

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 28, 2007

David R. Schanker
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. 2006AP2363

Cir. Ct. No. 1995CF955346

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARVIN RHODES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MEL FLANAGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Marvin Rhodes appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2005-06)¹ postconviction motion to vacate a

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

judgment of conviction or order a new trial. We conclude that Rhodes's claims are procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). We affirm.

Background

¶2 Rhodes pled guilty in 1996 to four counts of sexual exploitation of a child. See WIS. STAT. § 948.05(1)(b) (1995-96). Rhodes's appellate counsel filed a notice of appeal, followed by a no-merit report. Rhodes filed a response challenging, among other issues, his trial attorney's effectiveness; we required appellate counsel to reply. See *State v. Rhodes*, No. 97-0066-CR-NM, unpublished slip op. at 2 nn.2-3 (Wis. Ct. App. July 24, 1997) (*Rhodes I*). Following review of the submissions and the record, this court summarily affirmed the convictions. See *id.* at 3. The supreme court denied Rhodes's petition for review. See *State v. Rhodes*, No. 97-0066-CR-NM (Wis. Nov. 20, 1997).

¶3 Rhodes then filed a *pro se* postconviction motion. See WIS. STAT. § 974.06 (1997-98). He claimed that his trial attorney was ineffective in at least seven particulars, including by his failure "to move to suppress evidence and post-arrest statements." The trial court summarily denied the motion. We affirmed on the grounds that Rhodes's claims had been finally adjudicated in *Rhodes I*. See *State v. Rhodes*, No. 98-1896, unpublished slip op. (WI App Jan. 13, 2000) (*Rhodes II*).

¶4 Between November 2000 and September 2004, Rhodes brought three further postconviction motions. The record reflects that Milwaukee County circuit courts denied these motions; Rhodes did not appeal.

¶5 Rhodes brought his fifth postconviction motion in September 2006. He claimed that trial counsel was ineffective in failing to file a motion to suppress his statements and that his appellate counsel was ineffective in failing to raise the issue. The circuit court concluded that his claims were barred by the holding of *Escalona-Naranjo*. This appeal followed.

Discussion

¶6 A defendant is barred from pursuing claims in a subsequent appeal that could have been raised in an earlier postconviction motion or direct appeal unless the defendant provides a “sufficient reason” for not raising them previously. *Escalona-Naranjo*, 185 Wis. 2d at 181-82. The bar applies with equal force where the direct appeal was conducted pursuant to the no-merit procedure of WIS. STAT. RULE 809.32. See *State v. Tillman*, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574.

¶7 The ineffective assistance of defendant’s postconviction lawyer in failing to raise a meritorious issue can be a sufficient reason for permitting an additional motion pursuant to WIS. STAT. § 974.06. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Rhodes relies on *Rothering* here, but its holding does not permit a limitless number of postconviction motions. “Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of [§ 974.06(4)].” *Escalona-Naranjo*, 185 Wis. 2d at 185.

¶8 Moreover, issues previously concluded in a prior appeal may not be renewed in subsequent postconviction litigation. *Peterson v. State*, 54 Wis. 2d 370, 381, 195 N.W.2d 837, 845 (1972). *Rhodes I* resolved the issue of trial

counsel's effectiveness. Rhodes sought to revisit the issue in *Rhodes II* and he tries again in his current litigation. He may not do so.

By the Court.—Order affirmed.

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

