

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 14, 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. 2008AP1643

Cir. Ct. No. 1992CF920500

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDDIE CHARLES ROGERS,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Eddie Charles Rogers appeals from a circuit court order denying his postconviction motion, nominally filed pursuant to WIS. STAT.

§ 901.03(4) (2007-08).¹ The circuit court held that Rogers's claims were barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-182, 517 N.W.2d 157 (1994) (postconviction claims that could have been raised in prior postconviction or appellate proceedings are barred absent defendant articulating a sufficient reason for failing to raise the claims in the earlier proceedings). On appeal, Rogers argues that because his current postconviction claims are for "plain errors" that occurred prior to his conviction, *Escalona* does not apply. We disagree, and we affirm the order denying Rogers's postconviction motion.

In 1992, a jury found Rogers guilty of first-degree intentional homicide while armed with a dangerous weapon and an attempt of that same offense. The circuit court imposed a life sentence for the homicide and a concurrent twenty-five-year sentence on the attempted homicide. The circuit court also established 2032 as Rogers's parole-eligibility date. Rogers sought postconviction relief and sentence modification under WIS. STAT. RULE 809.30 (1993-94), but the circuit court denied Rogers's requests. Rogers appealed, and this court affirmed by opinion dated April 19, 1994.

Approximately ten years later, Rogers filed a *pro se* petition for a writ of habeas corpus in this court challenging postconviction counsel's effectiveness for failing to challenge trial counsel's effectiveness. See *State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992) (to bring a claim of ineffective assistance of appellate counsel, a defendant must petition the appellate court that heard the appeal for a writ of habeas corpus). This court denied Rogers's request for two

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

reasons. First, the issues raised in the petition had been decided in Rogers's appeal of right, and Rogers failed to demonstrate that postconviction and appellate counsel's decision to raise them in the way she did represented deficient performance or that he was prejudiced by counsel's decision to pursue the issues in the manner she did. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to maintain an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient and that this deficient performance prejudiced the defense). Second, the court noted that Rogers had failed to establish that his ten-year delay in bringing the *Knight* petition was reasonable.

Eighteen months later, Rogers filed another postconviction motion in the circuit court, this time under WIS. STAT. § 974.06 (2003-04) and *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996) (claims of ineffective assistance of postconviction counsel on issues never preserved for appeal should be filed in circuit court under § 974.06 or as petition for habeas corpus relief). The circuit court denied the motion and this court affirmed on appeal. We noted that Rogers had not overcome *Escalona's* procedural bar to serial postconviction litigation by failing to articulate a sufficient reason for failing to raise this issue in his prior postconviction and appellate proceedings.

Rogers then filed the postconviction motion that is the subject of this appeal, entitled "Motion to Vacate the Conviction pursuant to S. 901.03(4), Stats." Rogers argued that several instances of "plain error" at trial warranted reversal of

his conviction.² He further argued that allegations of plain error “supersede” *Escalona*’s procedural bar. The circuit court disagreed and held that *Escalona* applied to bar Rogers’s new claims. Rogers appeals. We conclude that the circuit court was correct and that Rogers’s claims are barred.

Escalona makes no exception for claims that are simply designated by the movant as “plain error.” As the circuit court noted, to allow such an exception would undercut the basis for *Escalona* and would allow claimants to circumvent *Escalona* simply by couching their claims in terms of “plain error.” In addition, we can see no basis for simply allowing successive postconviction motions alleging “plain error”—or, for that matter, any other type of error—without some explanation as to why the claimant was unable to raise those claims in earlier proceedings. Here, Rogers makes no attempt, either in his postconviction motion or in his briefs on appeal, to articulate any reason for his inability to raise these “plain error” claims in his earlier postconviction or appellate proceedings. Consequently, his motion was procedurally barred by *Escalona*.

By the Court.—Order affirmed.

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

² Among Rogers’s ten claims of “plain error” on appeal, he argues that: (1) the circuit court improperly instructed the jury; (2) the circuit court erred when it ruled admissible certain “other acts” evidence; (3) some of the jurors were biased against him; and (4) the circuit court approached sentencing with its mind made up and sentenced him “to fit the crime,” rather than the defendant.

