

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 2010

A. John Voelker
Acting 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. 2009AP1516

Cir. Ct. No. 2001CF1783

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD D. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
RICHARD J. SANKOVITZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Edward Anderson, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2007-08)¹ motion. Anderson contends the

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

circuit court erroneously exercised its discretion in denying the motion without a hearing. We agree with the circuit court's decision and affirm the order.

BACKGROUND

¶2 In 2003, Anderson was convicted on two counts of third-degree sexual assault following a court trial. The primary evidence against him was the victim's videotaped statement. He was sentenced to a total of eight years' initial confinement and eight years' extended supervision. Following an unsuccessful postconviction motion, Anderson appealed. In that appeal, Anderson claimed: his constitutional speedy trial right was violated; he was denied the right to present a defense when the court denied his motion to introduce the child victim's prior sexual conduct; and the court imposed an unduly harsh sentence. We rejected the speedy trial claim, but we remanded to the circuit court for a determination of whether evidence of the victim's prior behavior was admissible under *State v. Pulizzano*, 155 Wis. 2d 633, 651, 456 N.W.2d 325 (1990). See *State v. Anderson*, No. 2004AP2607-CR, unpublished slip op. ¶¶20, 30 (WI App Sept. 27, 2005) (*Anderson I*).

¶3 Anderson had assaulted his four-year-old victim by placing his mouth on her vagina, and by placing his penis in her anus. Anderson's mother claimed that she had, while babysitting the victim, observed the girl licking or sucking the crotch area of a Barbie doll. Anderson thus claimed this evidence showed the victim had an alternative source for her sexual knowledge other than Anderson's assault.

¶4 Under *Pulizzano*, in order for evidence of the doll incident to be admissible, Anderson had to show that: (1) the prior incident his mother claimed to have observed "clearly occurred"; (2) the incident "closely resembled" the facts

of the present case; (3) the prior act was relevant to a material issue; (4) evidence of the act was necessary; and (5) the probative value of the evidence outweighed the prejudicial value. *Id.*, 155 Wis. 2d at 656. Following a hearing on remand, the circuit court concluded that Anderson had not satisfied the *Pulizzano* criteria. The matter returned to this court and we affirmed. See *State v. Anderson*, No. 2004AP2607-CR, unpublished slip op. (WI App Nov. 6, 2007) (*Anderson II*). We also affirmed Anderson's sentence, rejecting his claim that it was unduly harsh.

¶5 In October 2008, Anderson filed a *pro se* postconviction motion, raising five issues. First, he claimed that the State committed a discovery violation by failing to disclose that his victim received "a large back-pack filled with toys and arts-supplies" in purported exchange for her making a videotaped statement that constituted the key evidence against Anderson. Second, Anderson alleged that the State violated his right to a prompt disposition under WIS. STAT. § 971.11, the Intrastate Detainer Act, and violated his constitutional right to a speedy trial. Third, he claimed that the failure of some of his attorneys to properly investigate witnesses with allegedly relevant testimony about the victim's post-assault behavior constituted ineffective assistance. Fourth, Anderson alleged that remand counsel was ineffective because he failed to present testimony of fifteen other witnesses at the hearing. Fifth, Anderson claimed that remand counsel was ineffective because counsel failed to object to the State's suborning of perjury.

¶6 The circuit court determined Anderson's motion was brought under WIS. STAT. § 974.06 and *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), and rejected the motion. It ruled that remand counsel was not ineffective because none of the witnesses had any relevant evidence to explain how the victim would have precocious awareness of sodomy;

therefore, Anderson suffered no prejudice from counsel's failure to call these witnesses. The court rejected the speedy trial claim because it had been previously decided, and concluded all other issues were barred because they had not previously been raised. *See* WIS. STAT. § 974.06(4); *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Anderson appeals.

