

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 17, 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. 2008AP1961

Cir. Ct. No. 2002CF4395

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GERALD WILLIAMS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Gerald Williams appeals from an order denying his postconviction motion. The issue is whether postconviction counsel's alleged ineffectiveness overcomes the procedural bar of *State v. Escalona-Naranjo*, 185 Wis.2d 168, 185-86, 517 N.W.2d 157 (1994). We conclude that the mere

allegation of postconviction counsel's ineffectiveness does not constitute a sufficient reason for failing to raise these issues previously when they were or should have been known at the time of Williams's direct appeal, and certainly by the time he filed his first postconviction motion (subsequent to his direct appeal and previous to the current postconviction motion). Therefore, Williams's current motion is procedurally barred and we affirm.

¶2 A jury found Williams guilty of first-degree reckless homicide, and he pled guilty prior to trial for possessing a firearm in violation of an injunction ordered against him. The trial court imposed a thirty-five-year sentence, comprised of twenty-five- and ten-year respective periods of initial confinement and extended supervision.

¶3 Williams appealed, raising the issues of testimonial references to the victim as compromising his theory of self-defense, improper admission of hearsay testimony, and the premature dismissal of a juror. *See State v. Williams*, No. 2005AP362-CR, unpublished slip op. ¶1 (WI App Jan. 25, 2006). We affirmed. *See id.*

¶4 Approximately fifteen months later, Williams moved for postconviction relief, raising three instances of trial counsel's alleged ineffectiveness. The trial court summarily denied the motion as procedurally barred by *Escalona*. In the trial court's order, it explained in detail how *Escalona* requires a defendant to raise all grounds for postconviction relief in his or her original postconviction motion or on direct appeal. In denying Williams's motion, the trial court concluded that "[t]he defendant could have raised his current claims of trial counsel ineffectiveness in the Court of Appeals. Consequently, he is precluded from having these claims reviewed in the circuit court under section

974.06.” Although Williams filed a notice of appeal to challenge that order, he voluntarily dismissed that appeal.

¶5 Fourteen months after the trial court denied Williams’s first postconviction motion, he brought another; he petitioned for a writ of habeas corpus. In that petition, Williams raised two additional ineffective assistance claims against postconviction counsel for trial counsel’s ineffectiveness: one was related to his previous claims, the other was not. He also challenged his sentence as an erroneous exercise of discretion.

¶6 The trial court construed Williams’s habeas corpus petition as a postconviction motion pursuant to WIS. STAT. § 974.06 (2007-08).¹ See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996). The trial court implicitly concluded that postconviction counsel’s alleged ineffectiveness constituted a sufficient reason to overcome *Escalona*’s procedural bar and denied the motion on its merits. See *id.* at 682 (postconviction counsel’s alleged ineffectiveness “may be in some circumstances ... a sufficient reason as to why an issue which could have been raised on direct appeal was not”). It is from the trial court’s denial that Williams now appeals.

¶7 To avoid *Escalona*’s procedural bar, Williams must allege a sufficient reason for failing to have previously raised all grounds for

¹ The rule against successive motions without an adequate explanation for failing to previously raise the current issues also applies to petitions for habeas corpus relief. See *State ex rel. Schmidt v. Cooke*, 180 Wis. 2d 187, 189-90, 509 N.W.2d 96 (Ct. App. 1993). Consequently, the trial court’s construing Williams’s petition as a motion does not in and of itself impair his right to seek relief.

All references to the Wisconsin Statutes are to the 2007-08 version.

postconviction relief on direct appeal. See *Escalona*, 185 Wis.2d at 185-86. Whether *Escalona*'s procedural bar applies 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).

¶8 In Williams's petition, he makes no mention of why he failed to raise these issues previously; he simply contends that his postconviction counsel was ineffective for failing to challenge trial counsel's effectiveness. We independently conclude that this contention is not a sufficient reason to overcome *Escalona*'s procedural bar.

¶9 First, Williams should have been well aware of *Escalona*'s procedural bar; it was addressed extensively in the trial court's denial of his first postconviction motion. Williams's failure to explain why he did not include these ineffective assistance claims with those he raised first on direct appeal, and then in a previous postconviction motion does not entitle him to an exemption from *Escalona*'s procedural bar. Second, each issue he raises—the alleged inadequacies in investigating and presenting his self-defense claim, failing to object to the prosecutor's allegedly improper remarks in the State's sentencing presentation, and the trial court's alleged erroneous exercise of sentencing discretion—were or should have been patently obvious at the conclusion of Williams's sentencing proceeding. Without explaining precisely why each of these claims could not have been raised on direct appeal, or certainly in Williams's previous postconviction motion, we will not permit Williams to circumvent *Escalona*'s procedural bar. Third, Williams voluntarily dismissed his appeal from the order denying his previous postconviction motion raising the ineffective assistance of counsel. Williams's failure to explain why he should be permitted a third opportunity to raise issues that should have been raised previously does not

compel us to disregard *Escalona*'s procedural bar to afford him that undeserved opportunity.

By the Court.—Order affirmed.

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

