

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2012

Diane M. Fremgen
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. 2011AP1605
STATE OF WISCONSIN**

Cir. Ct. No. 2006CF122

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DONALD A. NEWELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Chippewa County:
RODERICK A. CAMERON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Donald Newell, pro se, appeals an order denying his WIS. STAT. § 974.06 motion without a hearing.¹ Newell raises several

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

challenges to his conviction and sentence. We conclude Newell's arguments have either already been litigated or are procedurally barred. The order is therefore affirmed.

BACKGROUND

¶2 Newell was convicted, upon a jury's verdict, of ten counts of second-degree sexual assault for having intercourse with a person suffering a mental deficiency. The convictions are substantially based on Newell's sixteen-page written statement in which he admitted having anal intercourse with Tina H. ten to twelve times and performing oral sex on her on two or three occasions. Tina suffers from a number of physical and mental disabilities and, at thirty-five years old, functioned at the level of a five to eight year old. At trial, Tina confirmed two incidents of sexual intercourse with Newell. On direct appeal, we affirmed the convictions, rejecting Newell's claim that his confession was not sufficiently corroborated to support the convictions. *State v. Newell*, No. 2009AP449-CR, unpublished slip op. (WI App May 11, 2010).

¶3 On February 16, 2011, Newell, pro se, filed what he identified as a motion for a new trial pursuant to WIS. STAT. § 974.02, alleging twenty-five grounds for granting relief. The circuit court denied Newell's motion without a hearing and Newell did not appeal that order.² On April 5, 2011, Newell filed another pro se motion for a new trial, alleging the same twenty-five grounds for relief with some supplemental argument and citations to authority. In an April 29,

² The circuit court properly construed Newell's filing as a WIS. STAT. § 974.06 motion because the time for filing a motion pursuant to WIS. STAT. § 974.02 had expired.

2011 order, the circuit court denied the motion without a hearing. This appeal follows.³

DISCUSSION

¶4 We conclude Newell’s claims are barred by WIS. STAT. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Successive motions and appeals are procedurally barred unless the defendant can show a sufficient reason why the newly alleged errors were not previously raised. *Escalona-Naranjo*, 185 Wis. 2d at 185. We determine the sufficiency of a defendant’s reason for circumventing *Escalona-Naranjo*’s procedural bar by examining the “four corners” of the subject postconviction motion. See *State v. Allen*, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433.

¶5 Newell’s motion is an amalgam of conclusory assertions with a collection of appended quotations and legal citations. Ultimately, the motion offers no reason, much less a sufficient reason, for failing to properly raise all but one of his claims on direct appeal. The remaining claim—that his confession was not sufficiently corroborated—was raised and rejected by this court on direct appeal. We need not revisit it. See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (“A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.”).

³ During the pendency of this appeal, Newell filed yet a third postconviction motion alleging the same twenty-five claims. The circuit court’s denial of that motion is not the subject of this appeal.

¶6 Newell nevertheless intimates the circuit court erred by denying his motion without an evidentiary hearing. If a postconviction motion does not raise facts sufficient to entitle the defendant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has discretion to deny the motion without a hearing. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Here, Newell's claims were either already litigated or procedurally barred. Therefore, the court properly denied the motion without an evidentiary hearing.

¶7 The State requests that this court impose limitations on Newell's right to commence further postconviction proceedings in this court or the circuit court. We conclude this appeal is frivolous and sanctions are appropriate. This appeal involves Newell's second of three postconviction collateral attacks on his judgment of conviction. Newell's repetitive litigation imposes an unnecessary burden on both the judicial system and the attorney who must address his motions.

¶8 Because Newell has abused the judicial process by repetitively litigating the same matters in his postconviction motions, no further filings will be accepted from Newell unless his filings are accompanied by an affidavit including all of the following:

- (1) a copy of the circuit court's written decision and order he seeks to appeal;
- (2) a statement setting forth the specific grounds upon which the court can grant relief;
- (3) a statement showing how the issues sought to be raised differ from issues raised and previously adjudicated; and
- (4) a statement of why any new claims so raised are acceptable under *Escalona-Naranjo*, 185 Wis. 2d at 184-86.

Upon review of these documents, if this court or the circuit court determines that Newell states no claim, defense or appeal upon which relief may be granted, the court will refuse to accept the filing. *See State v. Casteel*, 2001 WI App 188, ¶25, 247 Wis. 2d 451, 634 N.W.2d 338.

By the Court.—Order affirmed; sanctions imposed.

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

