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

**March 20, 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. 2005AP2927** **Cir. Ct. No. 2001CF6620**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES A. NEWSON,**

**DEFENDANT-APPELLANT.**

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

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

¶1 PER CURIAM. James Newson appeals from an order denying his motion for postconviction relief. He argues that he received ineffective assistance of trial and postconviction counsel because neither one pursued the issue of

whether the State had failed to preserve exculpatory evidence. Because we conclude that the State did not have a duty to preserve the evidence, we affirm.

¶2 In 2001, a jury convicted Newson of one count of possession of more than 100 grams of cocaine, one count of keeping a drug vehicle, and one count of failure to purchase a drug tax stamp. He filed a postconviction motion alleging that he received ineffective assistance of trial counsel because trial counsel did not move to suppress the evidence obtained from a white van. This court affirmed the conviction and the order denying his motion for postconviction relief. ***State v. Newson***, No. 2004AP469-CR, unpublished slip op. (WI App Jan. 25, 2005).

¶3 Newson then filed a motion under WIS. STAT. § 974.06 (2003-04),[1] alleging that he received ineffective assistance of trial and postconviction counsel because they failed to file or pursue a motion to dismiss asserting that the State failed to preserve his cell phone and the van in which the cocaine was found. He claimed that he would have been able to prove that he did not have a key that opened the van's door, and that the cell phone would have provided a record of his incoming and outgoing calls. The circuit court denied the motion.

¶4 Generally, appellants must raise all of their grounds for relief in their initial postconviction motion or direct appeal, unless they offer a sufficient reason for not having raised it previously. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A claim of ineffective assistance of postconviction or appellate counsel, however, may overcome the ***Escalona*** bar. ***State ex rel.***

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

***Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Because Newson is alleging ineffective assistance of postconviction counsel, we will address the merits of his argument.

¶5 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.*** Counsel is not ineffective for failing to make meritless arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶6 The first step, then, is to determine whether Newson's trial and postconviction counsel were ineffective for failing to pursue a claim that the State destroyed exculpatory evidence.

> A defendant's right of pretrial access to exculpatory evidence needed to prepare a defense is protected by the Due Process Clause of the Fourteenth Amendment. ***State v. Greenwold***, 181 Wis. 2d 881, 885, 512 N.W.2d 237 (Ct. App. 1994). The defendant's due process rights are violated by the destruction of evidence if: (1) the evidence destroyed is apparently exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means; or (2) if the evidence was potentially exculpatory and was destroyed in bad faith. ***Id.*** at 885-86.

***State v. Noble***, 2001 WI App 145, ¶17, 246 Wis. 2d 533, 629 N.W.2d 317, *rev'd on other grounds*, 2002 WI 64, 253 Wis. 2d 206, 646 N.W.2d 38. Further, the State's duty to disclose exculpatory evidence applies only to that evidence within its exclusive possession. ***State v. Armstrong***, 110 Wis. 2d 555, 580, 329 N.W.2d 386 (1983).

¶7 Newson did not establish that the evidence was within the State's possession, or that the State destroyed the evidence. The testimony at his trial was that the police had the van towed to a lot and that it was later picked up by a person named "Sean P. Newson." The police report stated that Newson said the van belonged to his cousin, but he had been using it. An officer also testified at trial that they returned Newson's cell phone to him on the day he was arrested. Because Newson has not established that the evidence was within the State's possession, he cannot establish that the State had a duty to disclose it to him. Consequently, neither trial nor postconviction counsel were ineffective for failing to make an argument on this basis. We agree with the circuit court that Newson did not establish that he received ineffective assistance of counsel. For the reasons stated, 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.