**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 13, 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. 2004AP3293** **Cir. Ct. No. 2000CF3833**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**THOMAS HARRIS,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Thomas Harris appeals *pro se* from a postconviction order summarily denying his motion for a new trial, and from a related reconsideration order. The issue is whether Harris's ineffective assistance claims should have been brought against appellate rather than postconviction

counsel, and thus, in a petition for a writ of habeas corpus pursuant to ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992), rather than as a postconviction motion pursuant to WIS. STAT. § 974.06 (2003-04) and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996).[1] Harris's two substantive claims (for the appointment of successor trial counsel and for presentence plea withdrawal) were preserved for but never raised on direct appeal. We therefore conclude that Harris's ineffective assistance claims are actually challenging the effectiveness of appellate not postconviction counsel. Consequently, we affirm the postconviction and reconsideration orders summarily denying Harris's ***Rothering*** and reconsideration motions without prejudice to his filing a ***Knight*** petition for a writ of habeas corpus to pursue these ineffective assistance of appellate counsel claims.

¶2 Harris entered no-contest pleas to first-degree reckless homicide while armed and first-degree reckless injury while armed, which were reduced incident to a plea bargain from first-degree intentional homicide and an attempt of that same offense.[2] For the homicide conviction, the trial court imposed a forty-five-year sentence comprised of twenty-five- and twenty-year respective periods of confinement and extended supervision; for the reckless injury conviction, it imposed a fifteen-year consecutive sentence comprised of ten- and five-year

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

[2] By entering no-contest pleas, Harris did not claim innocence, but implicitly acknowledged the sufficiency of the State's evidence to establish his guilt beyond a reasonable doubt. *See* WIS. STAT. § 971.06(1)(c) (1999-2000); *see also* ***Cross v. State***, 45 Wis. 2d 593, 598-99, 173 N.W.2d 589 (1970). The consequences of a no-contest plea are substantially similar to those of a guilty plea. *See* ***State v. Princess Cinema of Milwaukee, Inc.***, 96 Wis. 2d 646, 651, 292 N.W.2d 807 (1980).

respective periods of confinement and extended supervision. The sole postconviction challenge was to modify the sentences, which was also the subject of Harris's direct appeal. The trial court denied the postconviction motion, and this court affirmed the judgment and order on direct appeal. *See* ***State v. Harris***, No. 2002AP85-CR, unpublished slip op. at 2 (WI App May 6, 2003).

¶3 Harris then sought *pro se* postconviction relief, pursuant to WIS. STAT. § 974.06, claiming ineffective assistance of counsel for failing to challenge the trial court's orders denying Harris's pretrial motions for the appointment of successor trial counsel, and for presentence plea withdrawal. The trial court summarily denied the motion, ruling that these were ineffective assistance of appellate counsel claims and should have been brought in the appellate court pursuant to a ***Knight*** petition for a writ of habeas corpus. Harris moved for reconsideration, alleging that his claims had to be challenged in a postconviction motion before they could be considered on appeal. The trial court denied his reconsideration motion, explaining in more detail why Harris's claims were against appellate not postconviction counsel.

¶4 Harris's two substantive claims are counsel's failure to challenge the trial court's orders denying his motions for the appointment of successor trial counsel, and for presentence plea withdrawal. Harris mistakenly insists that he is challenging the effectiveness of postconviction not appellate counsel because: (1) he is challenging what occurred in the trial court, not what occurred on direct appeal; and (2) the orders he seeks to challenge require a postconviction motion to preserve them for appeal. Harris is wrong; although he is challenging what originally occurred in the trial court, it is the failure to raise these issues on direct appeal that is now being challenged because it is no longer necessary to preserve these challenges for appeal by postconviction motion. *See* WIS. STAT. RULE

809.30(2)(h); WIS. STAT. § 974.02(2), *overruling* ***State v. Monje***, 109 Wis. 2d 138, 153a, 327 N.W.2d 641 (1982) (per curiam opinion denying reconsideration motion).

¶5 Postconviction counsel was not ineffective for failing to raise these issues again in the trial court by postconviction motion; they had been preserved for appeal. *See* ***id.*** Harris's criticism, that these two issues were not further pursued, is therefore against appellate counsel for failing to raise them on direct appeal.

¶6 An ineffective assistance of appellate counsel claim must be pursued by a petition for a writ of habeas corpus filed in the court that decided the appeal involving counsel whose effectiveness is being challenged. *See* ***Knight***, 168 Wis. 2d at 521-22. Consequently, we affirm the trial court's orders denying Harris's WIS. STAT. § 974.06 motion.

¶7 The State opposed Harris's appeal strictly on procedural grounds. Consequently, it did not (and because of our result was not required to) brief the two substantive issues. Thus, we are not in a position to construe Harris's ***Rothering*** claims as ***Knight*** claims because the State is entitled to brief these substantive issues. Harris requests that, in the event we affirm the order on procedural rather than substantive grounds, we reinstate his direct appeal rights, or allow him to pursue these issues within sixty days in a ***Knight*** petition.[3]

[3] Harris also requests that this court "send the necessary forms and instructions on [how to file a ***Knight*** petition,]" if we affirm the trial court's orders but allow him an opportunity to challenge these two issues. ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). Although we do not offer legal advice, there is no particular form for a petition for a writ of habeas corpus pursuant to ***Knight***. Harris may simply file the same type of papers he filed for his postconviction motion, but identify in the caption that this is a petition for a writ of habeas corpus (continued)

¶8 We affirm the trial court's postconviction and related reconsideration orders on the procedural basis that they were misfiled as a postconviction motion pursuant to WIS. STAT. § 974.06; we have not reviewed the denial of Harris's motions for the appointment of successor trial counsel or presentence plea withdrawal on their respective merits. Consequently, Harris may petition this court for a writ of habeas corpus pursuant to ***Knight*** to challenge appellate counsel's effectiveness for failing to pursue these potential issues on direct appeal.[4]

*By the Court.*—Orders affirmed.

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

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alleging appellate counsel's ineffectiveness, pursuant to ***Knight***, for failing to raise and brief the two identified issues on direct appeal. The ineffective assistance analysis for appellate counsel involves the necessity to evaluate "whether appellate counsel's performance was deficient and prejudiced [Harris's] appeal." ***Id.*** at 521; *see* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We also enclose a copy of the ***Knight*** opinion to Harris for his convenient reference. Contrary to his appellate assertion, the trial court need not rule on these two issues again prior to this court's review on appeal. The trial court's orders and oral rulings (transcripts) on these issues are preserved for appellate review. *See* WIS. STAT. RULE 809.30(2)(h); WIS. STAT. § 974.02(2).

[4] If Harris is interested in pursuing these issues in a ***Knight*** petition filed directly with this court (and providing the Attorney General with a copy of his petition and any supporting documentation), we encourage him to do so promptly. He requests sixty days to file a ***Knight*** petition if we decide one is necessary. We do not establish a deadline for such a filing, but indicate that a petition filed within sixty days would be deemed timely, and that the timeliness of a petition filed more than sixty days from the date of this opinion should be considered in reference to the date of this opinion in which we notify Harris that a ***Knight*** petition is the appropriate method to challenge these two issues as ineffective assistance of appellate counsel claims.