

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-2987

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID L. CANEDY,

Defendant-Appellant.

APPEAL from an order of the circuit court for Rock County: J. RICHARD LONG, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. David Canedy appeals from an order denying his § 974.06, STATS., motion for postconviction relief which alleged ineffective assistance of trial counsel. The trial court concluded that Canedy was not entitled to relief because he failed to explain why he could not have raised the issue at an earlier stage of the proceedings. Because Canedy could not have

known that he needed to offer an explanation, we reverse and remand to allow him that opportunity.

Canedy's felony conviction occurred in 1989. He filed a timely § 974.02, STATS., motion for postconviction relief. The court denied his motion, and we affirmed the conviction on appeal. After the Wisconsin Supreme Court denied his petition for review, Canedy then filed his § 974.06, STATS., motion, alleging for the first time that trial counsel was ineffective. The trial court denied the motion in October 1993, after several evidentiary hearings on the issue.

Without sufficient reason, a defendant cannot raise an issue in a § 974.06, STATS., motion that could have been raised in an earlier § 974.02, STATS., motion, or in an earlier appeal. *State v. Escalona-Naranjo*, 185 Wis.2d 168, 173, 517 N.W.2d 157, 159 (1994). However, before *Escalona*, when Canedy filed and litigated his motion, courts were required to consider constitutional issues raised in § 974.06 motions, even if they could have been raised earlier. *Bergenthal v. State*, 72 Wis.2d 740, 748, 242 N.W.2d 199, 203 (1976). Although *Escalona* expressly overruled *Bergenthal*, *Escalona*, 185 Wis.2d at 181, 517 N.W.2d at 162, this did not occur until well after the trial court decided Canedy's motion.¹ As a result, Canedy could not have known that he needed sufficient reason for belatedly raising the ineffectiveness issue. The trial court therefore erred by not offering Canedy an opportunity to explain his reasons. On remand, the trial court shall provide that opportunity and shall then determine whether Canedy's reasons are sufficient to allow the motion. If they are, then the trial court must decide the motion on its merits.²

¹ The trial court relied on *State v. Robinson*, 177 Wis.2d 46, 501 N.W.2d 831 (Ct. App. 1993), and *State ex rel. Dismuke v. Kolb*, 149 Wis.2d 270, 441 N.W.2d 253 (Ct. App. 1989), for its holding. However, neither case is inconsistent with *Bergenthal*. Both held that a defendant must provide a sufficient reason for bringing more than one § 974.06, STATS., motion. They did not address whether a sufficient reason was necessary to bring an initial § 974.06 motion raising constitutional issues. See *State ex rel. Dismuke*, 149 Wis.2d at 271, 441 N.W.2d at 253 (Dismuke not entitled to relief "because this is Dismuke's second sec. 974.06 motion, and no reason is shown why the claim was not raised in his first motion").

² Canedy does not argue that because *Escalona* was decided after his motion, he need not show that he had sufficient reason for failing to raise the ineffective assistance of

By the Court. – Order reversed and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

(..continued)

counsel issue in his § 974.02, STATS., motion. We therefore do not decide whether *Escalona* applies to motions resolved before *Escalona* was decided.