

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 21, 2007**

A. John Voelker  
Acting 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. 2006AP284**

**Cir. Ct. No. 1996CF962703**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**KORY L. ELLIS,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
JOSEPH R. WALL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kory L. Ellis appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)<sup>1</sup> postconviction motion. Ellis claims

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

the trial court erred in denying his motion and argues that his motion was actually a motion seeking to modify his sentence, not a § 974.06 motion. Because Ellis's claim is procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), we affirm.

## BACKGROUND

¶2 In May 1997, after pleading guilty, Ellis was convicted of two counts of armed robbery while concealing identity as party to a crime. He was sentenced to two, twenty-year terms in prison, to be served consecutively, but the second term was stayed in favor of probation. After conviction, Ellis's counsel filed a no-merit appeal. We summarily affirmed the judgment in June 1998. The supreme court denied Ellis's petition for review.

¶3 In August 1999, Ellis filed a motion for postconviction relief under WIS. STAT. § 974.06. The trial court denied the motion and Ellis appealed. Ellis subsequently filed a notice of voluntary dismissal of the appeal, which we granted in October 1999. Shortly thereafter, Ellis filed a petition for *habeas corpus* pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), which we denied in November 1999.

¶4 In March 2000, Ellis filed a second WIS. STAT. § 974.06 motion, which was also denied by the trial court. Ellis appealed from the trial court order and we affirmed in April 2001. While this appeal was pending, Ellis filed a motion for sentence modification in the trial court in December 2000, alleging that he was sentenced on the basis of inaccurate information. The trial court denied the motion and we affirmed the trial court's order in June 2002.

¶5 In February 2003, Ellis filed a motion seeking to modify his sentence based on a new factor—namely, that the sentencing court mistakenly believed that Ellis had an ongoing substance abuse problem. The trial court denied this motion. Ellis filed a motion for reconsideration, which was also denied. Ellis then appealed from these orders to this court. We affirmed the trial court’s orders in January 2004.

¶6 In November 2005, Ellis filed another motion seeking sentence modification. He again claimed that a new factor existed. He alleged that the trial court considered information in Ellis’s juvenile file in violation of WIS. STAT. § 48.35(1)(b)1. (1995-96). The “new factor” was that the trial court, and all other parties, unknowingly overlooked this statute. The trial court construed this motion as another WIS. STAT. § 974.06 motion and denied it on the basis that it was procedurally barred. Ellis filed a motion for reconsideration in January 2006, which was also denied. Ellis now appeals.

## DISCUSSION

¶7 Ellis contends the trial court erred in construing his new factor/sentence modification motion as a WIS. STAT. § 974.06 motion. He claims that his motion was not a § 974.06 motion and therefore cannot be procedurally barred. We affirm the trial court’s decision denying Ellis’s motion on the grounds that his claim is procedurally barred.

¶8 The trial court ruled that Ellis’s motion was really an assertion that the trial court had erred in considering, at sentencing, information relating to Ellis’s juvenile record. Thus, his motion was, in actuality, a motion seeking postconviction relief under WIS. STAT. § 974.06, and thus procedurally barred. We agree with the trial court’s assessment.

¶9 Ellis raises a claim eight years after his sentencing, challenging the trial court's reference to his juvenile court record. Ellis was represented by counsel at the sentencing hearing. Neither Ellis nor his counsel objected to the trial court's use of his juvenile court record. Accordingly, Ellis waived any right to raise this issue. Thus, the only context in which Ellis could possibly have this claim heard would be to assert that his trial counsel provided ineffective assistance for failing to object. A claim of ineffective counsel is a constitutional issue, which is cognizable under WIS. STAT. § 974.06. Based on this analysis, we conclude that the trial court did not err in treating Ellis's motion as a § 974.06 claim. Moreover, we agree that Ellis's § 974.06 motion is procedurally barred.

¶10 Defendants are not permitted to pursue an endless succession of postconviction remedies:

We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

*Escalona-Naranjo*, 185 Wis. 2d at 185. Thus, claims which were raised previously, or could have been, but were not, raised in a prior postconviction motion or on direct appeal, are procedurally barred unless a sufficient reason for failing to raise the issue is presented. *Id.* “[D]ue process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error ....” *State ex rel. Macemon v. Christie*, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998).

¶11 Here, Ellis brought a direct appeal via the no-merit procedure<sup>2</sup> as well as two prior WIS. STAT. § 974.06 motions, two sentence modification motions, and a ***Knight*** petition. Enough is enough. Ellis fails to demonstrate that any sufficient reason exists for failing to raise the instant issue during any of his *six* earlier appeals. Based on the foregoing, we conclude that the trial court did not err in summarily denying Ellis's postconviction motion based on the procedural bar of ***Escalona-Naranjo***.

*By the Court.*—Order affirmed.

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

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<sup>2</sup> We have previously ruled that the *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) rules apply with equal force where the direct appeal was conducted pursuant to the no-merit process of WIS. STAT. RULE 809.32. See *State v. Tillman*, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574 (The *Escalona-Naranjo* procedural bar applies to defendants whose direct appeal was via the no-merit procedure, as long as the no-merit procedures were in fact followed, and the record demonstrates a sufficient degree of confidence in the result.). Here, the record demonstrates that the no-merit procedures were followed and a sufficient degree of confidence in the result.

