

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 14, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0293

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY E. ANDRASHKO,

Defendant-Appellant.

APPEAL from an order of the circuit court for Winnebago County:
WILLIAM H. CARVER, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Gary E. Andrashko has appealed pro se from a trial court order denying his motion for postconviction relief pursuant to § 974.06, STATS. Andrashko argues that the trial court committed reversible error by denying his motion without holding an evidentiary hearing and by denying his discovery request. We affirm the trial court's order.

The judgment of conviction from which Andrashko seeks relief was entered pursuant to his no contest pleas on November 13, 1987. After his

conviction, Andrashko was represented by counsel in postconviction proceedings conducted pursuant to § 974.02, STATS., and sought to withdraw his pleas based on an alleged breach of the plea agreement by the prosecutor. This court affirmed a trial court order denying that motion in *State v. Andrashko*, Nos. 89-2230, 89-2231, and 89-2232, unpublished slip op. at 2 (Wis. Ct. App. Sept. 26, 1990) (per curiam).

On July 21, 1992 and March 15, 1993, Andrashko filed pro se motions for postconviction relief pursuant to § 974.06, STATS. Counsel was appointed for Andrashko, and a hearing was held on June 9, 1993. At the hearing, evidence was presented on some, but not all, of the issues raised by Andrashko in his pro se motions. The trial court denied postconviction relief and this court affirmed that order in *State v. Andrashko*, No. 93-2657, unpublished slip op. at 3 (Wis. Ct. App. July 13, 1994) (per curiam).

On July 24, 1994, Andrashko filed another postconviction motion pursuant to § 974.06, STATS. After hearing argument telephonically from Andrashko, the trial court denied the motion without conducting an evidentiary hearing. It also denied Andrashko's motion for discovery. Andrashko's current appeal is taken from these rulings.

This appeal is governed by *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), and § 974.06(4), STATS.¹ Pursuant to *Escalona-Naranjo*, an issue which could have been raised in a postconviction motion under § 974.02, STATS., and on direct appeal may not be raised in a motion under § 974.06 unless the trial court ascertains that a sufficient reason exists for the defendant's failure to allege or adequately raise the issue in his or her original motion. *Escalona-Naranjo*, 185 Wis.2d at 181-82, 517 N.W.2d at 162. Here, as in *Escalona-Naranjo*, the issues raised in Andrashko's current § 974.06 motion were not raised by him in his original postconviction motion under § 974.02 or on direct appeal. Since Andrashko's current § 974.06 motion did not

¹ We recognize that the issue of whether Andrashko's motion should be denied based on *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), and § 974.06(4), STATS., was not raised in the trial court or relied on by the trial court in denying Andrashko's motion. However, it is well-established that this court may sustain a trial court's ruling on grounds which were not presented in the trial court. *State v. Holt*, 128 Wis.2d 110, 125, 382 N.W.2d 679, 687 (Ct. App. 1985).

set forth reasons for failing to raise his present claims regarding ineffective assistance of trial counsel and mental competency in the original postconviction proceedings, relief was properly denied by the trial court.²

Andrashko's motion was also properly denied because it constituted a successive postconviction motion under § 974.06, STATS. Section 974.06(4) prohibits successive postconviction motions "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion." *State ex rel. Dismuke v. Kolb*, 149 Wis.2d 270, 273, 441 N.W.2d 253, 254 (Ct. App. 1989).

Andrashko's most recent § 974.06, STATS., motion did not set forth sufficient reasons for his failure to litigate his present claims regarding ineffective assistance of trial counsel and mental competency in the earlier § 974.06 proceedings, and thus clearly did not permit the trial court to find that sufficient reason existed to consider the new motion. The only attempted justification provided for filing another § 974.06 motion was Andrashko's statement that he raised the issues of ineffective assistance of trial counsel and mental incompetency in the pro se motion filed by him on July 21, 1992, but the trial court never ruled on those claims. He also contended that the matter was referred to the office of the state public defender to consider appointment of counsel when he filed his July 21, 1992 motion, but the state public defender never appointed counsel who pursued the issues raised in the motion.

The defect in Andrashko's argument is that he filed another postconviction motion under § 974.06, STATS., on March 15, 1993, obtained counsel and was provided with an evidentiary hearing on June 9, 1993. While Andrashko apparently objects to his counsel's failure at that hearing to raise ineffective assistance of trial counsel and the precise mental incompetency

² Andrashko contends that *Escalona-Naranjo* should not be applied to him because it was not in existence when he filed his original postconviction motion under § 974.02, STATS., or his first § 974.06, STATS., motions. However, while *Escalona-Naranjo* was issued only shortly before Andrashko's current § 974.06 motion was filed, the prohibition on successive postconviction motions contained in § 974.06(4) was in effect since the time of Andrashko's conviction. The *Escalona-Naranjo* court applied this existing prohibition to hold that a defendant could not raise issues which he had not raised in his original postconviction motion and direct appeal. *Escalona-Naranjo*, 185 Wis.2d at 181-82, 517 N.W.2d at 162. We merely do the same thing here.

issues he now seeks to raise, we know of no authority for holding that Andrashko is not bound by the motion as presented by his counsel. Consequently, no adequate justification has been shown for failing to pursue the issue of ineffective assistance of trial counsel in the earlier § 974.06 proceedings. Moreover, some issues related to mental incompetency were addressed at that hearing, and Andrashko has shown no justification for being permitted to raise additional issues related to that subject now.³

Andrashko's final argument is that the trial court improperly denied his discovery request. Since Andrashko failed to establish that adequate reasons existed to permit him to file a new § 974.06, STATS., motion, the question of whether he should have been permitted discovery related to the merits of that motion is moot. In any event, discovery was properly denied.

Subject to constitutional considerations or rights conferred by statute, a criminal defendant has no right to discovery. See *State ex rel. Young v. Shaw*, 165 Wis.2d 276, 289-90, 477 N.W.2d 340, 345-46 (Ct. App. 1991). However, a defendant may have a due process claim if the prosecutor suppresses evidence material to guilt or punishment. See *State v. Ruiz*, 118 Wis.2d 177, 188-89, 347 N.W.2d 352, 357-58 (1984).

³ In his reply brief, Andrashko contends that he only recently obtained evidence to support his claims regarding ineffective assistance of trial counsel and mental incompetency, and thus has a sufficient reason for failing to raise them earlier. However, Andrashko was required to present his reasons for the delay in his § 974.06, STATS., motion, thus providing the trial court with an opportunity to address them. He failed to do so, and we will not consider explanations offered for the first time on appeal, particularly when they involve factual elements not brought to the attention of the trial court. See *Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980).

Andrashko also contends that the two attorneys who represented him in the previous postconviction and appellate proceedings provided him with ineffective assistance of appellate counsel when they refused to investigate or raise these issues, thus justifying his attempts to raise the issues now. However, an issue of ineffective assistance of appellate counsel is not an issue which can be raised within the context of this appeal. See *State v. Speese*, 191 Wis.2d 205, 227, 528 N.W.2d 63, 72 (Ct. App.), *petition for review granted*, ___ Wis.2d ___, 531 N.W.2d 325 (1995).

The discovery motion filed by Andrashko provided no basis for concluding that the evidence requested by him was exculpatory or critical to the claims he was attempting to raise in his § 974.06, STATS., motion. While he requested a copy of all information available concerning his mental history, he made no showing that any such information was in the possession of the prosecution, other than the presentence report which previously had been provided to him. Since he made no showing that any other items requested by him were relevant and necessary to his claims, no basis exists for concluding that he was entitled to discovery.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.