

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 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. 2007AP416

STATE OF WISCONSIN

Cir. Ct. No. 1992CF922607

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TREBLE H. HENDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
CHARLES F. KAHN, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. Treble H. Henderson appeals from an order denying his motion for postconviction relief. He claims that he received

ineffective assistance of trial counsel and that the circuit court accepted his plea without conforming to the mandates of WIS. STAT. § 971.08 (2005-06).¹ The circuit court concluded that Henderson's claims are procedurally barred and we affirm.

Background

¶2 Henderson entered *Alford*² pleas in 1993 to one count of aggravated battery and three counts of second-degree sexual assault. See WIS. STAT. §§ 940.19(3), 940.225(2)(a) (1991-92). He filed a timely notice of intent to pursue postconviction relief following his sentencing in June 1994, but he did not pursue a direct appeal.

¶3 In 2000, Henderson filed a motion for postconviction discovery, which the circuit court denied. On appeal, we affirmed the circuit court's exercise of discretion in concluding that the records sought were not material. *State v. Henderson*, No. 00-2506, unpublished slip op. at 4 (WI App Oct. 17, 2001).

¶4 In 2001, Henderson filed a postconviction motion seeking plea withdrawal pursuant to WIS. STAT. § 974.06 (2001-02). He alleged that the criminal complaint lacked a factual basis and that trial counsel was ineffective in failing to present evidence of his incompetency to proceed. The circuit court denied the motion. It found the allegations against counsel conclusory and the challenge to the complaint unsupported by the record. This court dismissed

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

² An *Alford* plea is one in which the defendant agrees to accept conviction while simultaneously maintaining his or her innocence. *North Carolina v. Alford*, 400 U.S. 25 (1970).

Henderson's appeal when he failed to pay the filing fee or petition for a fee waiver. *State v. Henderson*, No. 01-3078, unpublished order (WI App Jan. 25, 2002).

¶5 In 2002, Henderson filed a second postconviction motion seeking plea withdrawal pursuant to WIS. STAT. § 974.06 (2001-02). He alleged that the charges against him were multiplicitous and that trial counsel was ineffective in failing to advise him of his appellate rights. Henderson offered no reason for failing to raise these claims in his first postconviction motion; the circuit court therefore concluded that the claims were procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirmed. *See State v. Henderson*, No. 02-3151, unpublished slip op. (WI App Nov. 4, 2003).

¶6 Henderson initiated the instant litigation in January 2007, by filing a third postconviction motion. He contended that the circuit court should vacate his sentences because his pleas were defective and because trial counsel was ineffective in failing to make a complete record during the plea proceedings. The court denied the motion, again concluding that the claims were barred by *Escalona-Naranjo*. This appeal followed.

Discussion

¶7 Preliminarily, we consider the statutory authority for Henderson's current litigation. In the circuit court, he described his motion as one brought pursuant to WIS. STAT. § 971.08.

¶8 WISCONSIN STAT. § 971.08(1)(c) requires the court to warn the defendant that, for those who are not citizens, a plea of guilty has possible

consequences under federal law relating to deportation, exclusion from admission to this country, and denial of naturalization. Further, § 971.08(2) provides:

(2) If a court fails to advise a defendant as required by sub. (1)(c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea.

¶9 Henderson did not allege that his plea was likely to result in any of the consequences listed in WIS. STAT. § 971.08(2). We construe his *pro se* motion as brought pursuant to WIS. STAT. § 974.06.

¶10 Pursuant to WIS. STAT. § 974.06, a defendant may raise constitutional or jurisdictional issues after the time for filing an appeal has expired or direct appeal rights are exhausted. *State v. Evans*, 2004 WI 84, ¶¶32-33, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900. Henderson, however, may not proceed under § 974.06.

¶11 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. Henderson offers no reason, sufficient or otherwise, for failing to raise his claims in earlier proceedings. The claims are therefore barred.

¶12 "We need finality in our litigation Successive motions and appeals, which all could have been brought at the same time, run counter to the

design and purpose of [WIS. STAT. § 974.06].” *Escalona-Naranjo*, 185 Wis. 2d at 185.

By the Court.—Order affirmed.

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

