

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2008

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 Nos. 2008AP724-CR
2008AP725-CR**

**Cir. Ct. Nos. 1999CF4466
1999CF6213**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TITUS GRAHAM,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
MARTIN J. DONALD, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Titus Graham, *pro se*, appeals from orders denying his motion for sentence modification. Because Graham's claims are

barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), we affirm.

¶2 In 1999, Graham was charged with three counts of being a party to the crime of armed robbery and one count of armed robbery. Graham entered *Alford*¹ pleas and was convicted. The trial court sentenced Graham to concurrent thirty-year terms of imprisonment on each of the four counts.

¶3 Graham filed a postconviction motion to withdraw his pleas, arguing that his trial counsel was ineffective. Graham also argued that the sentence was excessive. The trial court denied the postconviction motion. Graham appealed. On appeal, Graham challenged only the sentence imposed by the trial court. This court upheld the trial court's denial of postconviction relief.² *State v. Graham*, Nos. 2003AP1915-CR and 2003AP1916-CR, unpublished slip op. (WI App May 27, 2004). The supreme court denied Graham's petition for review.

¶4 In 2005, Graham filed a WIS. STAT. § 974.06 (2005-06)³ motion for postconviction relief. Graham again sought to withdraw his pleas, raising arguments related to the effectiveness of trial, postconviction, and appellate counsel; newly discovered evidence; and the State's failure to disclose exculpatory evidence. The trial court denied Graham's motion without a hearing. Graham

¹ See *North Carolina v. Alford*, 400 U.S. 25 (1970).

² This court reversed those parts of the judgments of conviction relating to sentence credit, and ordered that Graham receive 170 days of sentence credit on both judgments. *State v. Graham*, Nos. 2003AP1915-CR and 2003AP1916-CR, unpublished slip op. ¶5 (WI App May 27, 2004).

³ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

appealed. This court affirmed. *State v. Graham*, Nos. 2005AP1094 and 2005AP1095, unpublished slip op. (WI App Mar. 28, 2006). The supreme court denied Graham's petition for review.

¶5 On February 8, 2008, Graham filed a "Motion for Resentencing under the Inherent Power of the Court." In that motion, Graham argued that the sentencing court relied on inaccurate information at sentencing and that the reliance constituted a "new factor" that frustrated the purpose of the sentence. In a February 15, 2008 order, the trial court denied Graham's motion, reasoning that the sentencing court's comments about Graham's mandatory release date were not inaccurate and, therefore, not a "new factor" for purposes of sentence modification. In a motion for reconsideration, Graham disavowed a "new factor" analysis, and urged the trial court to reconsider the motion as seeking "resentencing due to reliance on inaccurate information." The trial court denied reconsideration. The trial court did not rely on *Escalona-Naranjo* in its orders.

¶6 On appeal, Graham continues with the approach adopted in his motion for reconsideration, and he does not raise any "new factor" argument. Rather, he contends that the sentencing court's comments about his mandatory release date constituted inaccurate information that was actually relied on by the judge in imposing sentence. See *State v. Tiepelman*, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1 (A defendant who moves for resentencing on the ground that the trial court relied on inaccurate information must establish that inaccurate information was before the court and the court actually relied on the inaccurate information.). Because we conclude that Graham's claim is barred by *Escalona-Naranjo*, we do not address the merits of his argument. We affirm the trial court's denial of Graham's motion for resentencing. See *State v. Holt*, 128

Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (This court may affirm a trial court order using a rationale not used by the trial court.).

¶7 A defendant cannot raise an argument in a subsequent postconviction motion that was not raised in a prior postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. *Escalona-Naranjo*, 185 Wis. 2d at 181-82. A defendant must “raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion.” *Id.* at 185; *see also* WIS. STAT. § 974.06(4) (“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,” absent sufficient reason.).

[A] criminal defendant [is] required to consolidate all postconviction claims into his or her original, supplemental, or amended motion. If a criminal defendant fails to raise a constitutional issue that could have been raised on direct appeal or in a prior § 974.06 motion, the constitutional issue may not become the basis for a subsequent § 974.06 motion unless the court ascertains that a sufficient reason exists for the failure either to allege or to adequately raise the issue in the appeal or previous § 974.06 motion.

State v. Lo, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756 (citations omitted).

¶8 “[D]ue process for a convicted defendant permits him or her a single appeal of [a] conviction and a single opportunity to raise claims of error.” *State ex rel. Macemon v. Christie*, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). Graham has already had more than that single opportunity—in both his direct appeal and in his first WIS. STAT. § 974.06 motion. Therefore, he is procedurally barred from attempting to raise an additional claim in this latest motion.

¶9 Graham offers no sufficient reason, and we can discern none from the records, why the issue he raises in this latest motion was not raised previously, either in his direct appeal or in his first WIS. STAT. § 974.06 motion. The information that he now claims was inaccurate is derived from statements made by the trial court when imposing sentence. There is no reason why Graham could not have raised the issue in his prior postconviction litigation. As the supreme court has stated, “[w]e need finality in our litigation.” *Escalona-Naranjo*, 185 Wis. 2d at 185.

By the Court.—Orders affirmed.

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

