*, he bears the burden of demonstrating that the claims he now presents are “clearly stronger” than the claims actually raised by his appellate counsel. Roalson merely presents a summary of what occurred in his prior appeal; he appears to reason that his present claims are clearly stronger merely because he lost the prior appeal. This is insufficient; he must show that appellate counsel's failure to raise the asserted issues fell below an objective standard of reasonableness. *Balliette*, 336 Wis. 2d 358, ¶67. We presume that appellate counsel acted reasonably, and it is incumbent upon the defendant to overcome that presumption by presenting facts in a who, what, where, when, why and how format. *Id.*, ¶¶28, 67. Both Roalson's appellate brief and his WIS. STAT. § 974.06 motion fail in this regard.

¶9 Because Roalson has not alleged sufficient facts to show that his present ineffective assistance of trial counsel claims are clearly stronger than the claims his appellate counsel actually raised, he has not demonstrated a sufficient reason for failing to raise those matters in his direct appeal. Consequently, he is barred from now raising those issues. Because his arguments are procedurally barred, the circuit court properly denied Roalson's motion without holding an evidentiary hearing.

¶10 Roalson argues in his reply brief that, in responding to his motion in the circuit court, the State conceded that a sufficient reason existed to avoid application of the procedural bar. To the contrary, the State's only concession was

a necessary and general one on a matter of black-letter law: that ineffective assistance of appellate counsel *can* be a sufficient reason for a defendant’s failure to raise an issue on appeal. However, the State did precisely the opposite of conceding that issue; it argued that Roalson’s motion had not sufficiently alleged ineffective assistance of appellate counsel with respect to his prior appeal. There is no reasonable construction of the State’s response that would permit a conclusion it has conceded the “sufficient reason” issue.

By the Court.—Order affirmed.

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

