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DISTRICT IV

June 10, 2021

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

2020AP920-CR

State of Wisconsin v. John L. Jacques (L.C. #2007CF734)

Before Blanchard, Kloppenburg, 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).

John Jacques appeals a circuit court order denying his motion for postconviction relief under WIS. STAT. § 974.06 (2019-20).¹ Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We affirm.

In 2008, Jacques was convicted of using a computer to facilitate a child sex crime. Jacques appealed his conviction pro se and argued: (1) that the State withheld exculpatory evidence in the form of a computer application that would have permitted the jury to view animated emoticons in online chats between Jacques and an officer posing as a child, and (2) that trial counsel was ineffective for failing to ensure that the jury would be able to view the animated emoticons. *See State v. Jacques*, No. 2010AP82-CR, unpublished slip op. ¶1 (WI App March 10, 2011). This court affirmed Jacques' conviction. *Id.*

Jacques subsequently brought his current postconviction motion under WIS. STAT. § 974.06. As noted, the circuit court denied that motion in the order that Jacques now appeals.

As far as we can determine from Jacques' current postconviction motion and appellate briefing, the issues that Jacques now raises are substantially the same issues that were already litigated in his previous appeal. We decline to address those issues on the merits. Rather, we affirm based on *State v. Witkowski*, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991). Under *Witkowski*, “[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *See id.* at 990.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

To the extent that Jacques' current postconviction motion or appellate briefing might be viewed as raising new issues that were not already litigated, we agree with the State that such new issues are procedurally barred because Jacques has not alleged a "sufficient reason" for failing to raise those issues previously. *See State v. Romero-Georgana*, 2014 WI 83, ¶35, 360 Wis.2d 522, 849 N.W.2d 668. When, as here, "the defendant did file a motion under [WIS. STAT.] § 974.02 or a direct appeal or a previous motion under [WIS. STAT.] § 974.06, the defendant is barred from making a claim that could have been raised previously unless [the defendant] shows a sufficient reason for not making the claim earlier." *Id.*; *see also State v. Escalona-Naranjo*, 185 Wis.2d 168, 181-82, 185, 517 N.W.2d 157 (1994) (discussing the "sufficient reason" requirement).

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals

FILED

04-27-2020

Clerk of Circuit Court

La Crosse County WI

2007CF000734

BY THE COURT:

DATE SIGNED: April 27, 2020

Electronically signed by Todd W. Bjerke
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH III LA CROSSE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

JOHN L. JACQUES,

Defendant.

DECISION AND ORDER

Case No. 07-CF-734

John Jacques [Jacques] has filed a motion to vacate Wisconsin Statute Section 974.06.

For the reasons set forth below, the motion is DENIED.

DECISION

Jacques was convicted in La Crosse County Court File 07-CF-734 on May 5, 2008. He filed a timely Notice of Intent to Pursue Post-Conviction Relief on May 9, 2008, and he was assigned representation through the Frank J. Remington Center of the University Wisconsin Law School Criminal Appeals Project [CAP]. Over the fall of 2008, student participants and a supervising attorney received and evaluated the trial transcripts as well as Jacques's proposed

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avenues for relief. In December 2008, according to Jacques's Motion, the students shared their findings of no merit and enumerated his options over a visit. *Jacques, Mot. P. 4-5.*

It was after this visit that the participating students "believed" that Jacques wished to terminate their representation. They communicated this to their supervising attorney, and advised Jacques that he would receive communication from the supervising attorney in the near future for the purpose of again enumerating his options. *Id.*

Unfortunately, the supervising attorney "began experiencing debilitating health problems" and with the student participants on winter recess, the filing deadline extended to January 5, 2009 was missed. *Id. See CAP, Mot. P.3.* On January 29, 2009, CAP filed a Motion to Extend the Time to File for Post-Conviction Relief or a Notice of Appeal on the grounds that Jacques wishes to continue as a pro se litigant. *CAP, Mot. P.1-3.* Jacques ultimately was granted an extension to file to April 30, 2009, and he filed his Motion on April 28, 2009.

