

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 29, 2008

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. 2006AP2150

Cir. Ct. No. 2000CF6272

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL D. BURNS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Michael D. Burns appeals from an order summarily denying his postconviction motion. The issue is whether the claimed ineffective assistance of postconviction/appellate counsel for failing to challenge trial counsel's effectiveness at sentencing constitutes a sufficient reason to

overcome the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). We conclude that Burns's conclusory allegation for failing to raise this issue on direct appeal does not justify a delay of over three years and five months. Therefore, his motion is procedurally barred; we affirm.

¶2 Following a bench trial, Burns was convicted of first-degree sexual assault of a child, the eleven-year-old girlfriend of his girlfriend's young daughter. The trial court imposed a twenty-five-year sentence, comprised of fifteen- and ten-year respective periods of initial confinement and extended supervision.

¶3 On direct appeal, Burns contended that he was entitled to a new trial because of: (1) newly discovered evidence; (2) the ineffective assistance of trial counsel; and (3) insufficient evidence to support his conviction. Burns alleged that trial counsel was ineffective in a variety of ways, which were characterized as counsel's alleged failure to fully cross-examine the victim on a number of topics, and for advising Burns to waive his right to a jury trial because the trial court had excluded *in limine* other-acts evidence, namely that Burns had previously told police that he had sexually assaulted his own daughters when they were about the same age as this victim. Burns contended that the trial court's ruling to exclude this other-acts evidence *in limine* would not have been known to a jury, whereas the trial court's awareness of such unfairly prejudicial information improperly influenced it to wrongfully convict him, particularly when there was insufficient evidence against him.

¶4 In its order denying Burns's original postconviction motion, the trial court explained extensively why it rejected his ineffective assistance and other-acts evidence claims. It also explained that it found the victim "highly credible in comparison with the defendant's testimony or his son's testimony." In sum, the

trial court explained that it convicted Burns on the basis of the victim's testimony that the person who assaulted her had "beer breath, cigarette breath, [a] mustache, kiss[ed her] on the lips, and the[n] kiss[ed her] on the forehead[, which] was the signature of one person in that house and one person alone and that was the defendant, Michael Burns." On direct appeal, we affirmed the judgment and postconviction order. *See State v. Burns*, No. 2002AP1045-CR, unpublished slip op. (WI App Dec. 5, 2002).

¶5 Over three years later, Burns moved for postconviction relief on the basis of ineffective assistance of counsel for failing to raise trial counsel's ineffectiveness. To avoid *Escalona's* procedural bar in a subsequent postconviction motion, Burns must allege a sufficient reason for failing to have previously raised all grounds for postconviction relief on direct appeal or in his original postconviction motion. *See Escalona*, 185 Wis. 2d at 185-86. 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). To overcome *Escalona's* procedural bar, Burns alleged: "That sufficient reason is the ineffective assistance of postconviction counsel ... for failing to raise the issue on appeal, that the sentencing court relied on erroneous information in sentencing the defendant."¹

¹ Burns's other alleged reasons addressed an unrelated concern, namely that Burns's correspondence that was previously construed as a postconviction motion pursuant to WIS. STAT. § 974.06(4) (2003-04), should not constitute a procedural bar to the postconviction motion underlying this appeal. We do not, and the trial court that denied the current postconviction motion did not, consider that correspondence as a procedural bar; the referenced procedural bar relates to Burns's failure to previously raise these issues on direct appeal, or to explain why it took him years to do so.

Burns raised other issues (such as the alleged failure of trial counsel to conduct a factual investigation, the admissibility of his polygraph test results, the references during pre-trial and

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¶6 Burns raises two identifiable sentencing issues: (1) the trial court’s allegedly “erroneous inferences” and alleged reliance on inaccurate information at sentencing to which trial counsel failed to object; and (2) the trial court’s consideration of the same other-acts evidence at sentencing that it excluded *in limine* from the State’s case-in-chief at trial. We independently conclude that Burns’s conclusory allegation of postconviction/appellate counsel’s ineffectiveness (in failing to challenge trial counsel’s effectiveness) is insufficient to overcome *Escalona*’s procedural bar because in the instances that postconviction/appellate counsel was even arguably ineffective, Burns does not allege why a two-year, five-month delay in pursuing this alleged ineffectiveness was justified.² See *Tolefree*, 209 Wis. 2d at 424.

