

**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. 2004AP2903

Cir. Ct. No. 1998CF980328

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PRIEST JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Priest Johnson appeals from an order denying his postconviction motion. The issues are whether: (1) Johnson received ineffective assistance of counsel; (2) there was insufficient proof of the victim's age to convict Johnson of sexually assaulting a child; (3) he is entitled to resentencing;

and (4) the trial court had jurisdiction over the original charge (and subsequent proceedings). We conclude that: (1) Johnson's knowing and voluntary insistence to discharge counsel and proceed *pro se* on appeal (and in doing so, failing to seek postconviction relief from the trial court) waives his ineffective assistance claims; (2) our rejection of the insufficient proof of age claim on direct appeal bars its attempted resurrection; (3) Johnson's sentencing claims are procedurally barred; and (4) Johnson's unsubstantiated and belated allegation that the sexual contact occurred on a federal military reservation was insufficient to obtain postconviction relief. Therefore, we affirm.

¶2 Johnson was convicted of three counts of second-degree sexual assault of a child following a bench trial on stipulated facts. Johnson sought to proceed *pro se*. He was extensively warned about the risks and obligations of proceeding *pro se*, but insisted on discharging counsel, which the record reflects he knowingly and voluntarily elected to do. By doing so, he forfeited the right to now claim that his unfamiliarity with the law precluded him from preserving the issues he seeks to raise. Similarly, by discharging postconviction/appellate counsel and neglecting to return to the trial court to pursue postconviction proceedings before pursuing an adversary (as opposed to a no-merit) appeal, he waived any ineffective assistance claims he may have had.¹ *See generally State v. Simmons*, 57 Wis. 2d 285, 297, 203 N.W.2d 887 (1973). Once Johnson discharged counsel and proceeded *pro se*, he could have properly raised whatever issues he wanted; the fact that he failed to do so was his own fault, not the fault of the counsel whom he discharged.

¹ Ineffective assistance claims are not viable mechanisms to extricate one from one's own mistakes.

¶3 On direct appeal, Johnson raised the following issues:

(1) WIS. STAT. § 948.02(2) (1997-98) violates due process because it allows conviction without proof that the assailant knew the victim was a child; (2) the trial court erred by excluding evidence that the thirteen-year-old victim misrepresented her age to Johnson; (3) he received ineffective assistance from trial counsel; and (4) the trial court misused its sentencing discretion.

State v. Johnson, No. 00-0258-CR, unpublished slip op., ¶1 (WI App Aug. 16, 2001) (“*Johnson I*”) (statutory reference footnote omitted). We rejected the first two issues on their merits; we will not revisit our decision. See *id.*, ¶¶ 2-3; see, e.g., *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). We rejected the last two issues as waived because Johnson failed to raise them initially in postconviction proceedings. See *Johnson I*, ¶4.

¶4 Johnson claims that he was sentenced on inaccurate information from his presentence investigation report, and that the trial court erroneously exercised its sentencing discretion by unfairly emphasizing the need for community protection at the expense of other factors. A postconviction movant must raise all grounds for postconviction relief on direct appeal (or in his or her original, supplemental or amended postconviction motion) unless, in a subsequent postconviction motion, he or she alleges a sufficient reason for failing to previously raise those issues. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). Johnson alleges ineffective assistance as his reason for failing to raise these sentencing issues in *Johnson I*.² Johnson elected to represent himself on direct appeal. His failure to properly preserve or raise the

² In his appellate brief, he elaborates on his reasons. It is too late however, to allege the reasons on appeal; they must be alleged in the postconviction motion. See WIS. STAT. § 974.06(4) (2003-04).

issues he elected to pursue in his direct appeal after he discharged postconviction/appellate counsel was the result of his own ineffectiveness, not the ineffectiveness of his former counsel. Considering the unsophisticated nature of his belated claims, of which he should have been readily aware at the conclusion of sentencing, Johnson did not adequately explain why he did not raise these issues at the same time he raised other sentencing issues *pro se* on direct appeal. We independently conclude that Johnson's reason for failing to raise these issues on direct appeal was not sufficient to overcome *Escalona's* procedural bar. See *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶5 Johnson also contends that these sexual assaults occurred on a military reservation, depriving this court of jurisdiction, a challenge that cannot be waived. We deny this challenge because it was insufficiently alleged, not because it was waived.

¶6 To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria.

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. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [*State v.*] *Bentley*, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. *Id.* at 310; *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to

support its decision by written opinion.” *Nelson*, 54 Wis. 2d at 498. *See Bentley*, 201 Wis. 2d at 318-19 (quoting the same).

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

As an assistance to defendants and their counsel, we propose that postconviction motions sufficient to meet the *Bentley* standard allege the five “w’s” and one “h”; that is, who, what, where, when, why, and how. A motion that alleges, within the four corners of the document itself, the kind of material factual objectivity we describe above will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant’s claim.

Id., ¶23 (footnote omitted).

¶7 The entirety of this allegation is that Johnson “has always maintained that these events were out [of] the authority of the Court because they occurred at the address of 5100 West Silver Spring Drive, with[in] the City of Milwaukee. The above listed location is that of the United State[s] Military Reservation.” This does not satisfy the requisites for a postconviction evidentiary hearing. *See id.*, ¶¶9, 23.

¶8 We consequently affirm the trial court’s order summarily denying Johnson’s postconviction motion. His knowing and voluntary election to discharge counsel waives his ineffective assistance claims. His claim regarding the insufficiency of proof of the victim’s age is barred by *Johnson I*. His sentencing claim is procedurally barred by *Escalona*. His jurisdictional claim is insufficient to warrant an evidentiary hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

