

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 14, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3465

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BIRDELL A. PETERSON,

Defendant-Appellant.

APPEAL from an order of the circuit court for Eau Claire County:
THOMAS H. BARLAND, Judge. *Affirmed.*

MYSE, J. Birdell A. Peterson appeals an order denying his § 974.06, STATS., motion for postconviction relief that was based on his assertion that he was denied his constitutional right to testify in his own defense. Peterson contends that he was denied his constitutional right to testify because his attorney did not advise him of his right to testify or permit him to testify and the trial court failed to advise him of his right to testify. Because this court concludes that Peterson's § 974.06 motion was untimely, the order is affirmed.

Peterson was convicted of two counts of fourth-degree sexual assault in violation of § 940.225(3)(m), STATS., following a two-day jury trial. One year later, Peterson filed a motion for a new trial based upon the claims of

newly discovered evidence and ineffective assistance of trial counsel. The trial court denied the motion and three months later, Peterson simultaneously filed a motion for reconsideration and a motion for postconviction relief under § 974.06, STATS., both based on the previously unasserted claim that he was denied his constitutional right to testify on his own behalf at trial. The trial court denied the motions concluding that Peterson's motion was untimely, that Peterson waived his constitutional right to testify and that his failure to testify did not prejudice him.

Peterson contends that his § 974.06, STATS., motion was timely. This issue presents a mixed question of law and fact because it requires findings of fact and application of those facts to § 974.06. The trial court's findings of fact will not be set aside unless clearly erroneous. Section 805.17(2), STATS. Application of those facts to a statute presents a question of law that this court reviews without deference to the trial court. *Kania v. Airborne Freight Corp.*, 99 Wis.2d 746, 758-59, 300 N.W.2d 63, 68 (1981).

Section 976.06(4), STATS., provides:

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.* (Emphasis added.)

In *State v. Escalona-Naranjo*, 185 Wis.2d 168, 185, 517 N.W.2d 157, 164 (1994), our supreme court held that the plain language of § 974.06(4), STATS., requires a sufficient reason to raise a constitutional issue that could have been but was not raised in a previous motion for postconviction review. Peterson concedes that his initial motion for a new trial filed under §§ 974.02, 805.15 and 805.16, STATS., based upon newly discovered evidence and

ineffective assistance of counsel was filed without raising the constitutional claim that he was denied his right to testify in his own defense. Peterson contends, however, that because he incorporated this ground into his motion for reconsideration filed three months after the court denied his motion for a new trial, he has met the requirement that it be raised in the "original supplemental or amended motion."

This court does not read the statutory language so broadly as to encompass a motion for reconsideration as an amendment to the previously filed motion. In *Escalona-Naranjo*, the court stated:

We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which could have been brought at the same time, run counter to the design and purpose of the legislation.

Id. at 185, 517 N.W.2d at 163-64.

If this court accepted Peterson's argument, it would entirely defeat the holding of *Escalona-Naranjo* and abolish the concept of finality in postconviction motions. A defendant could always evade the requirements of § 974.06(4), STATS., by simply calling any subsequent motion a motion for reconsideration. Such a reading is inconsistent with the language of the statute and the language of our supreme court in *Escalona-Naranjo*. Therefore, this court concludes that Peterson did not raise his constitutional claim in his original, supplemental or amended motion.

Peterson next claims that the motion was timely because he stated sufficient reasons under § 974.06(4), STATS., for failure to raise the issue in his original motion. The original postconviction motion was filed after his trial counsel had died from brain cancer and exactly one year after his conviction. Peterson's motion was required to be filed within one year, and he did not contact counsel until the day the motion had to be filed. Peterson therefore contends that his attorney had to file the original motion without reference to the record and did not discover his constitutional claim until he had an

opportunity to thoroughly investigate and research the matter. Peterson claims that he was unaware of his constitutional right to testify until after the trial court had denied his original motion.

This court concludes that Peterson has not demonstrated a sufficient reason for failing to include his constitutional claim in the original motion. The explanation that Peterson's attorney did not have adequate time to review the record before filing the motion is not sufficient for several reasons. First, the original motion as filed could have been amended between the date of filing and the date the court denied the motion without a hearing, which was over a month later. Peterson's counsel had ample opportunity to study the record and develop additional reasons which could be asserted to the trial court before the original motion was denied. The transcript of the trial was filed with the clerk of court the day before the original motion was filed and Peterson did not file his § 974.06, STATS., motion until three months after the trial court had denied the original motion.

Moreover, it was Peterson who elected to wait one year before asserting any postconviction motion. During that year he was aware that his trial counsel had become ill with brain cancer and that the illness was terminal. Notwithstanding this information Peterson did nothing to bring his claims for a new trial until after his trial counsel's death and exactly one year after his conviction. One may not intentionally and deliberately delay filing a claim seeking a new trial and then claim that there was inadequate time to properly prepare a comprehensive motion.

Finally, this court rejects Peterson's claim that he was unaware of his right to testify. In its decision after the postconviction hearing, the trial court found that Peterson acquiesced in the decision not to testify and understood why he could not and should not testify at the trial. At the hearing, Peterson testified that he told his trial attorney that he wanted to testify and when his attorney told him that it was not part of the game plan, Peterson said "you're running the show." Peterson also acquiesced to the theory of defense proposed by his trial attorney. At trial, Peterson's defense was that his sexually inappropriate conduct was the result of voluntary intoxication resulting from a drug that he had taken. This defense is inconsistent with taking the witness stand and denying that the conduct occurred, which is his current plan. He may not now undertake a theory of defense that he could have but did not assert at trial. This court construes the trial court's findings as a finding of fact

that Peterson knew of his right to testify and that he voluntarily acquiesced in the decision not to testify. The trial court, at least implicitly, made a finding of fact that Peterson knew of his right to testify. See *State v. Walstad*, 119 Wis.2d 483, 514-15, 351 N.W.2d 469, 485 (1984). The trial court's findings of fact are not clearly erroneous. See § 805.17(2), STATS.

Based on the foregoing, this court concludes that Peterson failed to establish a sufficient reason for not including his constitutional claim in his original motion. Therefore, the order denying the motion is affirmed.

By the Court. – Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.