

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 20, 2005**

Cornelia G. Clark  
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. 2003AP2613**

**Cir. Ct. No. 2000CF1681**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LEVI BOOTH,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
JEAN W. DIMOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Levi Booth appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)<sup>1</sup> motion. The circuit court denied the motion

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

on the ground that Booth's claims were barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Because the circuit court did not err, we affirm.

## BACKGROUND

¶2 A jury found Booth guilty of one count of first-degree reckless homicide and two counts of first-degree recklessly endangering safety, all as party to the crimes.<sup>2</sup> While Booth was visiting friends and relatives, discussion turned to possible retaliation against whomever had allegedly shot at Booth's nephew the previous night. Sylvester Townsend asked Booth to return to Booth's house to retrieve a bag of bullets that Townsend had given to Booth. Booth did as Townsend requested. When Booth returned with the bullets, Townsend distributed them to several men who had guns. Townsend then asked Booth to drive two of the armed men to the area where the retaliation was to occur. Booth agreed to do so. On the way there, however, Booth told the armed men that they would be fools to participate and he turned around and dropped them back at Townsend's house. Some of the other armed men did carry out the retaliatory shooting, and two persons were injured and an eleven-year-old girl was killed by a bullet that pierced the wall of her residence.

¶3 Booth appealed and raised three issues. He argued that (1) the circuit court erred by not conducting a colloquy to determine whether a witness's

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<sup>2</sup> These facts are taken from this court's opinion in *State v. Booth*, No. 2001AP2013-CR, unpublished slip op. (WI App Mar. 26, 2002).

testimony should have been heard by the jury sitting on his case;<sup>3</sup> (2) his trial counsel was ineffective for not objecting to that witness's testimony; and (3) the court erroneously exercised sentencing discretion. *State v. Booth*, No. 2001AP2013-CR, unpublished slip op. ¶¶5, 9 and 17 (WI App Mar. 26, 2002). We rejected Booth's arguments and affirmed the judgment of conviction and postconviction order. The supreme court denied Booth's petition for review.

¶4 Fifteen months later, Booth filed the postconviction motion that is the subject of this appeal. In that motion, Booth contended that his trial counsel was ineffective for not arguing that the initial appearance was not timely conducted, in violation of *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), and for not litigating a suppression motion. The circuit court denied the motion without a hearing. This appeal follows.

## DISCUSSION

¶5 “Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review.” *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. First, this court determines whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. *Id.* This is a question of law that we review de novo. *Id.* If the motion raises such facts, the circuit court must hold an evidentiary hearing. *Id.* “However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only

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<sup>3</sup> Booth's son, Alfonso Taylor, was charged in the same criminal complaint. The cases were severed for trial, but tried at the same time before two separate juries. See *State v. Avery*, 215 Wis. 2d 45, 571 N.W.2d 907 (Ct. App. 1997).

conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [circuit] court has the discretion to grant or deny a hearing.” *Id.* We review a circuit court’s discretionary decisions under the deferential erroneous exercise of discretion standard. *Id.*

¶6 Issues that were previously adjudicated cannot be raised in a WIS. STAT. § 974.06 motion. *Escalona-Naranjo*, 185 Wis. 2d at 181-82. Issues that could have been, but were not, raised in earlier appeals may not be raised in a later motion under § 974.06 unless the party establishes “sufficient reason” for failing to raise the issues in earlier postconviction motions, petitions and appeals. *See id.*

[A] criminal defendant [is] required to consolidate all postconviction claims into his or her original, supplemental, or amended motion. If a criminal defendant fails to raise a constitutional issue that could have been raised on direct appeal or in a prior § 974.06 motion, the constitutional issue may not become the basis for a subsequent § 974.06 motion unless the court ascertains that a sufficient reason exists for the failure either to allege or to adequately raise the issue in the appeal or previous § 974.06 motion.

*State v. Lo*, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756 (citations omitted).

¶7 In his postconviction motion, Booth asserts that “the issues now being raised ... have not been previously heard or decided on other grounds.” The motion does not, however, establish any reason, let alone a “sufficient reason,” why the issues were not raised in his direct appeal. The dispositive issue in this appeal is whether the postconviction motion filed with the circuit court “on its face alleges sufficient material facts that, if true, would entitle the defendant to relief.” *Allen*, 274 Wis. 2d 568, ¶9. Because Booth’s motion does not address why the issues were not previously raised, it does not meet that standard, and the circuit

court did not erroneously exercise its discretion when it denied Booth's motion without a hearing.

¶8 We recognize that, in his appellate brief, Booth addresses at length why the issues raised in his postconviction motion were not raised in his direct appeal. Not surprisingly, he points the finger at appellate counsel, and argues that appellate counsel was ineffective for not adequately challenging the effectiveness of trial counsel. Booth also introduces another issue into the mix, and challenges the sufficiency of the evidence to support the "party to a crime" aspect of his convictions. Neither discussion, however, was before the circuit court, and therefore, we cannot consider them. If we were to do so, we would circumvent the appellate process by placing this court, rather than the circuit court, in the position of evaluating Booth's arguments for the first time. Because that would be inconsistent with the basic principles of appellate review, we decline to do so. *See State v. Flynn*, 190 Wis. 2d 31, 46 n.4, 527 N.W.2d 343 (Ct. App. 1994) (appellate court would not consider affidavit from defendant that was not part of the circuit court record because the appellate court is "limited to the record as it comes to us from the [circuit] court.").

¶9 Because Booth's postconviction motion, on its face, does not allege sufficient material facts that, if true, would entitle him to relief, the circuit court properly denied the motion without a hearing.

*By the Court.*—Order affirmed.

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

