

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 27, 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. 2009AP1311

Cir. Ct. No. 1994CF943302

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NORMAN STAPLETON,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Norman Stapleton, *pro se*, appeals from orders denying his WIS. STAT. § 974.06 (2007-08)¹ motion and a motion for

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

reconsideration. We agree with the circuit court that the § 974.06 motion is procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and we affirm the orders.

¶2 Stapleton was convicted of strong-arm robbery and burglary in 1995. He was resentenced² in 1997 to consecutive ten- and forty-year prison terms. Stapleton had a direct appeal; on April 2, 1999, this court summarily affirmed the judgment of conviction.

¶3 On October 6, 1999, Stapleton filed a *pro se* WIS. STAT. § 974.06 motion, challenging the performance of trial and postconviction/appellate counsel. The circuit court stated that Stapleton's claims of ineffective assistance of trial counsel would normally be barred by *Escalona* because the claims had not been raised on direct appeal. However, because Stapleton had alleged postconviction counsel was ineffective for failing to file a postconviction motion challenging trial counsel's performance, the court addressed the ineffective-assistance-of-trial-counsel claims on their merits. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). The circuit court ultimately denied the motion, however, and we affirmed the denial on May 1, 2001.

¶4 On December 7, 2004, Stapleton moved for sentence modification, invoking WIS. STAT. § 973.19 and complaining that the resentencing court had relied on inaccurate information about the victim's injuries. The circuit court denied the motion, which it treated as another WIS. STAT. § 974.06 motion, because of the *Escalona* bar. The court noted that this alleged error should have

² Stapleton was first sentenced in July 1995. He was resentenced because a prior conviction from Nebraska, which had been a factor in setting parole eligibility, had been vacated.

been raised in the first § 974.06 motion and, further, the motion did not adequately set forth a “new factor.” We affirmed the circuit court on December 5, 2006. On July 7, 2008, Stapleton filed a new sentence modification motion, raising the same claims as the 2004 motion. The circuit court again rejected the motion based on *Escalona*. We summarily affirmed the circuit court on March 10, 2009.

¶5 On April 7, 2009, Stapleton filed a new WIS. STAT. § 974.06 motion, his fourth postconviction motion. This motion asserted multiple claims of ineffective assistance of trial counsel. In an attempt to avoid *Escalona*, Stapleton asserted that postconviction counsel was ineffective for failing to identify and raise trial counsel’s errors. Stapleton also asserted that he had not intentionally withheld his claims from the court, but had been relying on “jailhouse lawyers” to assist him in the preparation of his legal materials.

¶6 The circuit court denied the motion. It observed that Stapleton had already pursued direct appellate relief under WIS. STAT. RULE 809.30 and relief under WIS. STAT. § 974.06. The court further observed that Stapleton had pursued two resentencing motions that had been construed as § 974.06 motions and deemed barred by *Escalona*. The court went on to state that while *Rothering* indicates ineffective assistance of postconviction counsel may be a sufficient reason for not previously raising an issue in an appeal or postconviction motion, neither *Rothering* nor § 974.06 authorizes successive motions for relief. Accordingly, the court concluded the April 2009 motion was barred by *Escalona*. In a footnote, the court also rejected Stapleton’s attempt to rely on “inadequate[] draft[ing]” by “jailhouse lawyers” as a sufficient reason for failing to previously raise issues.

¶7 Seizing on the language of the footnote, Stapleton moved for reconsideration, arguing the circuit court failed to acknowledge his proffered “sufficient reason” of ineffective assistance of postconviction counsel. The circuit court denied the motion for reconsideration. Stapleton appeals.

¶8 WISCONSIN STAT. § 974.06 permits collateral review of a defendant’s conviction based on errors of jurisdictional or constitutional dimension. *State v. Johnson*, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981). However, it “was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later.” *Escalona*, 185 Wis. 2d at 185. Thus, a defendant is required to raise all grounds for relief in his or her original, supplemental or amended motion for postconviction relief, unless sufficient reason is shown for failing to raise the issues earlier. *See* WIS. STAT. § 974.06(4); *see also Escalona*, 185 Wis. 2d at 181-82. The phrase “original, supplemental or amended motion” also encompasses a direct appeal. *State v. Lo*, 2003 WI 107, ¶32, 264 Wis. 2d 1, 665 N.W.2d 756.

¶9 Stapleton’s fundamental claim of error in his new motion is that trial counsel was ineffective for failing to challenge multiple aspects of the respondent’s court’s decision. Because claims of ineffective assistance of trial counsel must be raised in the trial court in a postconviction motion prior to a direct appeal, WIS. STAT. RULE 809.30(2)(h), postconviction counsel’s failure to raise ineffective assistance of trial counsel may present a “sufficient reason” to overcome the *Escalona* procedural bar. *See, e.g., Rothering*, 205 Wis. 2d at 682.

¶10 However, all claims of error that a criminal defendant can bring should be consolidated into one motion or appeal. Thus, while ineffective

assistance of postconviction counsel might have been a sufficient reason to explain why Stapleton failed to raise issues with trial counsel's performance in his direct appeal or, possibly, in the first WIS. STAT. § 974.06 motion, ineffective assistance of postconviction counsel does not explain why Stapleton failed to raise his current claims of error in his second or third postconviction motions.

¶11 Stapleton argues that *Escalona* only requires explanation for why issues were not raised on a direct appeal or in a first postconviction motion. This interpretation, however, is erroneous. “[C]laims that could have been raised on direct appeal *or in a previous § 974.06 motion* are barred from being raised *in a subsequent § 974.06 postconviction motion* absent a showing of a sufficient reason for why the claim were not raised on direct appeal *or in a previous § 974.06 motion.*” *Lo*, 264 Wis. 2d 1, ¶44 (emphasis added).

¶12 The circuit court correctly concluded that Stapleton's current motion is barred by *Escalona*.³ Ineffective assistance of postconviction counsel does not explain Stapleton's failure to raise his current claims of error in previous motions. As *Escalona* notes, “We need finality in our litigation.... Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of [WIS. STAT. § 974.06].” *Escalona*, 185 Wis. 2d at 185.

³ To the extent that certain claims actually were previously raised, Stapleton cannot relitigate them. See *State v. Lo*, 2003 WI 107, ¶23, 264 Wis. 2d 1, 665 N.W.2d 756; *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). These claims include whether the circuit court sentenced Stapleton on erroneous information, whether the burglary statute was constitutional, and whether the sentence was excessively harsh.

Stapleton's current motion offends this finality principle, and the circuit court properly denied it.⁴

By the Court.—Orders affirmed.

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

⁴ Stapleton's argument that the circuit court failed to recognize his "sufficient reason" of ineffective assistance of postconviction counsel is simply wrong. The court clearly identified, but ultimately rejected, Stapleton's argument.

