

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 11, 2006

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. 2005AP671

STATE OF WISCONSIN

Cir. Ct. No. 1997CF971747

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN K. SCHESSLER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID A. HANSHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Brian Schessler, *pro se*, appeals from the circuit court's order denying his postconviction motion. His motion sought the circuit court's permission to withdraw his guilty plea. The motion also alleged that he

was denied the effective assistance of trial counsel. Because we conclude the circuit court properly determined that Schessler's motion was barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), we affirm.

¶2 Schessler entered a guilty plea to one count of first-degree sexual assault of a child on June 30, 1997. After sentencing, Schessler filed a *pro se* postconviction motion under WIS. STAT. § 809.30,¹ contending in part that he was denied the effective assistance of trial counsel. The circuit court denied the motion, concluding, “[a]ll assertions are conclusory in nature and do not afford a basis for relief.” Schessler did not appeal.

¶3 Five years later, Schessler filed a *pro se* postconviction motion for a new trial pursuant to WIS. STAT. § 974.06(1).² This motion alleged that Schessler had discovered new evidence in support of his claim that he was denied the effective assistance of trial counsel. The circuit court denied the motion without a hearing and Schessler appealed. This court affirmed the circuit court's order, concluding that the circuit court's summary rejection of the motion was proper.

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

² WISCONSIN STAT. § 974.06(1) provides:

After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

State v. Schessler, No. 03-0923, unpublished slip op. at ¶6 (WI App Jan. 14, 2004).

¶4 On February 8, 2005, Schessler filed his third *pro se* postconviction motion. Schessler's motion alleged that he had not voluntarily nor knowingly entered his guilty plea inasmuch as he was under the influence of psychiatric medications when he pled guilty and that his trial counsel was ineffective for failing to request a psychological evaluation and for rushing him through the guilty plea questionnaire. Schessler's motion requested an evidentiary hearing. The motion did not state a reason for his failure to raise these matters earlier. The circuit court denied the motion and request for hearing and this appeal followed.

¶5 As the circuit court pointed out in its disposition of Schessler's current postconviction motion, a motion for postconviction relief under WIS. STAT. § 974.06(4),³ cannot be used to raise issues that could have been raised on an earlier direct appeal or postconviction motion under WIS. STAT. § 974.02, unless the defendant shows and the court finds that a sufficient reason exists for the defendant's failure to raise the issues in the earlier postconviction motion or appeal. WIS. STAT. § 974.06(4); *Escalona-Naranjo*, 185 Wis. 2d at 181-82. To

³ WISCONSIN STAT. § 974.06(4) 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.

the extent that the issue of whether trial counsel was effective was addressed in Schessler's first two postconviction motions, it will not be addressed again. *See State v. Witkowski*, 163 Wis. 2d 985, 990-92, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding"). To the extent that the issue presented is new, Schessler waived his right to its review by failing to raise it previously and, alternatively, by failing to present a sufficient reason for not having raised it in his original postconviction motion.⁴

By the Court.—Order affirmed.

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

⁴ Schessler argues that the Seventh Circuit's holding in *Page v. Frank*, 343 F.3d 901 (7th Cir. 2003) excuses him from satisfying the requirement that he show a sufficient reason for not having previously raised a ground known to him in his appeal as of right or original postconviction motion. We disagree. The federal court in *Page* held only that the *Escalona-Naranjo* bar to successive postconviction claims set forth in WIS. STAT. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), did not affect the availability of federal *habeas corpus* relief to a state prisoner under 28 U.S.C. § 2254 (2003) in federal court. *Page*, 343 F.3d at 908-09. *Page* did not address nor affect Wisconsin courts' interpretation and application of WIS. STAT. § 974.06(4) and *Escalona-Naranjo* to prisoners' litigation seeking collateral review of state court judgments of conviction.

