**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 30, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal Nos. 2007AP1355**
**2007AP1998**

**Cir. Ct. No. 2002CF54**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANTHONY ALVEGAS HAMILTON,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Anthony Alvegas Hamilton appeals from the order denying his motion for postconviction relief and the order denying his motion for

reconsideration.[1] He argues that he received ineffective assistance of postconviction counsel for failing to allege ineffective assistance of trial counsel, and that the circuit court committed plain error when it communicated with the jury outside of his presence. We conclude that Hamilton did not receive ineffective assistance of trial counsel and that his plain error argument is barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Consequently, we affirm the orders of the circuit court.

¶2 Hamilton was convicted of one count of robbery by use of force, and one count of armed robbery by threat of the use of a dangerous weapon. The court sentenced him to twenty years of initial confinement and twenty years of extended supervision. He appealed, we affirmed, and the supreme court denied his petition for review. Hamilton then, acting pro se, filed a motion for postconviction relief under WIS. STAT. § 974.06 (2005-06).[2] Hamilton, who was in prison, did not appear by telephone for the hearing scheduled on the motion. The circuit court denied the motion by an order dated January 30, 2007. In the order, the court noted that Hamilton had not appeared, and stated that it decided the motion on the submissions, concluding that his arguments did not have any basis in law.

¶3 Hamilton then moved for reconsideration of the January 30 order. He also filed a separate motion under WIS. STAT. § 974.06 arguing that the circuit court had committed plain error when it communicated with the jury outside of his

[1] Appeal No. 2007AP1998 is from the order dated June 15, 2007, which denied his motion for waiver of the cost of preparing transcripts. The State, however, had the transcripts prepared and filed at its own expense. Consequently, that appeal is moot and is dismissed.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

presence. The trial court held a hearing on these motions on April 9, 2007. The circuit court stated at the hearing that it had received a letter from the department of corrections stating that it was their fault that Hamilton had not appeared at the January 30, 2007 hearing. The court then said: "[M]y decision was to give Mr. Hamilton an opportunity to be heard on his original motions putting substance in front of the form. So we're essentially back to the original motions in the matter, which were filed in November of 2006 and I am ready to go on those motions." After hearing argument, the court denied the motions for the reasons stated in its January 30 order.

¶4 The State first argues that the court does not have jurisdiction of this appeal because Hamilton did not timely file his notice of appeal. Hamilton appeals from both the January 30 order and the April 9 order. Hamilton filed his first notice of appeal on June 13, 2007.[3] The State argues that the notice of appeal was not timely as to the first order. Further, the State argues that since Hamilton's motion for reconsideration did not raise any new issues, this court should not consider the April 9 order either. *See* ***VerHagen v. Gibbons***, 55 Wis. 2d 21, 24, 197 Wis. 2d 752 (1972).

¶5 We disagree. The record shows that the hearing on April 9 was more than just a motion for reconsideration. Because Hamilton had been prevented from appearing at the first hearing, the court allowed him to argue the substance of his initial motion at the second hearing. The court was not reconsidering but allowing Hamilton his first opportunity to present his arguments.

[3] Hamilton filed an amended notice of appeal on August 1, 2007.

We conclude that we have jurisdiction, and will address the issues presented by the appeal.[4]

¶6 Hamilton argues that he received ineffective assistance of postconviction counsel because his counsel did not argue that Hamilton received ineffective assistance of trial counsel for two reasons: (1) trial counsel did not ask for a jury instruction on the lesser included offense of theft and (2) trial counsel failed to impeach the victim, a security guard, with a statement he made to the police. Hamilton argues that the statement would have shown that Hamilton did not use force against the security guard during the incidents.

¶7 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the circuit court's factual findings unless they are clearly erroneous. ***Id.*** However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 128.

¶8 Hamilton argues that his trial counsel was ineffective when he did not ask for an instruction on the lesser included offense of theft. Hamilton argues

[4] In light of the circuit court's clear statement of intent at the April 9 hearing, we find the State's argument that Hamilton did not argue anything "new" at that hearing to be somewhat disingenuous. First, the circuit court decided to allow Hamilton to reargue his motion, and second, Hamilton argued the "old" issues because this is what the circuit court told him to do.

that the evidence was indisputable that he had committed theft, but the issue of whether he had threatened force was in dispute. We conclude that this claim is merely a repackaging of an issue Hamilton raised in his direct appeal.

¶9 "A motion under [WIS. STAT. § 974.06], is not a substitute for a direct appeal. A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (citations omitted). An appellant may not use a motion for postconviction relief to relitigate an issue that was litigated in a direct appeal, nor may an issue be re-litigated every time a new legal theory is advanced. ***Id.***

¶10 In his direct appeal, Hamilton argued that there was insufficient evidence to support either conviction. Specifically, he argued that there was insufficient evidence from which the jury could conclude that the victim believed that Hamilton had a gun. We concluded, however, that there was sufficient evidence from which the jury could find that the victim believed Hamilton had a gun. Hamilton's argument in this appeal that his trial counsel erred by not asking for the lesser included offense instruction is merely a rephrasing of his argument that there was insufficient evidence to support the conviction, and we reject it.

¶11 We also reject Hamilton's argument that his trial counsel was ineffective because he did not impeach the victim with a statement the victim gave to the police. Hamilton argues that trial counsel's failure to use the statement at trial "clearly fell below an objective standard of reasonableness." The record shows, however that trial counsel did raise the issue of the inconsistent statements in his cross-examination of the police officer who took the statement from the victim. Because counsel presented the statements to the jury, we cannot conclude

that postconviction counsel was ineffective for failing to argue that Hamilton received ineffective assistance on this basis.[5]

¶12 Hamilton next argues that the circuit court erred when it communicated with the jury when Hamilton and his counsel were not present. The State argues that this issue is barred by ***Escalona-Naranjo***. Under ***Escalona***, claims of error that could have been raised in the direct appeal or in a previous motion under WIS. STAT. § 974.06, cannot be raised in a subsequent § 974.06 motion unless the appellant offers a sufficient reason for failing to do so earlier. ***State v. Lo***, 2003 WI 107, ¶15, 264 Wis. 2d 1, 665 N.W.2d 756.

¶13 The State argues that this claim is barred because it was raised in Hamilton's "third" motion for postconviction relief. The State refers to the motion in which Hamilton raised this issue as his third motion for postconviction relief because it was filed after the initial motion and the motion for reconsideration. The record shows, however, that Hamilton filed the motion before the circuit court held the April 9 hearing. The circuit court considered the motion at that hearing. We conclude that by considering the motion, the circuit court, in essence, allowed Hamilton to supplement his initial motion. We cannot conclude that it was barred under ***Escalona*** because it was not raised in the initial postconviction motion. We

[5] The State argues that Hamilton has not established ineffective assistance of either postconviction or appellate counsel. In his brief to this court, Hamilton only alleges that he received ineffective assistance of postconviction counsel. This issue was properly raised in the circuit court. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996) (per curiam). A claim of ineffective assistance of appellate counsel must be brought to this court by means of a petition for a writ of habeas corpus under ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992). While we are addressing only whether postconviction counsel was ineffective, we note that appellate counsel would not be considered ineffective for failing to raise on direct appeal an issue that we have already determined lacked merit. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360,523 N.W.2d 113 (Ct. App. 1994).

conclude, however, that the issue is barred by ***Escalona*** because Hamilton has not offered any reason why this issue was not raised in his direct appeal. For the reasons stated. Therefore, we affirm the orders of the circuit court.

*By the Court.*—Orders affirmed.

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