

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 17, 2002**

Cornelia G. Clark  
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. 00-2790**

**Cir. Ct. No. 97-CV-407B**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE COMMITMENT OF FRANK A. NORMINGTON:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**FRANK A. NORMINGTON,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Rock County:  
JAMES E. WELKER, Judge. *Affirmed.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Frank Normington appeals from an order denying his motion for relief under WIS. STAT. § 806.07 (1999-2000)<sup>1</sup> from an order of commitment under WIS. STAT. ch. 980. We affirm.

¶2 Normington was found to be a sexually violent person and ordered committed in April 1998. On appeal, we affirmed the order in May 1999. Normington sought discretionary review in higher courts, which was denied in November 1999. In August 2000 he filed a motion for relief from the commitment order under WIS. STAT. § 806.07. That motion was denied, and Normington now appeals.

¶3 Normington argues that the commitment order must be vacated because the State failed to prove that he was within ninety days of release when the petition for commitment was filed. However, after this appeal was briefed, we held that this issue can be raised only by persons whose cases were on direct appeal and not finalized as of June 23, 2000. *State v. Thiel*, 2001 WI App 52, ¶1, ¶19, 241 Wis. 2d 439, 625 N.W.2d 321. Normington's direct appeal was finalized in November 1999, and therefore he cannot raise this issue.

¶4 Normington also argues that he should be granted relief from the commitment order, under WIS. STAT. § 806.07, because his trial counsel was ineffective by not moving to strike a juror for cause during *voir dire*. His attorney did, however, remove this juror with a peremptory strike.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶5 The State argues that if Normington's motion under WIS. STAT. § 806.07 is seen as analogous to a motion under WIS. STAT. § 974.06 in a criminal case, we should hold that he waived his right to raise this issue under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because he did not either raise the issue in his first appeal, or allege now a sufficient reason for why he did not raise it earlier. We choose to address the merits.<sup>2</sup>

¶6 On the merits, the State argues that the circuit court's decision to deny Normington's claim of ineffective assistance should be reviewed using the discretionary standard usually applied to motions brought under WIS. STAT. § 806.07 in civil cases. This raises another potential issue, as to the proper standard of review, but we need not consider that because we would affirm under any standard of review.

¶7 Defendants in WIS. STAT. ch. 980 proceedings have a right to effective assistance of counsel. See WIS. STAT. 980.03(2)(a); *A.S. v. State*, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). To establish ineffective assistance of counsel, a person must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To allege prejudice in this case, Normington relies on *State v. Ramos*, 211 Wis. 2d 12, 16, 564 N.W.2d 328 (1997), which held that the defendant's use of a peremptory challenge to correct a trial court error is adequate grounds for reversal

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<sup>2</sup> Proceedings under WIS. STAT. ch. 980 are civil, not criminal. See *State v. Thiel*, 2001 WI App 52, ¶9, 241 Wis. 2d 439, 625 N.W.2d 321. Therefore, *Escalona-Naranjo* does not have any application to these proceedings, because its conclusion was based on an interpretation of a statute that applies only to criminal cases, WIS. STAT. § 974.06(4). Normington's motion is made under WIS. STAT. § 806.07, a statute applying generally to civil cases, and which contains no similar limitation on successive motions. The State's argument is, essentially, that we should create such a limitation.

because it arbitrarily deprives the defendant of his right to exercise all of his peremptory challenges. However, after the present case was briefed, *State v. Lindell*, 2001 WI 108, ¶52, 245 Wis. 2d 689, 629 N.W.2d 223, overruled *Ramos*. Under *Lindell*, the focus is instead on whether the error has affected the substantial rights of the party. *Id.* at ¶111. The court concluded that the substantial rights of a party are not affected or impaired when a defendant chooses to exercise a single peremptory strike to correct a circuit court error. *Id.* at 113. In the present case, Normington removed the juror in question with a peremptory strike. Therefore, Normington was not prejudiced by his counsel's failure to make a motion to strike one juror for cause.

*By the Court.*—Order affirmed.

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

