

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 1, 2011

A. John Voelker
Acting 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. 2010AP94
STATE OF WISCONSIN**

Cir. Ct. No. 1995CF953628

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PARRISH CHRISTOPHER PAYNE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
PATRICIA D. MCMAHON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Parrish Christopher Payne, *pro se*, appeals from an order denying his motion for postconviction relief. The trial court denied Payne's motion on grounds that it was procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree and affirm on that basis.

BACKGROUND

¶2 A jury found Payne guilty of kidnapping, as party to a crime, and first-degree sexual assault, both directly and as party to a crime. On direct appeal, Payne argued: (1) there was insufficient evidence to support the jury's verdicts; (2) the trial court erroneously excluded evidence of the victim's subsequent acts; and (3) the trial court erroneously denied Payne's postconviction motion without first holding a *Machner*¹ hearing concerning Payne's allegations that his trial counsel insufficiently questioned a juror during voir dire, failed to use a peremptory strike to remove that juror, failed to effectively cross-examine the victim and failed to adequately discuss with Payne his right to testify. See *State v. Payne*, No. 97-1362-CR, unpublished slip op. at 2, 15 (Wis. Ct. App. May 5, 1998). We rejected his arguments and affirmed. Payne's petition for review was denied by the Wisconsin Supreme Court.

¶3 According to Payne, he subsequently sought federal habeas corpus relief with the assistance of an attorney. Payne asserts that his petition was summarily dismissed by the district court on procedural grounds in 2001, and that his subsequent *pro se* appeal to the Seventh Circuit was unsuccessful.²

¶4 In 2003, Payne filed a *pro se* motion for postconviction relief in the circuit court. Citing *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), Payne alleged that his *postconviction* counsel had provided ineffective assistance because he failed to adequately challenge the

¹ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

² The federal proceedings and decisions are not part of the record in this case and will not be further addressed.

effectiveness of *trial* counsel. Payne argued that trial counsel had performed ineffectively when he did not properly advise Payne concerning whether he should testify at trial. The trial court denied Payne's motion and we affirmed. We noted that the adequacy of trial counsel's advice to Payne had been addressed and rejected in Payne's direct appeal, but we chose to again address the merits of Payne's claim and concluded that Payne had failed to show that trial counsel had performed deficiently. *See State v. Payne*, No. 2003AP2409, unpublished slip op. at 2 (WI App Sept. 15, 2004).

¶5 In 2009, Payne filed the *pro se* motion for postconviction relief that is at issue in this appeal. Payne's motion alleged that his postconviction counsel provided ineffective assistance when he failed to assert that: (1) Payne's right to due process was violated when the car used to abduct the victim was destroyed prior to trial; (2) Payne's right to an impartial jury was violated when the court failed to inquire about a newspaper article the jury might have seen; (3) Payne's sentences constituted cruel and unusual punishment; and (4) trial counsel was ineffective for failing to assert multiplicity and double jeopardy objections to the two sexual assault charges.

¶6 The trial court denied Payne's postconviction motion without a hearing, concluding that Payne's motion was barred by *Escalona-Naranjo* because he did not raise these issues in his 2003 *pro se* postconviction motion. This appeal follows.

DISCUSSION

¶7 The trial court denied Payne's postconviction motion on grounds that it was procedurally barred. Whether *Escalona*'s procedural bar applies to a

postconviction claim is a question of law entitled to independent review. *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶18 Applying that independent review, we agree with the trial court that Payne’s postconviction motion is procedurally barred. A defendant cannot raise an argument in a subsequent postconviction motion that was not raised in a prior postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. *Escalona-Naranjo*, 185 Wis. 2d at 181-82; *see also* WIS. STAT. § 974.06(4) (2007-08)³ (“[a]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived ... in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion,” absent sufficient reason).

¶19 As the State points out, a defendant can attempt to overcome the *Escalona-Naranjo* bar by arguing that an issue was not raised due to postconviction counsel’s ineffectiveness. *See Rothering*, 205 Wis. 2d at 682 (“It may be in some circumstances that ineffective postconviction counsel constitutes a sufficient reason as to why an issue which could have been raised on direct appeal was not.”). However, Payne already filed a postconviction motion based on *Rothering* in 2003. At that time, he argued postconviction counsel had performed ineffectively by not adequately challenging trial counsel’s performance concerning advising Payne not to testify, and Payne pursued an appeal on that issue. Payne’s 2009 postconviction motion offers no explanation why he failed to raise additional allegations of postconviction counsel effectiveness in his 2003 postconviction

³ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

motion. Payne's 2009 postconviction motion asserts that he realized the extent of his postconviction counsel's ineffectiveness once he received all the documents and transcripts from his case, but he does not explain when this occurred or why he could not have raised all of his concerns in his 2003 postconviction motion. On appeal, in his reply brief, Payne asserts that he "only recently" received documents and transcripts, but he again fails to explain when he received the materials, why he did not seek them sooner and why he chose to file a 2003 postconviction motion without first reviewing all documents.

¶10 In sum, regardless of whether Payne could or should have raised on direct appeal the issues he raised in his 2009 postconviction motion, he is now procedurally barred from raising these new issues related to postconviction counsel's effectiveness, absent a sufficient reason for failing to raise the issues in his previous *pro se* postconviction motion. See *Escalona-Naranjo*, 185 Wis. 2d at 181-82. Payne offers no sufficient reason, and we can discern none from the record, why the issues he raised in his 2009 motion were not raised previously. As our supreme court has stated, "[w]e need finality in our litigation." *Id.* at 185. The trial court properly denied Payne's 2009 postconviction motion as procedurally barred.

By the Court.—Order affirmed.

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

