

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 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. 2010AP2388**

**STATE OF WISCONSIN**

**Cir. Ct. No. 1997CF975720**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PHAROAH VERNON MORRIS,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
ELSA C. LAMELAS, Judge. *Affirmed.*

Before Vergeront, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Pharoah Vernon Morris, pro se, appeals an order denying his postconviction motion. Morris contends that: (1) his trial counsel was

ineffective for failing to inform him that, under WIS. STAT. § 973.0135(2)(b) (2009-10),<sup>1</sup> the circuit court could set his parole eligibility date beyond twenty-five percent of his sentence; and (2) the circuit court erred in determining that he is procedurally barred from raising this issue because he failed to raise it on direct appeal or in a prior postconviction motion. We conclude that Morris' arguments are procedurally barred, and we affirm.

¶2 Morris was convicted of armed robbery in 1999, following a jury trial. The court sentenced Morris to thirty years of imprisonment and set his parole eligibility date at ten years from sentencing. Morris appealed, represented by counsel, arguing that his right to a speedy trial had been violated. See *State v. Morris*, No. 2000AP310-CR, unpublished slip op. (WI App Jun. 14, 2001). We affirmed. *Id.*

¶3 In December 2008, Morris filed a pro se motion in the circuit court, arguing that his judgment of conviction was void because he was never informed that WIS. STAT. § 973.0135(2)(b) would apply upon conviction, allowing the circuit court to set his parole eligibility at ten years. Morris argued that failure to inform him of the parole eligibility statute violated his rights to effective assistance of counsel and due process, and that he was entitled to relief from the judgment of conviction under WIS. STAT. § 806.07(1)(d). The circuit court denied the motion, explaining that Morris' arguments were barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because he had not raised those arguments on appeal. The court also found the arguments conclusory

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

and insufficient. In February 2009, Morris moved for reconsideration, arguing that he was not procedurally barred because his motion for relief from judgment was not a WIS. STAT. § 974.06 postconviction motion, but a motion for relief from judgment under § 806.07(1)(d). The court denied the motion for reconsideration, stating that § 806.07 applied to civil cases, and that Morris was required to bring his arguments in his direct appeal under § 974.06(4) and *Escalona*. Morris appealed and we affirmed, explaining that Morris' motion was cognizable under § 974.06 and Morris was required to explain why he did not challenge the validity of his conviction on his direct appeal, and he had not done so. *See State v. Morris*, No. 2009AP572, unpublished slip op. (WI App Apr. 6, 2010).

¶4 In August 2010, Morris filed a WIS. STAT. § 974.06 motion in the circuit court, again arguing that his rights to due process and effective assistance of counsel had been violated when he was not informed that WIS. STAT. § 973.0135 would allow the circuit court to set Morris' eligibility at ten years from sentencing. He claimed that ineffective assistance of postconviction counsel in failing to raise that issue established a sufficient reason for failing to raise the issue previously. The circuit court denied the motion, stating that Morris could have claimed ineffective assistance of postconviction or appellate counsel in his 2008 postconviction motion, and thus Morris was procedurally barred from raising that claim now. Morris moved for reconsideration, and the circuit court again explained that Morris' claim of ineffective assistance of postconviction counsel was barred. Morris appeals.

¶5 At the outset, Morris contends that the record in this appeal is defective because it does not contain documents related to Morris' motion to this

court to remand to the circuit court for a fact-finding hearing on Morris' claim of ineffective assistance of counsel.<sup>2</sup> Morris contends that this court cannot fully review whether Morris has previously raised his claims without all of his filings. However, this appeal is from the circuit court order denying Morris' WIS. STAT. § 974.06 postconviction motion, and our review of that issue is limited to the record before the circuit court in reaching its decision. Morris' motion to this court for remand is not relevant to our review of the circuit court decision. Finally, on this issue, it appears that Morris is contending that this court erred in denying his motion to remand for a hearing. That argument is outside the scope of this appeal, which is limited to a review of the circuit court order denying Morris' most recent § 974.06 motion.

¶6 We turn, then, to the issue properly before us: whether the circuit court erred in denying Morris' postconviction motion. Morris asserts that he is not procedurally barred from raising arguments related to his sentencing because he had a sufficient reason under *Escalona* for failing to raise those arguments on direct appeal, that is, ineffective assistance of postconviction and appellate counsel. See *Escalona*, 185 Wis. 2d at 185-86 (claims barred if not brought in first appeal absent showing of sufficient reason for failing to raise claim in first appeal); *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556

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<sup>2</sup> It appears that Morris moved this court to remand during his appeal from the circuit court order denying his first postconviction motion. We denied the motion, stating that we were not convinced that remand was necessary or appropriate. During the pendency of this appeal, Morris moved to correct the record, apparently referencing his motion for remand during his prior appeal. We denied the motion, interpreting Morris' motion as contending that the record was defective because the circuit court did not hold a hearing on his claim of ineffective assistance of counsel. We stated that Morris' argument was not properly before us in a motion to correct the record because the purpose of a motion to correct the record is to add to the record items that were considered by the circuit court in reaching its decision. We instructed Morris to raise his arguments in his brief.

N.W.2d 136 (Ct. App. 1996) (ineffective assistance of postconviction counsel may constitute sufficient reason to overcome *Escalona* procedural bar). The problem with this argument, however, is that Morris did raise the arguments as to his sentencing in his prior postconviction motion.<sup>3</sup> The circuit court denied Morris' claims, determining that Morris was procedurally barred from raising those arguments in a postconviction motion when he failed to raise them on his direct appeal. We affirmed. Morris has already litigated this issue, and may not do so again here. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (holding that a matter once litigated may not be relitigated in a subsequent postconviction proceeding).

¶7 We recognize that Morris now raises a new argument not raised in his first WIS. STAT. § 974.06 postconviction motion filings in the circuit court in December 2008 and February 2009. The new argument is that his sufficient reason for failing to raise this argument previously was ineffective assistance of postconviction counsel. However, Morris has not explained why he could not have asserted ineffective assistance of postconviction counsel in his prior postconviction motion as a sufficient reason to overcome the procedural bar.<sup>4</sup>

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<sup>3</sup> Morris contends that the circuit court erred in determining that Morris has filed a previous WIS. STAT. § 974.06 motion. Morris contends that his prior postconviction motion was filed under WIS. STAT. § 806.07, not § 974.06, and thus cannot act as a procedural bar to his motion here, which Morris categorizes as his first § 974.06 motion. As already explained, we rejected that argument in Morris' prior appeal. *See supra*, ¶3.

<sup>4</sup> It appears that Morris is also contending that he did attempt to raise ineffective assistance of postconviction counsel in his prior postconviction motion proceedings by moving this court to remand for an evidentiary hearing on his claim of ineffective assistance of postconviction counsel. However, Morris did not raise this issue in the circuit court. He raised it to this court after he appealed from the circuit court orders denying his postconviction motion and motion for reconsideration. At that point, Morris had fully litigated his postconviction motion in the circuit court, and this court declined to remand for a hearing.

Because Morris did not raise that argument in his first § 974.06 postconviction motion, that argument is barred under *Escalona*.

*By the Court.*—Order affirmed.

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

