

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 7, 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. 2010AP1616

Cir. Ct. No. 2002CF1089

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK A. ADELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
RICHARD J. SANKOVITZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mark A. Adell, *pro se*, appeals from an order that denied his postconviction motion seeking a new trial pursuant to WIS. STAT.

§ 974.06 (2009-10).¹ Because Adell's claim of ineffective assistance of counsel is procedurally barred and his remaining claim is inadequately briefed, we affirm.

BACKGROUND

¶2 In November 2003, a jury found Adell guilty of three counts of burglary. Proceeding *pro se*, he filed a postconviction motion in January 2005 claiming that his trial attorneys were ineffective in sixteen ways. The circuit court entered an order discussing and rejecting each claim. Adell appealed, but he voluntarily dismissed his appeal after the Office of the State Public Defender appointed counsel for him. We extended his appellate deadlines to permit appointed counsel to pursue relief on his behalf.

¶3 In June 2007, Adell, by counsel, filed his second postconviction motion. He sought sentence modification, and he mounted another claim that his trial counsel performed ineffectively. The circuit court denied the motion, and we affirmed. *See State v. Adell*, No. 2007AP1423-CR, unpublished slip op. (WI App Aug. 12, 2008).

¶4 In 2008, Adell, once again *pro se*, filed a series of related motions seeking redetermination of his eligibility to participate in the earned release program. The circuit court denied relief, and we affirmed. *See State v. Adell*, No. 2009AP18-CR, unpublished slip op. (WI App Jan. 26, 2010).

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 Adell next filed the postconviction motion underlying this appeal.² He alleged that his postconviction counsel performed ineffectively by failing to raise approximately seven claims of trial counsel's ineffectiveness. He also asserted that he had newly discovered evidence and that he should be awarded a new trial in the interest of justice. The circuit court denied the motion.

¶6 On appeal, Adell narrows his focus somewhat. He first asserts that his trial counsel performed ineffectively by failing to dispute fingerprint evidence discovered on a restaurant carry-out bag found at the scene of one of the burglaries. He seeks relief on the basis that his postconviction counsel performed ineffectively by failing to challenge this aspect of trial counsel's performance. Next, he contends that the circuit court analyzed his ineffective assistance of counsel claims using the wrong legal standard. Finally, he asserts that the circuit court ignored his claim of newly discovered evidence. We reject each contention.

DISCUSSION

¶7

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.

² Adell first filed the postconviction motion underlying this appeal in May 2009. At that time, the circuit court lacked power to act on his claims because his appeal of an order denying a prior postconviction motion was pending in this court. *See* WIS. STAT. § 808.075(3)-(4)(g). The circuit court entered an order permitting Adell to renew the motion, if he chose to do so, after resolution of his pending appeal. Adell renewed his motion in March 2010.

State v. Escalona-Naranjo, 185 Wis.2d 168, 185, 517 N.W.2d 157 (1994). Accordingly, a prisoner who wishes to pursue a second or subsequent postconviction motion must demonstrate a sufficient reason for failing in earlier postconviction proceedings to raise or adequately address the issues. *See id.* at 184.

¶8 Adell asserts that he could not raise his claims against postconviction counsel earlier because they arose “post direct appeal et al.” Ineffective assistance of postconviction counsel may in some circumstances constitute a sufficient reason for failing to raise claims in a first postconviction motion. *State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). *Rothering*, however, does not permit a defendant to pursue a series of collateral attacks on a conviction. Adell’s reliance on postconviction counsel’s ineffectiveness in 2007 is wholly inadequate to explain why he did not raise his present claims in any of his 2008 *pro se* submissions. Because he offers no sufficient reason for failing to raise his claims previously, they are barred.

¶9 Adell’s allegations of ineffective assistance of counsel are barred for the additional reason that he has presented them before. In his 2005 *pro se* postconviction motion, he alleged that his trial counsel performed ineffectively by failing to challenge the fingerprint evidence found on the restaurant carry-out bag. He alleged that his trial counsel coerced and pressured him until he stipulated to admitting the fingerprint evidence, and he complained because trial counsel conceded that police found his fingerprint at a crime scene. The circuit court, however, rejected Adell’s contentions, determining that trial counsel’s actions were not prejudicial because if “the defendant decided not to sign this stipulation, the [S]tate would have called the crime lab identification technician who examined

this evidence to testify at trial.” See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to prove ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense).

¶10 In his current attack on his conviction, Adell again explains that trial counsel coerced and pressured him to sign the stipulation admitting fingerprint evidence. He again lays the blame for his conviction on “the ineffectiveness and recklessness of [trial counsel]” in conceding that police discovered Adell’s fingerprint on the carry-out bag found at a crime scene. He concludes, however, by faulting postconviction counsel for “refus[ing] or neglect[ing]” to raise these matters, and by asserting that the “arguments [Adell] presented in the past and here today reflect that his postconviction counsel was deficient in his performance.”

¶11 To prevail on a claim that postconviction counsel was ineffective by failing to challenge trial counsel’s performance, a defendant must demonstrate that trial counsel was in fact ineffective. See *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. The circuit court, however, previously rejected Adell’s claims that trial counsel performed ineffectively in regard to the fingerprint evidence. “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). We will not permit Adell to smuggle a fully resolved claim of trial counsel’s ineffectiveness back before the courts by cloaking it in a purportedly new allegation of postconviction counsel’s ineffectiveness.

¶12 Adell next asserts that the circuit court “may have applied the wrong standard” when assessing his ineffective assistance of counsel claim. Because his claim is procedurally barred, the precise standard for the circuit court to use in a substantive assessment is not material. Ordinarily, this court will not address an issue when its resolution will have no practical effect upon an existing controversy. *State v. Leitner*, 2002 WI 77, ¶13, 253 Wis. 2d 449, 646 N.W.2d 341. We apply that rule here.

¶13 Last, Adell asserts that the circuit court “ignored Adell’s claim that newly discovered evidence merited a closer look at his crime lab claims and that i[t] was in the best interest of justice that the court grant Adell’s motion and relief requested.” Adell submits no argument in support of these contentions. He merely states that he incorporates by reference his arguments on other issues. Because Adell did not adequately brief his final claim, we will not address it. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Order affirmed.

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

