

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 17, 2007

David R. Schanker
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. 2005AP2345

Cir. Ct. No. 1986CF6292

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RAY FREDRIC WERNS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
ELSA C. LAMELAS, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Ray Fredric Werns appeals from postconviction orders summarily denying his motions for a new trial and for reconsideration. The issue is whether Werns's belated realizations of the significance of the multitude of issues he raises in support of his motion for a new trial are sufficient to

overcome the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). We conclude that Werns's reasons are not sufficient to overcome *Escalona*'s procedural bar because he has not received any additional documentation since before he filed his most recent petition in 2003. Therefore, we affirm.

¶2 A jury convicted Werns of two counts of attempted first-degree murder; the trial court imposed two twenty-year consecutive sentences. Werns challenged his trial counsel's effectiveness by postconviction motion. On direct appeal, Werns claimed that he was denied due process of law because the jury became aware of a newspaper article about the trial; he also challenged the sufficiency of the evidence, and trial counsel's effectiveness. This court rejected those challenges, and affirmed the judgment of conviction and the postconviction order. *See State v. Werns*, No. 88-2344-CR, unpublished slip op. (Wis. Ct. App. Sept. 1, 1989) ("*Werns I*").

¶3 Werns then sought sentence modification, which the trial court denied. This court affirmed the trial court's order denying sentence modification. *See State v. Werns*, No. 97-0799-CR, unpublished order (Wis. Ct. App. Oct. 16, 1998) ("*Werns II*").

¶4 Werns also filed a petition for a writ of habeas corpus, challenging appellate counsel's effectiveness for failing to raise trial counsel's failures to adequately pursue: (1) the admissibility of a custodial statement; (2) the credibility of psychiatric evaluations; and (3) the sufficiency of the evidence. This court rejected those challenges and denied the petition. *See State ex rel. Werns v. Smith*, No. 97-1543-W, unpublished order (Wis. Ct. App. July 24, 1992) ("*Werns III*").

¶5 Werns filed a second petition for a writ of habeas corpus, renewing his previous challenges. This court affirmed the order dismissing the petition on the basis of *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (we will not revisit previously rejected issues), and *State ex rel. Schmidt v. Cooke*, 180 Wis. 2d 187, 189-90, 509 N.W.2d 96 (Ct. App. 1993) (a defendant is limited to a single habeas corpus petition alleging the ineffectiveness of appellate counsel absent a sufficient reason for failing to raise the current challenge in the first petition). See *State ex rel. Werns v. State*, No. 2003AP793, unpublished slip op. at 2-3 (WI App Nov. 11, 2003) (“*Werns IV*”).

¶6 Werns now files a motion for a new trial challenging: (1) the sufficiency of the complaint; (2) his confession; (3) trial counsel’s alleged failure to “fully investigate”; (4) the trial court’s alleged ex parte communications with expert witnesses; (5) the alleged failure to disclose an expert’s exculpatory report; (6) the trial court’s alleged instruction to the expert not to file a written report until five days before trial; (7) the alleged denial of Werns’s right to personally participate in *voir dire*; (8) a variety of alleged due process violations; and (9) instances of alleged ineffective assistance of trial counsel. In that motion, Werns also seeks sentence modification on alleged new factors, namely a combination of his mental status and several of the previously alleged issues, such as the alleged failure to disclose, and alleged denials of due process. Werns alleges that he did not know about the referenced report until 2000, and it took him “this long” to figure out its significance. The trial court summarily denied his motion as procedurally barred, and denied his reconsideration motion because he raised nothing to persuade the trial court otherwise.

¶7 To avoid the procedural bar of *Escalona*, which requires a sufficient reason for failing to raise all postconviction challenges on direct appeal or in

defendant's original, supplemental or amended postconviction motion, Werns alleges that he was unable to previously raise some of these claims because he did not know about the most recent report until 2000 (despite his allegation that he was given that report in August of 1993), and that it took him "this long" to understand other claims because he was "deliberately" denied due process. Whether *Escalona*'s procedural bar applies to a postconviction claim is a question of law entitled to independent review. See *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶8 Werns's reasons are insufficient. This is Werns's fifth challenge to his judgment of conviction. His most recent challenge was his second habeas corpus petition, filed in 2003, three years following his claimed awareness of some of these issues. We affirmed the dismissal of Werns's second habeas corpus petition in *Werns IV*, as procedurally barred, among other reasons. See *Werns IV*, No. 2003AP793, unpublished slip op. at 2-3. The only arguable reason he has alleged for failing to raise these issues in *Werns IV* (in 2003), is that it took him "this long" to fully understand the significance of his challenges.¹ First, some of these issues are variations of related issues that he had raised previously. Second, any *pro se* litigant could allege this same reason, which does not foreclose subsequent motions, predicated on taking even longer to figure out these issues more fully, thereby circumventing *Escalona*'s procedural bar. See *id.*, 185

¹ Werns refers to the records from the Milwaukee County Mental Health Complex (in the trial court record) and the report Werns claims he still does not have (from Dr. Joseph B. Layde, who allegedly examined Werns on intake at the Milwaukee County Jail); he has not shown that there is a reasonable probability that the alleged disclosure of the records or Dr. Layde's report (assuming one exists) would have resulted in a different outcome. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Wis. 2d at 185-86. We cannot condone these reasons as sufficient.² If we did, we would negate *Escalona*'s procedural bar. *See also* WIS. STAT. § 974.06(4) (2005-06); *Schmidt*, 180 Wis. 2d at 189-90.

¶9 Werns knew or should have known about most of these issues at the time of his direct appeal, if not shortly thereafter, but certainly before he filed his second habeas corpus petition in 2003 (*Werns IV*). Werns should have alleged a sufficient reason for failing to raise these issues in *Werns IV*. Werns's reasons for failing to raise these issues in *Werns IV* are woefully insufficient and do not overcome *Escalona*'s procedural bar. Similarly, his allegations on reconsideration are insufficient.³ Consequently, we also affirm the trial court's order denying Werns's reconsideration motion.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

² Werns seemingly had the report he challenges since August of 1993. Consequently, we are not confident that he was not aware of this report considerably before 2000, although we afford Werns the benefit of the doubt by accepting his allegation of 2000.

³ Insofar as Werns alleges (on reconsideration) other reasons for his failure to raise these issues previously, WIS. STAT. § 974.06(4) (2005-06) requires the reason to be alleged in the motion itself, not thereafter, on reconsideration, or on appeal. Werns cites *State v. Sharlow*, 106 Wis. 2d 440, 444-45, 317 N.W.2d 150 (Ct. App. 1982), *aff'd*, 110 Wis. 2d 226, 327 N.W.2d 692 (1983); we procedurally bar consideration of the issues Werns raises on a different basis than that addressed in *Sharlow*. Werns's current issues are procedurally barred because his current reasons for failing to raise them previously (in *Werns I* through *IV*) are insufficient.

