

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 15, 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. 2004AP1194

STATE OF WISCONSIN

Cir. Ct. No. 1997CF972944

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID L. GRAY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
VICTOR MANIAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. David L. Gray appeals *pro se* from a circuit court order denying his WIS. STAT. § 974.06 (2001-02)¹ postconviction motion. In his motion, Gray argued that evidence unconstitutionally seized by police had been improperly introduced at trial and that his trial and postconviction attorneys had been ineffective for failing to raise this issue. In addition, Gray argued that newly-discovered evidence of a trial witness's recantation warranted postconviction relief. We agree with the circuit court that Gray's constitutional claims, including his claim of ineffective assistance of counsel, are procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994) (defendant barred from raising § 974.06 motion claims that could have been raised in prior postconviction and appellate proceedings). We are also satisfied that the newly discovered evidence proffered by Gray was legally insufficient to warrant postconviction relief. We therefore affirm the circuit court's order.

¶2 A jury found Gray guilty of attempted first-degree intentional homicide and armed robbery. The circuit court imposed a forty-year sentence for the attempted homicide, and withheld sentence and imposed a twenty-five-year consecutive term of probation for the armed robbery. Gray, by appointed counsel, sought postconviction relief, but after an evidentiary hearing, the circuit court denied the motion. Gray appealed, and this court affirmed the judgment of conviction and the postconviction order.

¶3 Gray then sought postconviction relief *pro se*, pursuant to WIS. STAT. § 974.06 (2001-02), contending that he was denied his right to a speedy trial

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

and that his postconviction counsel was ineffective for failing to raise that issue. The circuit court denied Gray's motion, and Gray appealed. This court affirmed the circuit court's ruling, noting, among other things, that Gray's speedy-trial complaint was procedurally barred by *Escalona-Naranjo*.

¶4 Gray then filed the postconviction motion that is the subject of this appeal. In it, Gray argued that: (1) certain evidence had been seized in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures;² (2) his trial counsel had been ineffective for failing to raise the issue pretrial; and (3) his postconviction counsel had been ineffective for failing to raise the issue of trial counsel's effectiveness in direct postconviction and appellate proceedings. He also contended that he should be granted a new trial on the basis of newly-discovered evidence. Specifically, he claimed that a witness at his trial, Tawanda Westmoreland, lied when she told the jury that Gray had been with her in Milwaukee on the day of the crime. In support of this claim, Gray submitted an affidavit from Westmoreland stating that Gray, who was her boyfriend at the time of the crime, never left California and therefore could not have committed the crime.

¶5 The circuit court denied the motion without a hearing. It reasoned that Gray's ineffective-assistance-of-counsel claims were barred by *Escalona-Naranjo* because they could have been raised in his prior postconviction motions, but were not. In regard to the newly-discovered evidence, the circuit court held that the Westmoreland affidavit did not satisfy the requirements for ordering a new trial on the basis of newly-discovered evidence, at least in part because there was

² See U.S. CONST. amend IV.

no corroboration for Westmoreland's new claim. Gray appeals both circuit court holdings.

¶6 A defendant may not bring postconviction claims under WIS. STAT. § 974.06 if the defendant could have raised issues in a previous postconviction motion or on direct appeal, unless the defendant states a "sufficient reason" for failing to do so. *Escalona-Naranjo*, 185 Wis.2d at 181-82. Whether a defendant's claims are barred by *Escalona-Naranjo* presents a question of law that this court reviews *de novo*. *State v. Tolefree*, 209 Wis.2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). In addition, § 974.06 does not "create an unlimited right to file successive motions for relief." *State ex rel. Dismuke v. Kolb*, 149 Wis.2d 270, 273, 441 N.W.2d 253 (Ct. App. 1989). "[A] prisoner's failure to assert a particular ground for relief in an initial postconviction motion bars the prisoner's assertion of the ground in a later motion, in the absence of justification for the omission." *Id.* at 274.

¶7 As we noted above, Gray sought direct postconviction and appellate relief after his conviction. When he was unsuccessful, he sought postconviction relief under WIS. STAT. § 974.06, challenging postconviction counsel's effectiveness for failing to raise a claim that he had been denied his right to a speedy trial. Again, that motion was unsuccessful in the circuit court and in this court. This appeal is from the denial of Gray's third postconviction motion. In that motion, Gray failed to offer the circuit court *any* reason, much less a sufficient reason, for his failure to raise this particular ineffective-assistance claim in his prior postconviction motions. The circuit court therefore properly held that Gray's claim was procedurally barred by *Escalona-Naranjo*.

¶8 We turn next to Gray's contention that newly discovered evidence provided the basis for a new trial. When a defendant seeks a new trial on the basis of newly discovered evidence, the defendant must first prove:

[B]y clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial. Finally, when the newly discovered evidence is a witness's recantation, ...the recantation must be corroborated by other newly discovered evidence.

State v. McCallum, 208 Wis. 2d 463, 473-74, 561 N.W.2d 707 (1997) (citation omitted).

¶9 Here, the circuit court held that Gray had failed to meet any of the criteria set forth in *McCallum*. We need not examine the circuit court's holding as to each criterion, however. Even if we were to assume that Tawanda Westmoreland's recantation of her testimony constituted newly discovered evidence, Gray failed to provide in his postconviction motion any newly discovered evidence that would corroborate the recantation. Consequently, the circuit court correctly denied Gray's motion.

By the Court.—Order affirmed.

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

