

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 17, 2010

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. 2009AP1093

Cir. Ct. No. 1997CF973351A

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JULIUS M. COVINGTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DANIEL L. KONKOL, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Julius M. Covington, *pro se*, appeals from an order that denied his postconviction motion filed pursuant to WIS. STAT.

§ 806.07(1)(d) (2007-08).¹ The circuit court determined that § 806.07 is inapplicable to a criminal defendant's postconviction challenges and that Covington's claim is procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree and affirm.

BACKGROUND

¶2 A jury convicted Covington in 1998 of six felony offenses. Covington appealed his convictions with the assistance of appointed counsel. He claimed that the circuit court "violated his Sixth Amendment right to counsel when it allowed [his] second attorney to withdraw, and that [his] appointed stand-by counsel did not provide him the constitutionally required assistance." *State v. Covington*, No. 1999AP0536-CR, unpublished slip op. at 2 (WI App Apr. 27, 2000) (*Covington I*). This court affirmed Covington's convictions. *Id.* The supreme court denied Covington's petition for review.

¶3 Covington next filed a petition for a writ of *habeas corpus* claiming that he received ineffective assistance from his appellate counsel. *See State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992) (to bring claim of ineffective assistance of appellate counsel, defendant must petition the appellate court that heard the appeal for a writ of *habeas corpus*). He asserted that his appellate counsel's ineffective performance led this court "to reject his argument that the circuit court violated his right to counsel by improperly allowing his appointed attorney to withdraw." *See State ex rel. Covington v. Kingston*, No.2004AP1282-W, unpublished slip op. at 2 (WI App June 15, 2004) (*Covington*

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

II). We denied the petition. We explained that if appellate counsel had made the argument that Covington pressed in his writ petition, we would nonetheless have concluded that the circuit court properly permitted trial counsel to withdraw. *Id.* at ¶¶4-5.

¶4 Covington next filed a postconviction motion pursuant to WIS. STAT. § 974.06 (2005-06). He asserted that the circuit court erred by permitting the State to amend the information by adding additional charges and erred again by failing to re-establish Covington’s waiver of his right to counsel after the State filed the amended information. Covington argued that his postconviction counsel performed ineffectively by not raising these claims of circuit court error during the direct appeal process. The circuit court denied Covington’s motion, and we affirmed. *See State v. Covington*, No. 2005AP1169, unpublished slip op. (WI App May 9, 2006) (*Covington III*).

¶5 Covington then filed the postconviction motion underlying this appeal. He argued that the circuit court erroneously exercised its discretion by improperly analyzing the claims he raised in his WIS. STAT. § 974.06 motion. He asserted that the circuit court’s order underlying our decision in *Covington III* is therefore “void” and should be vacated pursuant to WIS. STAT. § 806.07(1)(d). The circuit court denied the motion, and this appeal followed.

DISCUSSION

¶6 We begin by addressing Covington’s efforts to secure postconviction relief by filing a motion under WIS. STAT. § 806.07. Application of a statute to a set of facts presents a question of law that we review *de novo*. *State v. Bodoh*, 226 Wis. 2d 718, 724, 595 N.W.2d 330 (1999).

¶7 WISCONSIN STAT. § 806.07(1) permits a court to relieve a party from a judgment, order, or stipulation for enumerated reasons. According to Covington, § 806.07 provides a mechanism for him to seek relief from the adverse order that disposed of his motion filed under WIS. STAT. § 974.06. Covington is wrong. Section 806.07 applies in civil actions. *See State ex rel. Lewandowski v. Callaway*, 118 Wis. 2d 165, 172, 346 N.W.2d 457 (1984). A motion filed under § 974.06, however, “is a part of the original criminal action, [and] is not a separate proceeding.” *See* § 974.06(2). Covington cannot use § 806.07 in a criminal action to challenge an order entered pursuant to § 974.06.

¶8 WISCONSIN STAT. § 974.06 is a potential avenue for criminal defendants who seek to raise constitutional and jurisdictional claims after the time for an appeal has passed. *See id.* Although Covington insists that he did not file his most recent postconviction motion under the authority of § 974.06, we may look beyond the label that a prisoner applies to pleadings to determine if he or she is entitled to relief. *See bin-Rilla v. Israel*, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). Here, the substance of Covington’s contention is that the circuit court’s improper analysis of his earlier claims denied Covington his constitutional rights to counsel and to due process. Thus, Covington raises the kind of constitutional claims that are cognizable under § 974.06. Nonetheless, Covington cannot pursue his claims because they are procedurally barred.

¶9 “We need finality in our litigation.” *Escalona-Naranjo*, 185 Wis. 2d at 185. Therefore, “[a]ll grounds for relief available to a person under [WIS. STAT. § 974.06] must be raised in his or her original, supplemental or amended motion.” *See* § 974.06(4). Failure to raise a particular claim in the original motion or appeal, however, does not necessarily prevent review of that claim. *See Escalona-Naranjo*, 185 Wis. 2d at 184. Rather, successive

postconviction motions raising additional claims under § 974.06 are barred only if the defendant fails to allege a sufficient reason that the claim was not asserted or was inadequately raised earlier. *Escalona-Naranjo*, 185 Wis. 2d at 184.

¶10 Covington did not proffer a reason justifying serial litigation in his postconviction motion. On appeal, he incorrectly maintains that “the sufficient reason standard of WIS. STAT. § 974.06(4) is inapplicable.” Because Covington did not offer the circuit court a sufficient reason for an additional postconviction motion, the circuit court correctly determined that his claims are barred.²

By the Court.—Order affirmed.

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

² Covington’s most recent postconviction motion also runs afoul of the rule that “[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). Covington claimed in his first postconviction motion that he suffered violations of his constitutional rights during his criminal trial. He now asserts that the circuit court applied the wrong analysis in resolving his claims. Covington’s first postconviction motion and his appeal from the denial of that motion resolved not only the substantive issues that Covington raised but also the correct analysis for disposing of those issues. Claims cannot be resubmitted whenever a losing party thinks of a new theory in support of his or her position. See *id.*