DISCUSSION

I. The State's Alleged Discovery Violation.

¶7 Anderson alleges the State failed to disclose, under WIS. STAT. § 971.23, that it had "paid" his victim with toys and art supplies for her videotaped statement. Assuming without deciding that the State was obligated to disclose that information, Anderson argued that the State had committed a statutory violation, for which his remedy should have been suppression. Although the circuit court ruled this matter was procedurally barred because it had not been previously raised, this claim is barred because WIS. STAT. § 974.06 claims are generally limited to constitutional and jurisdiction issues. *See* WIS. STAT. § 974.06(1); *State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶19, 314 Wis. 2d 112, 758 N.W.2d 806. The State's alleged discovery violation does not fall within the scope of a § 974.06 motion and was appropriately rejected by the circuit court.

II. The Speedy Trial/Intrastate Detainer Issue.

¶8 In Anderson's first appeal, he claimed a violation of his constitutional speedy-trial rights. *See Anderson I*, unpublished slip op. at ¶8. We rejected the claim. *Id.*, ¶20. Anderson's current motion alleges a violation of WIS. STAT. § 971.11. This alleged statutory violation is also outside the scope of a WIS. STAT. § 974.06 motion. To the extent Anderson alleges a violation of his

constitutional right to a speedy trial, the matter was previously litigated and cannot be revisited. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

III. Pre-remand Counsels' Failures.

¶9 Anderson alleges that two of his prior trial attorneys, before the remand, were ineffective for failing to find and interview witnesses to testify about the victim's non-fearful behavior towards Anderson, subsequent to his assault. This issue is barred by *Escalona-Naranjo*. It is an issue that could have been raised previously, in prior postconviction or appellate proceedings, and Anderson offers no explanation for failing to raise it previously.²

IV. Ineffectiveness of Remand Counsel.

¶10 Anderson claims Attorney Scott Anderson was ineffective for failing to call fifteen witnesses on remand. The circuit court rejected this claim on its merits,³ noting that the proposed testimony of these witnesses was largely irrelevant to the two key questions on remand: Whether the doll incident occurred, and whether it "closely resemble[d]" the alleged assaults. *See Pulizzano*, 155 Wis. 2d at 651. In addition, the court noted that even if the

² Anderson only alleged that trial Attorneys Richard Johnson and James Toran were ineffective for failing to find these witnesses and present the evidence to the trial court.

³ The State argues that this issue is also procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), because Anderson should have raised the issue on direct appeal after remand. However, remand counsel occupies a procedural posture similar to postconviction counsel. Ineffective assistance of postconviction counsel should first be brought to the circuit court's attention; otherwise, appellate counsel cannot raise it for the first time on appeal. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). It is, therefore, not entirely evident that the issue of remand counsel's effectiveness had to be raised in the last appeal.

proposed testimony made it more likely that the doll incident occurred, none of it was sufficient to establish how the victim obtained an alternate source of knowledge about sodomy.

¶11 We agree with the circuit court's analysis on the proposed testimony; it was irrelevant. Because the evidence was irrelevant, it was inadmissible. Because it was inadmissible, Anderson suffered no prejudice from counsel's failure to pursue it. Because there was no prejudice, counsel was not ineffective. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984).

V. Perjured Testimony.

¶12 Anderson also claimed Attorney Anderson was ineffective because he failed to object to the victim's mother's "perjured" testimony. On remand, the mother testified that she did not learn about the alleged Barbie doll incident until trial. Previously, the State had represented that the mother reported she may have had a brief conversation with Anderson's mother about the victim and a Barbie doll in 1998 when the child was twelve to twenty-four months old. The circuit court implicitly decided this issue when rejecting the overriding claim that Attorney Anderson was ineffective.

¶13 Perjury is a specific legal term. It requires a person "under oath or affirmation" to orally make before a court or judge "a false material statement which the person does not believe to be true[.]" *See* WIS. STAT. § 946.31. The State made its representation in August 2002; the victim's mother testified in April 2006. At best, Anderson shows that the victim's mother's remand testimony was inconsistent with the State's representation made four years earlier. Highlighting an apparent inconsistency does not establish perjury.

VI. “Real Controversy.”

¶14 Finally, Anderson argues the real controversy was not fully tried, so he should receive a new trial. The real controversy of whether Anderson assaulted his victim was, in fact, fully tried. A new trial is not warranted, and the court properly rejected Anderson’s motion without a hearing.

By the Court.—Order affirmed.

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

