

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 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. 2009AP1657

Cir. Ct. No. 1998CF749

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL F. HOWARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
SUE E. BISCHEL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Michael Howard, pro se, appeals an order denying his motion to cure an excessive sentence. Howard argues his sentence exceeds the maximum penalty authorized by statute. We affirm.

¶2 On December 21, 1998, Howard pled no contest to four counts of first-degree recklessly endangering safety, each as party to a crime. The circuit court sentenced Howard to consecutive six-year terms of imprisonment on each count. Howard filed a postconviction motion seeking plea withdrawal. He argued that the State breached the plea agreement by recommending consecutive rather than concurrent sentences and that he was denied effective assistance of trial counsel when his counsel failed to object to the State's breach. The circuit court denied Howard's motion. On appeal, we concluded the State materially and substantially breached the plea agreement, and we remanded to the circuit court to conduct a *Machner*¹ hearing to determine whether Howard's trial counsel performed deficiently. See *State v. Howard*, 2001 WI App 137, ¶1, 246 Wis. 2d 475, 630 N.W.2d 244.

¶3 On remand, the circuit court concluded counsel's performance was deficient. However, the court refused to allow Howard to withdraw his plea. Instead, it resentenced him to consecutive sentences of eight years' imprisonment on three of the four convictions for recklessly endangering safety. With respect to the fourth conviction, the court imposed and stayed an eight-year sentence and ordered ten years' probation.

¶4 On April 26, 2002, Howard moved for postconviction relief, arguing that his new sentence was unduly harsh and that the convictions for recklessly endangering safety were multiplicitous and therefore violated double jeopardy. The circuit court denied Howard's motion. Howard appealed, and we affirmed the

¹ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

circuit court. *See State v. Howard*, No. 2002AP1677, unpublished slip op. ¶1 (WI App Apr. 1, 2003).

¶5 On June 1, 2009, Howard filed a motion to cure an excessive sentence pursuant to WIS. STAT. § 973.13.² The circuit court denied the motion without a hearing, and Howard now appeals.

¶6 We conclude Howard's present appeal is barred by WIS. STAT. § 974.06(4)³ and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). *Escalona-Naranjo* holds that a criminal defendant may not engage in serial postconviction litigation. *Id.* at 181. Successive motions and appeals are procedurally barred unless the defendant can show a sufficient reason why the newly alleged errors were not previously raised. *Id.* at 185. Whether a defendant's successive appeal is procedurally barred is a question of law that we review independently. *State v. Fortier*, 2006 WI App 11, ¶18, 289 Wis. 2d 179, 709 N.W.2d 893.

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

³ WISCONSIN STAT. § 974.06(4) states:

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.

¶7 Here, Howard has not provided any reason, let alone a sufficient reason, for failing to raise the excessive sentence argument in his 2002 postconviction motion and appeal. Howard's 2002 postconviction motion dealt with sentencing issues, but it did not argue his sentence was in excess of the statutory maximum. Because Howard has not demonstrated a sufficient reason for his failure to raise the excessive sentence argument previously, WIS. STAT. § 974.06(4) and *Escalona-Naranjo* procedurally bar his present appeal.

By the Court.—Order affirmed.

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

