

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 22, 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.

Nos. 95-0121
95-0356

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 95-0121

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. CAULEY,

Defendant-Appellant.

No. 95-0356

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LINDA R. CAULEY,

Defendant-Appellant.

APPEAL from an order of the circuit court for Price County:
DOUGLAS T. FOX, Judge. *Affirmed.*

MYSE, J. Michael J. Cauley and Linda R. Cauley appeal an order denying their § 974.06, STATS., motion for postconviction relief. The Cauleys contend that the trial court erred by failing to hold an evidentiary hearing on their claims. They claim they were denied effective assistance of counsel and that the doctrine of double jeopardy precludes state prosecution for their offenses because the bankruptcy court had made a determination that they had not engaged in fraudulent practices. Because the claim of ineffective assistance of counsel was waived and the remaining claim is without merit, this court affirms the trial court's order denying relief.

Michael and Linda Cauley are husband and wife who operated a business involving the sale of goods to others. They were each charged with a series of criminal complaints alleging theft by fraud. Pursuant to a plea bargain, pleas of no contest were made to some of the offenses while the State dismissed the balance of the allegations but had them read in for restitution purposes. The court withheld sentence and placed both defendants on probation for three years. As conditions of probation, the Cauleys were to each serve thirty days in jail and pay court costs and restitution. The Cauleys each subsequently filed a motion to modify their sentence. The motion was denied, the denial was appealed and ultimately a no merit determination was made dismissing the appeal. After the supreme court denied their petition for review, the Cauleys filed their § 974.06, STATS., motions.

Defendants cannot raise an issue in a § 974.06, STATS., motion that could have been raised in an earlier motion or appeal unless they give sufficient reason. *State v. Escalona-Naranjo*, 185 Wis.2d 168, 170-73, 517 N.W.2d 157, 158-59 (1994). Because these matters were not brought to the trial court at the time of the filing of the initial motion, without adequate explanation as to this failure, *Escalona* holds that the trial court is without the power to hear the § 974.06 motions in this case.

The Cauleys claim that such a holding would give *Escalona* retroactive effect because their original motion was made a year before *Escalona* was decided. They claim they relied on *Bergenthal v. State*, 72 Wis.2d 740, 242 N.W.2d 199 (1976) (court required to consider constitutional issues raised in § 974.06 STATS., motion even if they could have been raised earlier), which *Escalona* expressly overruled. Because we do not apply *Escalona*, we

will address the merits without deciding whether *Escalano* has retroactive effect.

This court reviews a trial court's denial of such a motion without an evidentiary hearing for an abuse of discretion. See *Rohl v. State*, 96 Wis.2d 621, 627-28, 292 N.W.2d 636, 640 (1980). If the defendant fails to allege sufficient facts in a § 974.06, STATS., motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing. *State v. Carter*, 131 Wis.2d 69, 78, 389 N.W.2d 1, 4 (1986).

The claim of double jeopardy is conclusively without merit on its face because a federal bankruptcy court's determination does not preclude a state court prosecution under the doctrine of dual sovereignty. *United States v. Wheeler*, 435 U.S. 313, 317 (1978). Furthermore, because the claim of inadequate counsel was not briefed in this appeal, we cannot determine the nature of the claim or whether an evidentiary hearing was required before the trial court. Claims not briefed are deemed waived and will not be addressed. *State v. S.H.*, 159 Wis.2d 730, 738, 465 N.W.2d 238, 241 (Ct. App. 1990). This court therefore concludes that the trial court did not err by dismissing the motions filed by each of these defendants without an evidentiary hearing.

By the Court. – Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.