trial proceedings to other-acts evidence, and the alleged denial of his right to a fair trial); however, he limited his alleged reason under *Escalona* to sentencing issues. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Even if we were to include the non-sentencing issues in our consideration of Burns’s alleged reason (ineffective assistance) for failing to previously or adequately raise all of the issues in his current postconviction motion, it would be insufficient to overcome *Escalona*’s procedural bar because he did not explain why a two-and-a-half- to three-and-a-half-year delay was justified.

Burns also raised, renewed and recharacterized related issues, blurring the distinction between raising a “new” issue, renewing an issue or an aspect of an issue that we had previously decided, or more fully developing an issue that he had previously raised. See WIS. STAT. § 974.06(4) (“Any ground finally adjudicated or not so raised ... may not be the basis for a subsequent motion, unless the court finds a ... sufficient reason” for failing to previously raise the issue); *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (we will not revisit previously rejected issues). Regardless of whether the precise issue or characterization has been previously decided, raised, or never raised, Burns’s alleged reason does not explain why he waited two to three years to raise, renew or recharacterize these issues in his current *pro se* postconviction motion, and is thus, insufficient to overcome *Escalona*’s procedural bar.

² Burns refers to a *pro se* postconviction motion he submitted to the trial court that was rejected for filing because it exceeded the page limitations for postconviction motions pursuant to WIS. STAT. § 974.06 (2003-04). See Milwaukee County Circuit Court Local Rule 427. In his current postconviction motion, he claimed that the trial court did not return that motion to him until February 5, 2004 (three days after he claimed to have submitted it). If we accept the one year delay from remittitur to the submission of that motion, Burns has still not explained why a delay of over two years and five months was a justified excuse under *Escalona*, particularly when

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¶7 Burns was at the sentencing hearing and should have been aware of those allegedly erroneous assumptions and inaccurate information at sentencing or certainly by the time of his direct appeal. He fails to allege any reason for the two-and-a-half- to three-and-a-half-year delay in pursuing this claim that is now procedurally barred by *Escalona*.

¶8 The second sentencing issue challenges the trial court's alleged reliance on the other-acts evidence when it sentenced Burns. Burns should have been aware of this alleged reliance on the other-acts evidence when he was sentenced. Over five years elapsed between Burns's sentencing and his current postconviction motion. Burns does not allege in his postconviction motion why such a lengthy delay was warranted to raise this issue.

¶9 The trial court rejected the merits of this issue in its postconviction order. It explained, with citations to legal authority, that other-acts evidence may be considered at sentencing as evidence of the defendant's character. *E.g.*, *State v. Damaske*, 212 Wis. 2d 169, 195-96, 567 N.W.2d 905 (Ct. App. 1997). It further explained that "[t]here is no indication that [the trial court] relied on this information in [its] trial decision, having previously excluded it as evidence."³ *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). We will not repeat the two previous multi-page postconviction explanations here.

Burns's motion was rejected as over length; presumably, he could have simply revised the motion to reduce its length and resubmitted it for filing. We consequently refer to the delay as either three years and five months (from remittitur), or two years and five months (to account for the previously submitted but returned over length *pro se* 2004 postconviction motion).

³ To summarize, in its original postconviction order denying Burns's motion for a new trial, the trial court explained that "[it] did not base its decision on the possibility that the defendant had previously assaulted his daughters; it had no need to. All of the evidence in this case pointed to the defendant as the person who assaulted [the victim]." (Emphasis in original.)

¶10 Insofar as Burns alleges any reason to overcome *Escalona*'s procedural bar, he does not explain the several year delay in seeking postconviction relief. Consequently, his postconviction motion is procedurally barred. *See Escalona*, 185 Wis. 2d at 181-82; WIS. STAT. § 974.06(4).

By the Court.—Order affirmed.

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

