

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 11, 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. 2007AP797**

**Cir. Ct. No. 1994CM410515**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**PRIEST JOHNSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
MARSHALL B. MURRAY, Judge. *Affirmed.*

¶1 CURLEY, P.J.<sup>1</sup> Priest Johnson, *pro se*, appeals the order denying his postconviction motion. He contends that the trial court erred in holding that *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), bars

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06).

his current WIS. STAT. § 974.06 (2005-06) motion.<sup>2</sup> He submits that because his earlier pleading was a writ of *coram nobis*, his newly-filed § 974.06 motion is not subject to the *Escalona* bar, and he cites *State v. Heimermann*, 205 Wis. 2d 376, 556 N.W.2d 756 (Ct. App. 1996), as support. Because the issues that Johnson raises now are identical to those decided in his writ of *coram nobis*, and § 974.06 prohibits the bringing of a motion if the issue has already been adjudicated, this court affirms the trial court, but on other grounds.<sup>3</sup>

### I. BACKGROUND.

¶2 In 1994, Johnson was charged with impersonating a peace officer and two counts of carrying a concealed weapon (he possessed both a starter pistol and a knife). In early 1995, Johnson entered into a plea negotiation. In exchange for Johnson's pleading guilty, the State amended the charge of impersonating a peace officer to one of operating as a private detective without a license, contrary to WIS. STAT. § 440.26 (1993-94), and the State dismissed the carrying a concealed weapon charge for possessing a knife.<sup>4</sup> He was found guilty, and he was sentenced to six months in the House of Correction and a \$100 fine on count one, and sixty days in the House of Correction, consecutive to any other sentence,

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

<sup>3</sup> We may affirm a trial court's decision even if the lower court reached its result for different reasons. See *State v. Tolefree*, 209 Wis. 2d 421, 424 n.3, 563 N.W.2d 175 (Ct. App. 1997).

<sup>4</sup> In *State v. Johnson*, No. 2005AP1515, unpublished slip op. ¶3 (Mar. 28, 2006), this court wrote that Johnson pled guilty to an amended charge of operating as a private detective without a license, contrary to WIS. STAT. § 440.26 (1995-96). This discrepancy has no effect on the outcome of either Johnson's prior appeal to this court or his present appeal.

on count two. The trial court then stayed the sentence and placed Johnson on probation for three years. No direct appeal was ever filed.

¶3 In 2005, Johnson filed a petition for a writ of *coram nobis*. Presumably sometime after being placed on probation, Johnson's probation was revoked. Also, Johnson must have been convicted of other crimes, as he was incarcerated at the time he brought the writ; however, nothing in the record confirms this. The trial court denied the petition and also denied Johnson's two motions for reconsideration. Johnson appealed the trial court's order and this court affirmed. See *State v. Johnson*, No. 2005AP1515, unpublished slip op. (Mar. 28, 2006). On March 6, 2007, Johnson filed a postconviction motion pursuant to WIS. STAT. § 974.06. The trial court denied the motion, citing *Escalona*, and concluded that his § 974.06 motion is barred. This appeal follows.

## II. ANALYSIS.

¶4 Johnson argues that the trial court erred in ruling that his WIS. STAT. § 974.06 motion was barred on *Escalona* grounds. He submits that his seeking a writ of *coram nobis* earlier in time did not trigger the *Escalona* bar. In his § 974.06 motion, he argues that his trial attorney was ineffective for "failing to move to dismiss the charges of operating as a private detective without a license and carrying a concealed weapon, a starter pistol." Finally, he contends that the lack of transcripts "is not fatal to [his] claims."