In the intervening years, Jacques first received a Decision denying his 946.02 Motion through this court, dated December 22, 2009, and a Decision from the Wisconsin Court of Appeals, District IV, dated March 10, 2011, which affirmed this Court's Judgment. Jacques' current Motion was filed November 2, 2017 and was lost in the courthouse. *Jacques, Mot. P. 2.* He again filed the Motion to Vacate on September 12, 2019.

Wisconsin Statute Section 974.06(1) (2020) allows an imprisoned defendant to file a Motion to Vacate in the court "which imposed the sentence" when the defendant is "claiming a right to be released upon the ground that the sentence was imposed in violation of the U.S. Constitution or the laws of this state." It is under this statute which Jacques brings his claim of ineffective assistance of post-conviction counsel.

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Post-conviction relief is to be granted only if the defendant states with particularity the factual and legal grounds of the motion. *See, State v. Allen*, 2004 WI 106, 274 Wis.2d 568 N.W.2d 433. The factual basis of the motion must be material to issue being asserted. *State v. Bentley*, 201 Wis.2d 303, 314, 584 N.W.2d 50 (1996). Therefore, the applicable test, as articulated in *Allen*, requires the movant to “allege the five “w’s” and one “h”; that is, who, what, where, when, why, and how.” *Allen*, 274 Wis.2d 568, at 585.

In this case, Jacques provides the who, what, when and where factors with aplomb; however, he does not provide the applicable analysis as to the why and how factors. *State v. Balliette*, 2011 WI 79, 336 Wis.2d 358, 384-86, 805 N.W.2d 334, exemplifies how a failure to assert the “why factor” may cause a court to dismiss a 974.06 motion. *Balliette*, like Jacques,

[I]dentif[ied] ‘*several acts and omissions*’ of trial counsel that he believes constitute ineffective assistance and should have been raised by postconviction counsel. But this is, at best, *only part* of what is required in a § 974.06 motion. Balliette was required to assert why it was deficient performance for postconviction counsel not to raise these issues.

Id., at ¶63. (*Emphasis added*).

If a motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may, in the exercise of its legal discretion, deny the motion without a hearing. *State v. Bentley, id.*, at 309-310, N.W.2d at 53 (citing *Nelson v. State*, 54 Wis.2d 489, 497-498, 195 N.W.2d 629 (1972)). Jacques does not put forth facts that would entitle him to relief and he fails to analyze why he should be entitled to relief. As such, Jacques’s Motion to Vacate may be denied without a hearing.

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In support of his argument, Jacques provides three examples of allegedly deficient representation by his appellate counsel:

1. His post conviction counsel failed to adhere to the statutorily mandated No-Merit Procedure outlined in Wisconsin Statute Section 809.32.
2. His post-conviction counsel “failed to find and argue deficiencies in Jacques’ trial representation.”
3. His post-conviction counsel failed to communicate with him and missed a deadline to file for post-conviction relief.

The right to effective counsel is fundamental and is enumerated in both the 6th and 14th Amendments to the United States Constitution. As articulated by the United States Supreme Court in *Strickland v. Washington*, 166 U.S. 668, 686 (1984), a movant must prove each element of a two prong test to prove a claim of ineffective assistance of counsel. “First, that counsel’s performance was deficient; second, that the deficient performance resulted in prejudice to the defense.” *Balliette, id.*, at ¶ 21 citing *Strickland, id.*, at 687. *Strickland* further defines prejudice as “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Balliette, id.*, at ¶ 24, citing *Strickland, id.*, at 694. For Jacques’s motion to be granted, he would have needed to assert all the “w’s and h” within the four corners of the document. He does not do so.

