

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 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. 2006AP746

Cir. Ct. No. 1987CF7798

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDDIE DEAN CANNON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer¹ and Kessler, JJ.

¹ This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 PER CURIAM. Eddie D. Cannon appeals, *pro se*, from an order denying his WIS. STAT. § 974.06 (2005-06)² motion. He claims that the trial court erred in summarily denying his contention that postconviction counsel provided ineffective assistance. Because Cannon's claims are procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), we affirm.

BACKGROUND

¶2 In 1990, Cannon was convicted for possession of cocaine with intent to deliver, while armed, and possession of a firearm by a felon. He was sentenced to thirty years on the drug charge and a two-year consecutive prison term on the firearm charge. His first appeal was dismissed to allow postconviction proceedings in the trial court. With the assistance of counsel, Cannon filed a postconviction motion seeking a new trial on the grounds that trial counsel provided ineffective assistance. The trial court summarily denied the motion.

¶3 Cannon then appealed to this court and we summarily reversed the trial court's order, and remanded the matter for a *Machner*³ hearing. Following the evidentiary hearing on remand from this court, the trial court ruled that Cannon's attorney provided effective assistance, and therefore denied the motion. Cannon then filed his direct appeal from the judgment and the order with this court. We affirmed the judgment and order in an unpublished opinion, *see State v. Cannon*, No. 93-0129, unpublished slip op. (Feb. 15, 1994), rejecting Cannon's claims that: (1) the trial court erred in admitting incriminating photographs; (2)

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

³ *State v. Machner*, 101 Wis. 2d 79, 303 N.W.2d 633 (1981).

the trial court erred in not allowing the disclosure of a confidential informant; (3) the trial court erred in allowing incriminating statements into evidence; (4) there was insufficient evidence; (5) trial counsel was ineffective; and (6) the trial court improperly applied sentence enhancers.

¶4 Following this court's affirmance, Cannon filed a petition seeking review with the supreme court, which was denied. Two years later, Cannon initiated additional proceedings wherein he sought the return of property that was seized in the case. His request asserted that all appeals and post-conviction relief proceedings had been concluded. These proceedings continued, but are not particularly relevant to the instant appeal. In March 1998, Cannon filed a federal habeas corpus petition, which was denied as untimely by the federal district court.

¶5 In February 2006, more than twelve years after this court affirmed Cannon's direct appeal, he filed a WIS. STAT. § 974.06 motion in the trial court. He alleged that his trial counsel provided ineffective assistance, that appellate counsel was ineffective for failing to assert certain instances of trial counsel's ineffectiveness and that his due process rights were violated. The motion also specified which of these claims had been previously raised and rejected in the Wisconsin courts and which claims had not previously been raised. The motion, however, failed to specify any reason why the claims had not been previously raised. The trial court denied the motion. Cannon now appeals.

DISCUSSION

¶6 Cannon claims that the trial court erred in denying his motion. We are not convinced. Defendants are not permitted to pursue an endless succession of postconviction remedies:

We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

Escalona-Naranjo, 185 Wis. 2d at 185. Thus, claims which were raised previously, or could have been, but were not, raised in a prior postconviction motion or on direct appeal, are procedurally barred unless a sufficient reason for failing to raise the issue is presented. *Id.* “[D]ue process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error.” *State ex rel. Macemon v. Christie*, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). Cannon presents no reason at all, let alone a *sufficient* reason for failing to raise this claim during his direct appeal.

¶7 Although postconviction ineffective assistance of counsel may constitute a “sufficient reason” to avoid the procedural *Escalona-Naranjo* bar, see *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996), Cannon failed to allege this as a sufficient reason. Moreover, when a defendant claims ineffective assistance of postconviction counsel on the basis of a failure to assert trial counsel’s ineffectiveness, the defendant must first establish that trial counsel provided ineffective assistance. *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 (“to establish that postconviction or appellate counsel was ineffective, a defendant bears the burden of proving that trial counsel’s performance was deficient and prejudicial”).

¶8 Here, Cannon’s claims of appellate ineffectiveness are entirely conclusory and legally insufficient. He asserts that appellate counsel was ineffective for failing to raise several instances of trial counsel ineffectiveness. However, he fails to allege any factual detail or support his claim with any

evidentiary support. We also note, as indicated above, that ineffectiveness of trial counsel was raised and an extensive evidentiary hearing on that claim was conducted in 1992. Both the trial court and this court found that Cannon failed to prove that his trial counsel provided ineffective assistance. Accordingly, Cannon's attempts now to argue that appellate counsel provided ineffective assistance for failing to raise instances of ineffective assistance of trial counsel are without merit. Trial counsel's alleged ineffective assistance was raised and rejected. Cannon is not, therefore, entitled to re-raise this issue again here.

¶19 Likewise, Cannon's claim of due process violations were either previously raised or could have been previously raised. He offers no reason for his failure to assert due process violations in his earlier appeal or postconviction proceedings. Accordingly, his claims are procedurally barred by *Escalona-Naranjo*.

By the Court.—Order affirmed.

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

