

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 31, 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. 94-2075

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH S. BETTS,

Defendant-Appellant.

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

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Keith S. Betts appeals from an order denying his § 974.06, STATS., motion for a new trial premised on the issues of: (1) whether he received ineffective assistance of counsel; (2) whether the trial court violated his due process rights by allegedly erroneously exercising its discretion by basing his sentence on allegedly incorrect information in his presentence investigation report; and (3) whether the trial court erred by failing to explain why it allegedly deviated from the sentencing guidelines in imposing Betts's sentence.

We conclude that our review of these issues is barred by § 974.06(4), STATS.,¹ and accordingly, we affirm the trial court's order.

In 1989, a jury convicted Betts of armed robbery and he received a sentence of twenty years in prison. He directly appealed, *pro se*, from that judgment of conviction, arguing that he received ineffective assistance of counsel, that he did not have a meaningful opportunity to examine his presentence investigation report, and that the trial court improperly considered “uncounseled juvenile adjudications” in sentencing him. We rejected Betts's arguments and summarily affirmed the judgment of conviction. See *State v. Keith Betts*, No. 89-1603-CR (Wis. Ct. App. July 10, 1990) (unpublished order), review denied, 461 N.W.2d 445 (1990).

On February 17, 1994, Betts filed a § 974.06, STATS., motion for a new trial, arguing that: (1) he received ineffective assistance of counsel; and (2) in the alternative, he should be resentenced for alleged errors made by the trial court at his sentencing. The trial court denied the motion without an evidentiary hearing. Betts now appeals from that order.

A § 974.06 motion cannot be used as a substitute for direct appeal and is limited to constitutional and jurisdictional questions. See *State v. Nicholson*, 148 Wis.2d 353, 360, 435 N.W.2d 298, 301 (Ct. App. 1988). Further, under § 974.06(4), a convicted defendant who has pursued a direct appeal cannot obtain collateral review of a constitutional or jurisdictional claim that could have been raised as part of the direct appeal. See *State v. Escalona-Naranjo*, 185 Wis.2d 169, 186, 517 N.W.2d 157, 164 (1994); § 974.06(4), STATS.

¹ Section 974.06(4), STATS., provides:

- (4) All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

The only exception is where the defendant demonstrates a “sufficient” reason for failing to raise it or for not adequately raising it on direct appeal. *Escalona-Naranjo*, 185 Wis.2d at 186, 517 N.W.2d at 164; § 974.06(4), STATS.

Betts essentially now argues that the “sufficient reason” to excuse the operation of § 974.06(4) is that he received ineffective assistance of appellate counsel which he claims forced him to proceed *pro se* on his direct appeal. We rejected this argument on his direct appeal. *Betts*, No. 89-1603-CR, unpublished slip. op at 2-3. Betts declined to have a no merit report filed by his appellate council and elected to proceed in his direct appeal *pro se*. Thus, his current argument for both inadequately raising and failing to raise the arguments in his direct appeal does not provide a “sufficient reason” to excuse the operation of § 974.06(4).

Accordingly, the issues raised in this appeal, i.e., the ineffective assistance of counsel argument, and the due process sentencing arguments, have essentially either been raised before on Betts's direct appeal and rejected, or in the case of Betts's argument that his sentence was outside the sentencing guidelines, he failed to raise it on his direct appeal. In either case, they are barred by the operation of § 974.06(4). We will not review them. The order of the trial court is affirmed.

By the Court. – Order affirmed.

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