

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 17, 2007

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. 2005AP2730

Cir. Ct. No. 2002CF1607

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROY FITZPATRICK,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Roy Fitzpatrick appeals from the decision and order denying his motion for sentence modification. He argues that he is entitled to sentence modification and additional sentence credit, and that he received

ineffective assistance of appellate counsel. Because we conclude that the circuit court properly denied his motion, we affirm.

¶2 In 2002, Fitzpatrick pled no contest to one count of robbery with the use of force.¹ The court, taking into consideration his extensive criminal background, sentenced him to ten years of initial confinement and four years of extended supervision. Fitzpatrick then filed a motion for postconviction relief that was denied by the circuit court. On a direct appeal to this court, we affirmed the judgment and order. *State v. Fitzpatrick*, No. 2003AP2067-CR, unpublished slip op. (WI App June 30, 2004).

¶3 In 2005, Fitzpatrick filed, *pro se*, a second motion for postconviction relief seeking sentence modification. The circuit court denied the motion, finding that his claim that his sentence was harsh and excessive had been previously litigated, and thus was barred. The court also denied the claims that he was sentenced on inaccurate information and received ineffective assistance of appellate counsel. He appeals, arguing that his claim is not waived because he brought the motion pursuant to the court's inherent power to modify a sentence.

¶4 If the appellant's grounds "for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a sec. 974.06 motion." *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). Claims of error that could have been raised in the direct appeal or in a previous motion under WIS. STAT. § 974.06, cannot be raised in a subsequent § 974.06 motion unless the appellant offers a sufficient reason for

¹ He also pled guilty to six misdemeanors that are not part of this appeal.

failing to do so earlier. *State v. Lo*, 2003 WI 107, ¶15, 264 Wis. 2d 1, 665 N.W.2d 756. A claim of ineffective assistance of postconviction or appellate counsel may overcome the *Escalona* bar. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Generally, however, only when omitted issues are stronger than those presented will the presumption of effective assistance of appellate counsel be overcome. *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

¶5 In this case, Fitzpatrick challenged his sentence in his previous motion for postconviction relief. In our decision affirming his conviction, we concluded that his sentence was not unduly harsh or excessive. Since Fitzpatrick has already litigated this issue, he cannot do so again. Further, he has not specifically identified any of the grounds he argues as being a new factor. Nor has he established that he is entitled to bring these challenges as a WIS. STAT. § 974.06 motion. Because he has already brought a postconviction motion and a direct appeal, he must give a reason why he did not raise the claims earlier. He has not done that either.

¶6 Neither has he established that he received ineffective assistance of appellate counsel. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. *Id.* at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

¶7 Fitzpatrick’s allegations about his appellate counsel’s performance are conclusory, difficult to follow, and not supported by material facts. We agree with the circuit court that Fitzpatrick did not establish a viable claim for relief.

¶8 The circuit court also denied Fitzpatrick’s claim for additional sentence credit because he did not first bring that claim before the Department of Corrections. *See* WIS. STAT. § 973.155(5). We agree that he is required to bring the claim before that Department before pursuing it in the courts. Consequently, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