In his Motion to Vacate, Jacques provides pages describing his post-conviction counsel’s actions. The bulk of the Motion consists of pages of describing his grievances with his trial attorney’s representation at trial, including citations to case law and statutes. However, he does not connect the facts he asserts to why each of his arguments constitute ineffective representation, and he does not explain how these alleged failures affected his success in his

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appeal. Jacques, despite asserting that his constitutional rights had been violated, does not cite provisions of the state and federal constitutions nor case law to prove deficiency in his post-conviction counsel (with one exception). *Jacques, Mt. P. 1-5.*

The referenced exception takes the form of Jacques's first argument (brought to "preserve grounds for a writ of habeus corpus to the Court of Appeals") that his appellate counsel failed to adhere to the statutorily-mandated no-merit procedure. *Jacques Mot. P 2-5.* Wisconsin Statute Section 809.32 provides guidance as to the procedures surrounding a no-merit report. In essence, a no-merit report is required in two situations: 1) when a defendant requests one, and 2) when the defendant "declines to consent to have the attorney close the file without further representation by the attorney[.]" *See, Wis. Stat. Sec. 809.32.*

Jacques does not assert that either of the Section 809.32 situations apply in his case. He admits that the law students assigned to his case reviewed their findings "and advised him of his options" during a meeting in December 2008, though the law students stated that the supervising attorney would further contact Jacques to further explain his options. *Jacques Mt. P. 5.* Jacques further states that after the meeting, the students believed that Jacques wished to discharge CAP from further representation. *Id.* Wisconsin Statute Section 809.32(b)(1)(c) does not require post-conviction counsel to provide a no-merit report when a defendant chooses "to have the attorney close the file and to proceed without an attorney or with another attorney retained at the person's expense." Jacques does not state anywhere in the memo that he made any request for such a report.

The remainder of Jacques's arguments fail along similar lines. He does not illustrate why his communication with CAP (including the missed deadline) and the failure to find and argue

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deficiencies in trial counsel's representation constitute deficiency. Further, the record itself illuminates why Jacques was not prejudiced by either of these assertions.

While CAP did admit to missing the January 3, 2009 filing deadline, the record shows that the Court of Appeals extended the filing deadline to April 30, 2009, as noted above. As Jacques discharged CAP from representation before he filed his Section 974.02 Motion, there was no opportunity for CAP and Jacques to "argue" the assertions Jacques wished to make. See *Jacques, Mt. P. 4-5*; See *CAP, Mot. P.1-3*. Further, Jacques presented his grievances against his trial counsel to this Court in a his Section 974.02 Motion (denied December 22, 2009) and to District IV of the Wisconsin Court of Appeals (judgment affirmed March 10, 2011). See *Orders*.

None of Jacques's alleged instances of ineffective counsel prevented him from presenting his case before this Court and the Court of Appeals. Jacques does not argue as to how the outcome would have been changed with different representation. See *Balliette, id.*, at ¶ 24 citing *Strickland, id.*, at 694. Therefore, Jacques is not entitled to relief.

Jacques's Motion to Vacate is insufficient to sustain his claim. He does not provide any of the necessary how and why factors to his assertions. Rather, he relies upon incomplete and conclusory factual claims and allegations. See *Allen, id.*, at 585. Moreover, even if the factual assertions were sufficient for the Court to consider, those assertions would still be insufficient since he fails to address the prejudice issue. Therefore, Jacques's Motion to Vacate is denied.

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ORDER

NOW, THEREFORE, IT IS ORDERED:

For the reasons stated above, Jacques' Motion to vacate is DENIED.

Dated at La Crosse, Wisconsin, this 27 April 2020

BY THE COURT

[ELECTRONICALLY SIGNED]
Todd W. Bjerke
Circuit Court Judge, Branch 3

cc: Tim Gruenke, District Attorney's Office
John Jacques
Oshkosh Correction Institution



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Supreme Court of Wisconsin

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November 17, 2021

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

No. 2020AP920-CR State v. John L. Jacques L.C. #2007CF734

A petition for review pursuant to Wis. Stat. § 808.10 having been filed by defendant-appellant-petitioner, John L. Jacques, pro se, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

**Additional material
from this filing is
available in the
Clerk's Office.**