

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 2009

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. 2007AP2982

STATE OF WISCONSIN

Cir. Ct. No. 1992CF924231

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS IVERY REESE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Thomas Ivery Reese appeals from an order denying his motion for postconviction relief. The issue is whether Reese is entitled to an evidentiary hearing on his ineffective assistance of counsel and sentence modification claims. We conclude that Reese's belated claims are

procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). Therefore, we affirm.

¶2 In 1993, Reese pled guilty to the first-degree sexual assault of a child. The trial court withheld sentence and imposed a five-year term of probation. Reese did not appeal.

¶3 In 1997, Reese's probation was ordered revoked and he was returned to the trial court, which imposed a seventeen-year sentence to run concurrent to another sentence. Reese did not appeal.

¶4 In 2003, Reese filed a *pro se* motion seeking sentence credit pursuant to WIS. STAT. § 973.155 (2003-04). The trial court partially granted that motion, awarding Reese 106 days of sentence credit.

¶5 Seven months thereafter, Reese moved for sentence modification on the basis of an allegedly new factor; the trial court denied the motion. This court dismissed Reese's appeal as prematurely filed; Reese never renewed his appellate challenge to the trial court's denial.

¶6 In 2006, Reese filed a second sentence modification motion seeking "final discharge" on his mandatory release date. The trial court denied the motion. Reese did not appeal.

¶7 In 2007, Reese filed a third postconviction motion for sentence modification. The trial court summarily denied that motion as procedurally barred by *Escalona*. Reese did not appeal.

¶8 Six months later, Reese filed his fifth postconviction motion and fourth motion for sentence modification. He contends that he was sentenced (after

the revocation of his probation) on inaccurate information that was in the presentence investigation report filed for his original sentencing in 1993. He correlatively claims the ineffective assistance of counsel for failing to review the presentence investigation report with him. The trial court summarily denied the motion as procedurally barred by *Escalona*. Reese appeals.

¶9 Reese contends that he was sentenced on inaccurate information, namely that he admitted to the presentence investigator that he molested Danielle, a different stepsister than the victim in the underlying case. Reese vehemently denies that he molested Danielle, or that he admitted he had done so. Reese contends that the trial court imposed a lengthier sentence predicated on his “[b]ad [c]haracter,” including its mistaken belief that he had molested Danielle and other children. Reese also contends that the trial court did not consider positive developments that had occurred since he had been on probation, and instead considered the 1993 presentence investigation report that had not been updated in the years between the imposition and revocation of his probation. Reese correlatively claims that had his trial counsel afforded him effective representation, he would have corrected and updated this information.

¶10 To avoid *Escalona*’s procedural bar, Reese 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).

¶11 Reese alleges two reasons that his motion is not barred by *Escalona*: (1) he was not informed until July of 2007 that no direct appeal had ever been

taken; and (2) since this is his “first appeal,” *Escalona* does not apply. The trial court disagreed, summarily denying his motion because Reese “has shown no hesitation in pursuing his postconviction claims in *pro se* filings.”

¶12 Reese alleges that until July of 2007, he did not know that an appeal had not been pursued on his behalf. Reese’s lawyers addressed the presentence investigation report in 1993, and again in 1997. Reese’s lawyer in the original sentencing proceeding in 1993 corrected a misimpression of Reese by the presentence investigator, implying that counsel and Reese had discussed the report. In 1997, Reese’s lawyer specifically referred to the allegation about Danielle as merely “[p]ossibl[e].”

¶13 Reese was in court at those times and did not mention or correct anything about the various inappropriate contacts, including that allegedly with Danielle, nor did he mention any positive developments, instead waiting until a decade later. Regardless of whether and when Reese discovered that no direct appeal was ever filed in his case(s), he knew in 1997 at the sentencing-after-revocation hearing about the allegations involving Danielle and the alleged absence of references to any positive developments. Raising these issues along with a correlative ineffective assistance claim ten years later, particularly when he has litigated numerous other aspects of his sentence in the interim, is not a sufficient reason to overcome *Escalona*’s procedural bar.

¶14 Reese’s second reason that *Escalona* does not apply to issues initially raised by postconviction motion when there has been no direct appeal, is a misinterpretation of the law. *Escalona* extends the application of the procedural bar of WIS. STAT. § 974.06(4) from successive postconviction motions to those that follow a direct appeal. *See Escalona*, 185 Wis. 2d at 185-86. The purpose of

this procedural bar is to avoid successive motions on claims that could have been pursued more promptly in a consolidated fashion, as opposed to piecemeal over the course of many years. *See id.* The “sufficient reason” allowed in both § 974.06(4) and *Escalona* allows litigants to explain why their claims were not pursued more promptly and in a consolidated fashion.

¶15 Our independent review of Reese’s factual allegation regarding his unawareness that no appeal had been taken misses the point, and does not compensate for his failure to object or appeal after hearing his lawyer discuss the presentence investigation report in detail, including the mention of Danielle at sentencing in 1997, particularly when Reese has challenged his sentence *pro se* on many other bases and occasions.¹ Reese’s interpretation of *Escalona*’s inapplicability to his postconviction motion is an erroneous legal interpretation, and as such, does not constitute a sufficient reason to overcome *Escalona*’s procedural bar.

¶16 The State seeks sanctions against Reese, similar to those we imposed in *State v. Casteel*, 2001 WI App 188, ¶¶25-26, 247 Wis. 2d 451, 634 N.W.2d 338, namely that we require him to file an affidavit and supporting documents to demonstrate why his claims are not procedurally barred by *Escalona* as a prerequisite to his future filings. We imposed that sanction because we were

¹ Reese alleges, incident to his ineffective assistance claim that his counsel failed to tell him that he could object to false information referred to during sentencing. First, Reese does not allege that his trial counsel affirmatively told him that he could not object to false information. Second, Reese does not allege why he did not tell his trial counsel that the information addressed at sentencing was false. Third, Reese does not allege why, when the trial court asked him if “there [was] anything you want to say before I sentence you,” he failed to mention the false information during his allocution, which immediately preceded the trial court’s imposition of sentence.

disposing of Casteel's sixth appeal on the basis of *Escalona*, concluding that Casteel knew or should have known that his successive appeals from orders denying his repeated postconviction motions were frivolous. *See Casteel*, 247 Wis. 2d 451, ¶19. We had also warned Casteel in a previous appeal that "another frivolous motion and appeal" would likely prompt sanctions. *Id.*, ¶20.

¶17 Reese's successive nonmeritorious filings have not been in this court, as this is his first full appeal because his previous appeal was dismissed as prematurely filed. Although this court declines to impose sanctions on Reese at this time, we warn Reese that his repeated trial court filings are approaching the conduct in the trial court for which Casteel was sanctioned. *See id.*, ¶27 (citation omitted).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