¶5 Whether *Escalona* bars Johnson from bringing a postconviction motion pursuant to WIS. STAT. § 974.06 is a question of law. See *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). Johnson argues that *Heimermann* supports his contention. *Heimermann* does stand for the proposition that a writ of *coram nobis*, brought after a postconviction motion was

denied, was not subject to the *Escalona* bar. *Heimermann*, 205 Wis. 2d at 380. However, the facts there were quite different. Heimermann filed a postconviction motion while he was on probation. *Id.* at 380. The motion was denied. *Id.* at 381. After he was discharged from probation, he petitioned for a writ of *coram nobis*. *Id.* In reversing the trial court, this court explained that after his release from custody, the § 974.06 remedies were no longer available to Heimermann and his only avenue to challenge what had occurred was via the writ of *coram nobis*. *Id.* at 385-86. In contrast, Johnson brought his writ of *coram nobis* first and then filed a § 974.06 motion, claiming that when he brought the earlier motion he thought that he had already served the sentences in this case and only subsequently learned that the sentences in this case would not be served until some time later.<sup>5</sup> Even if this court agrees with him that his filing a writ of *coram nobis* did not bar his bringing a § 974.06 motion, there is another reason why the trial court correctly refused to entertain his motion. This is so because the issues he raises have previously been litigated and have been found to be meritless.

¶6 In his original writ of *coram nobis*, Johnson raised two issues. First, he argued that the charge of operating as a private detective without a license to which he pled guilty did not apply to him because, pursuant to WIS. STAT. § 440.26(5)(b) (1997-98), he was working for a commercial establishment which is an exception to the statute prohibiting one from working as a private detective without a license.<sup>6</sup> Second, he claimed that the charge of carrying a concealed

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<sup>5</sup> It should be noted that there is no documentation in the file supporting any of Johnson's contentions concerning his prison status.

<sup>6</sup> As the State points out in its brief, Johnson relies on language in WIS. STAT. § 440.26(5)(b) (1997-98), which was not present in the version that was in effect when he was charged.

weapon did not apply to a starter pistol. In his WIS. STAT. § 974.06 motion, he submitted that his attorney's failure to discover that he was exempt from the licensing regulations and failure to move to dismiss the charge of carrying a concealed weapon because, in his opinion, to be charged with carrying a starter pistol you need to show "an underlying nexus deal[ing] with some form of either armed robbery or a crime of violence," constituted ineffective assistance of counsel.

¶7 In the decision addressing Johnson's first motion to reconsider its denial of the writ of *coram nobis*, the trial court addressed both contentions. As to the first, the trial court wrote: "Although the defendant claims that he was working as a special investigator for Walgreens at the time of his arrest, there is no evidence that he was working for Walgreens or any other commercial establishment." In addressing the second issue, the trial court commented that:

The question of whether the starter pistol could be a dangerous weapon is one of law and not of fact. State v. Antes, 74 Wis. 2d 317[, 246 N.W.2d 671] (1976)[,] observed that a starter pistol which could not discharge a bullet was still a dangerous weapon because it *could* be used as a bludgeon and because it had the appearance of a lethal gun. [Id.] 74 Wis. 2d at 326 (quoting Boyles v. State, 46 Wis. 2d 473, 477[, 175 N.W.2d 277] (1970)).

Thus, both issues have been addressed previously and determined to be without merit.

¶8 WISCONSIN STAT. § 974.06(4) provides that "[a]ll grounds for relief available to a prisoner under this section must be raised in his original, supplemental or amended motion. Any ground finally adjudicated ... may not be the basis for a subsequent motion..." That language bars Johnson from obtaining a second hearing under § 974.06 on the issues decided in his motion to reconsider

the denial of his writ of *coram nobis*. Moreover, if, as Johnson now alleges in his brief, he has served his sentences for these crimes, “This has since be[en] corrected from the appellant’s understanding, an[d] now the appellant has reached his [mandatory release] on the case at bar, but will not finish serving the rest of the sentence until sometime in the 2021 or thereabout,” and he is no longer in custody in this case, then he would not be eligible for § 974.06 remedies. His only recourse in that event would be a writ of *coram nobis*, but he has already filed and obtained a determination on the issues he raises now. He is not entitled to a second writ of *coram nobis* based on the identical issues raised previously. Thus, for the reasons stated, the trial court is affirmed, albeit on other grounds. Because of our decision on this first issue, it is not necessary for us to address the remaining arguments. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

