

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2013

Diane M. Fremgen
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. 2012AP2307

Cir. Ct. No. 2006CF2015

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LARRY DARNELL REDMOND,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
ELLEN R. BROSTROM, Judge. *Affirmed.*

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

¶1 PER CURIAM. Larry Darnell Redmond, *pro se*, appeals from orders of the circuit court, denying his WIS. STAT. § 974.06 motion for relief and a motion for reconsideration. The circuit court concluded that the § 974.06 motion was barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157

(1994), in light of two prior *pro se* motions that Redmond had filed. We agree that the current motion is barred, though for slightly different reasons than the circuit court, and we affirm the orders.

¶2 In 2006, Redmond was charged with one count of kidnapping, one count of attempted second-degree sexual assault of a child, and one count of false imprisonment based on the allegations of his fifteen-year-old victim. A jury convicted him of kidnapping and false imprisonment, but could not agree on a verdict for the sexual assault charge, which was dismissed without prejudice. The circuit court sentenced Redmond to twelve years' initial confinement and four years' extended supervision on the kidnapping, plus a concurrent two years' initial confinement and two years' extended supervision on the false imprisonment.

¶3 With the assistance of counsel, Redmond filed a postconviction motion for resentencing. The motion was denied. Redmond appealed, but we affirmed. *See State v. Redmond*, No. 2007AP2430-CR, unpublished slip op. (WI App Nov. 25, 2008).

¶4 In July 2010, Redmond filed a *pro se* motion to vacate the DNA surcharge that had been imposed. The circuit court granted that motion. In October 2010, Redmond filed a *pro se* motion to amend the original judgment of conviction. He noted that the sexual assault charge had been dismissed, so he thought that he should not be subject to the sex offender registration requirements, wondering, “[I]f that count was dismissed, why should I still be punished for that count?” The circuit court denied the motion. It explained that under WIS. STAT. § 301.45(1g)(a), registration is required for anyone convicted of a sex offense. A “sex offense” includes kidnapping and false imprisonment if the victim is a minor

and the individual convicted is not the victim's parent, *see* WIS. STAT. § 301.45(1d)(b), and Redmond was not the victim's parent.

¶5 In August 2012, Redmond filed a *pro se* “§ 974.06 Rothering Postconviction Relief Motion” in which he alleged that appellate counsel was ineffective on direct appeal for not challenging trial counsel's failure to pursue additional witnesses or an as-applied constitutional challenge to WIS. STAT. § 301.45.¹ The circuit court, noting Redmond's two prior *pro se* motions from 2010, denied the § 974.06 motion as procedurally barred under *Escalona*. Redmond moved for reconsideration, but the circuit court denied that motion as well, relying on this court's decision in *State v. Starks*, No. 2010AP425, unpublished slip op. (WI App Jun. 14, 2011), to explain that Redmond's prior DNA motion barred the current motion. Redmond now appeals.

¶6 WISCONSIN STAT. § 974.06 is meant to supplement a criminal defendant's standard appellate and postconviction remedies. *See State v. Starks*, 2013 WI 69, ¶41, 833 N.W.2d 146, 158. Once a defendant has exhausted his direct remedies, § 974.06 allows him to move to vacate, set aside, or correct a sentence if he contends that the sentence was imposed contrary to the federal or state constitutions; that the sentencing court lacked jurisdiction; or that the sentence exceeded the maximum allowed by law or is otherwise subject to collateral attack. *Ibid.*

¹ There is a distinction between the roles of postconviction and appellate counsel, even if he or she is the same person. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 678–680, 556 N.W.2d 136, 138–139 (Ct. App. 1996). The circuit court treated Redmond's motion as though he had alleged the ineffective assistance of postconviction counsel; we will do the same.

¶7 The ability to seek relief under WIS. STAT. § 974.06 is not unlimited.

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.

§ 974.06(4). That is, “if the defendant’s grounds for relief have been finally adjudicated, waived, or not raised in a prior postconviction motion, they may not become the basis for a sec. 974.06 motion” unless there is a sufficient reason alleged for not including the grounds in the prior motion. *Escalona*, 185 Wis. 2d at 182, 517 N.W.2d at 162.

¶8 For purposes of the WIS. STAT. § 974.06/*Escalona* bar, a prior motion challenging solely the DNA surcharge based on the holding of *State v. Cherry*, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, does not bar a later § 974.06 motion. See *Starks*, 2013 WI 69, 349 Wis. 2d at 300–301, ¶47, 833 N.W.2d at 159–160. Thus, the circuit court was incorrect to rely on our *Starks* decision to conclude Redmond’s DNA motion barred his § 974.06 motion and deny reconsideration.²

¶9 Redmond’s prior DNA motion, however, was not the only other postconviction motion he filed. Even disregarding the fact of the prior direct

² To be fair, the supreme court had not decided *State v. Starks*, 2013 WI 69, 49 Wis. 2d 274, 833 N.W.2d 146, at the time the circuit court ruled on Redmond’s reconsideration motion, although it had granted the petition for review.

appeal and postconviction motion, Redmond also filed a *pro se* motion challenging the validity of the sex offender registration requirement. Though he did not so label his motion, it was a WIS. STAT. § 974.06 motion. See *bin-Rilla v. Israel*, 113 Wis. 2d 514, 521, 335 N.W.2d 384, 388 (1983) (we look to substance of pleadings, not labels, of *pro se* prisoner filings). He was, in essence, raising a constitutional due process challenge to his sentence by asserting that it could not be imposed for his particular crimes of conviction or that he could not be punished for a crime for which he was not convicted.

¶10 In light of *that* prior motion, not the DNA motion, Redmond was required to allege, in the current WIS. STAT. § 974.06 motion, a sufficient reason explaining why he did not raise his current issues earlier. Redmond did not so allege. While ineffective assistance of postconviction counsel under *Rothering* might explain why the issues were not raised in the direct postconviction or appellate proceedings, it does not explain why Redmond did not raise his current issues in his own prior motion. Thus, the current § 974.06 motion is barred by *Escalona*, and the circuit court's denials were appropriate.

By the Court.—Orders affirmed.

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

