

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 14, 2009

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. 2008AP1083

Cir. Ct. No. 1998CF1342

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY WOODROW MYARTT,

DEFENDANT-APPELLANT.

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

Before Dykman, Bridge and Gaylord,¹ JJ.

¹ Circuit Court Judge Shelley J. Gaylord is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 PER CURIAM. Larry Myartt appeals from an order denying his latest motion for postconviction relief from a 2000 conviction for robbery. Myartt's current motion claims that the trial court violated his right to a unanimous jury by individually questioning a juror who dissented during a poll of the jury before sending the jury back for further deliberations. We affirm on the grounds that Myartt is procedurally barred from raising the unanimity issue at this stage.

BACKGROUND

¶2 Myartt filed a direct appeal from his conviction in which he argued, *inter alia*, that he was entitled to a mistrial once a juror indicated dissent during polling, and that the trial court's questioning of the dissenting juror violated Myartt's right to an impartial jury. We rejected those arguments and affirmed in a decision issued October 2, 2001.

¶3 On June 7, 2005, the Wisconsin Supreme Court issued a decision holding that a court may not question a dissenting juror beyond clarifying an ambiguous response during polling. *State v. Raye*, 2005 WI 68, ¶¶35, 49, 281 Wis. 2d 339, 697 N.W.2d 407. Once a juror's dissent has been expressed unambiguously, the court is limited to granting a mistrial or directing the jury to deliberate further. *Id.*, ¶¶32, 49.

¶4 On April 12, 2006, Myartt filed a pro se motion for postconviction relief in which he argued that the trial court's questioning of the dissenting juror in this case violated his right to an impartial jury under *Raye*. The trial court denied the motion, reasoning that it was procedurally barred because Myartt had previously raised issues relating to the dissenting juror and had not shown that counsel had provided ineffective assistance in the prior proceedings. This court

affirmed the denial of Myartt's postconviction motion, and the Wisconsin Supreme Court denied review on March 20, 2007.

¶5 On April 4, 2008, this time represented by counsel, Myartt filed what he labeled as a “renewed [WIS. STAT.] § 974.06 [(2007-08)]² motion,” again asserting that the trial court's polling of a dissenting juror had violated Myartt's right to a unanimous jury under *Raye*. Myartt asserted that the issuance of the *Raye* decision after the completion of his direct appeal provided a sufficient reason why he had not raised the unanimity issue on that appeal. Myartt further argued that his pro se status when he filed his first § 974.06 motion provided a sufficient reason why he inadequately argued the unanimity issue in that motion by failing to assert that the unavailability of the *Raye* decision during his direct appeal provided a sufficient reason for his prior failure to raise the unanimity issue. The trial court again determined that Myartt was procedurally barred from raising the unanimity issue, and Myartt again appeals.

STANDARD OF REVIEW

¶6 We will independently review whether claims are procedurally barred. See *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

DISCUSSION

¶7 WISCONSIN STAT. § 974.06(1) permits a defendant to challenge a sentence “upon the ground that the sentence was imposed in violation of the U.S.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack” after the time for seeking a direct appeal or other postconviction remedy has expired. Section 974.06(4) limits the use of this postconviction procedure, however, in the following manner:

All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. 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, 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.

The purpose of subsection (4) is “to require criminal defendants to consolidate all their postconviction claims into one motion or appeal.” *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994). Successive motions and appeals, including those raising constitutional claims, are procedurally barred unless the defendant can show a “sufficient reason” why the newly alleged errors were not previously or adequately raised. *Id.* at 185. The unforeseen effect of subsequent law may in some circumstances provide such a sufficient reason. *See id.* at 182 n.11 (discussing *State v. Klimas*, 94 Wis. 2d 288, 288 N.W.2d 157 (Ct. App. 1979)).

¶8 Here, we will assume for the sake of argument that that the timing of the *Raye* decision provided a sufficient reason why Myartt failed to raise the

unanimity issue on his direct appeal.³ We do not accept, however, that Myartt's pro se status provided a sufficient reason for inadequately raising the unanimity issue in his first WIS. STAT. § 974.06 motion.

¶9 The vast majority of WIS. STAT. § 974.06 motions are filed by pro se defendants. Therefore, treating a defendant's pro se status as a sufficient reason for failing to adequately develop an argument on a § 974.06 motion would allow the exception to swallow the general rule that successive motions are procedurally barred. The liberal construction which courts afford pro se filings should provide adequate protection in most instances against the dismissal of plainly meritorious § 974.06 motions which are merely poorly articulated or developed.

¶10 To the extent that Myartt argues that the trial court should have more liberally construed his first WIS. STAT. § 974.06 motion to include an assertion that the decision Myartt was relying upon for his requested relief was not previously available, his remedy was limited to his appeal from the order denying that motion. A litigant cannot seek further relief from an adverse appellate decision just by filing a "renewed" motion in the trial court. In sum, regardless whether Myartt could or should have raised the unanimity issue in his direct appeal, he was procedurally barred from raising the issue in his second § 974.06 motion after it was actually litigated in his first § 974.06 motion. *See Escalona-Naranjo*, 185 Wis. 2d at 178; *see also State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (a party may not relitigate matters previously decided, no matter how artfully rephrased.).

³ Thus, we do not address the retroactive effect of *Raye* or whether a unanimity argument merely presents a variation of the mistrial argument Myartt already raised on his first appeal.

By the Court.—Order affirmed.

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

