



OFFICE OF THE CLERK  
**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT I**

October 11, 2013

To:

Hon. Jeffrey A. Wagner  
Milwaukee County Circuit Court  
901 N. 9th Street  
Milwaukee, WI 53233

Christine A. Remington  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

John Barrett, Clerk  
Milwaukee County Circuit Court  
821 W. State Street, Room 114  
Milwaukee, WI 53233

Sherwood L. Hard, # 443632  
Kettle Moraine Correctional Inst.  
P.O. Box 282  
Plymouth, WI 53073-0282

Karen A. Loebel  
Asst. District Attorney  
821 W. State Street  
Milwaukee, WI 53233

You are hereby notified that the Court has entered the following opinion and order:

---

2012AP2826

State of Wisconsin v. Sherwood L. Hard  
(L.C. #2002CF3787)

Before Curley, P.J., Kessler and Brennan, JJ.

Sherwood L. Hard, *pro se*, appeals the circuit court's order denying his eleventh postconviction motion. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).<sup>1</sup> Because Hard's claims have either already been litigated or are procedurally barred, we affirm.

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

## BACKGROUND

In 2003, a jury found Hard guilty of second-degree sexual assault of a child. Since that time, Hard has had six appeals from eleven postconviction motions. We incorporate the chronology provided by the State, which is supported by the record:

### **First Appeal:**

Hard's appellate counsel filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967). Hard submitted several responses and motions during his no-merit appeal. *See State v. Hard*, No. 2004AP1193-CRNM, [unpublished op. and order (WI App)] Feb. 11, 2005). This court concluded there were no issues of arguable merit and affirmed Hard's conviction. This court explicitly addressed the issues of the sufficiency of the criminal complaint, inconsistencies in trial testimony, the sufficiency of the evidence, the circuit court's exercise of sentencing discretion, and the alleged ineffectiveness of Hard's counsel.

### **First and Second Postconviction Motions:**

In March 2005, Hard filed both a petition for a writ of habeas corpus and a motion for a hearing on his ineffective assistance of counsel claims. The circuit court denied both, and Hard did not appeal either decision.

### **Third Postconviction Motion:**

On December 13, 2005, Hard filed a postconviction motion pursuant to WIS. STAT. § 974.06, raising claims regarding the validity of his arrest, the sufficiency of the criminal complaint, and the effectiveness of his trial counsel. The circuit court denied the motion and found that Hard's claims were procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and *State v. Tillman*, 2005 WI App 71, ¶¶25-27, 281 Wis. 2d 157, 696 N.W.2d 574. Hard did not appeal.

### **Second Appeal:**

Next, Hard filed a second petition for a writ of habeas corpus based on the alleged ineffectiveness of the appellate attorney who filed his no-merit appeal. *See State [ex rel. Hard] v. Endicott*, No. 2006AP168-W, [unpublished op. and order (WI App)] Mar. 3, 2006). In that petition, Hard attempted to reformulate the same ineffective assistance of counsel claims he

had raised earlier in his no-merit appeal. This court denied Hard's petition after finding that Hard failed to establish either deficient performance or prejudice, as required by *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

**Fourth Postconviction Motion/Third Appeal:**

On June 16, 2006, Hard filed another postconviction motion pursuant to WIS. STAT. § 974.06, raising a number of issues, some new and some from prior proceedings. The motion addressed the validity of his arrest; the alleged denial of his right to counsel; violations of his right of confrontation, as well as his rights under *Franks v. Delaware*, 438 U.S. 154 (1978), *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), and *Batson v. Kentucky*, 476 U.S. 79 (1986); alleged errors in the jury instructions; the circuit court's authority and alleged misuse of discretion at sentencing; and, the alleged ineffectiveness of trial counsel. The circuit court denied the motion as procedurally barred under *Escalona-Naranjo* and *Tillman*. Hard appealed. This court affirmed in *State [v. Hard]*, No. 2006AP1629, [unpublished op. and order (WI App) Aug. 6, 2007], noting that "Hard's history of postconviction litigation is a textbook example of why the procedural bar exists."

**Fifth and Sixth Postconviction Motions/Fourth Appeal:**

In the summer of 2008, Hard filed two postconviction motions: one for sentence modification and another for postconviction relief under WIS. STAT. § 974.06. The circuit court denied both motions as procedurally barred under *Escalona-Naranjo*. Hard appealed. This court affirmed the circuit court's decision. See *State [v. Hard]*, No. 2008AP1858-CR, [unpublished slip op. (WI App) Aug. 11, 2009]. This court independently determined that Hard's motion for sentence modification did not raise any new factors. This court found that Hard's WIS. STAT. § 974.06 motion had provided neither a "sufficient reason" for not pursuing his claims in earlier proceedings nor any reason why he should be allowed to renew issues already decided. Hard filed a motion to reconsider that this court denied. The supreme court denied Hard's petition for review.

**Seventh and Eighth Postconviction Motions:**

On March 13, 2009, Hard filed a postconviction motion for a new trial because of newly-discovered evidence and in the interest of justice. The circuit court denied that motion because this court had jurisdiction at that time. On November 18, 2009, Hard filed a very similar postconviction motion pursuant to WIS. STAT. § 974.06, seeking a new trial based on newly-discovered evidence and in the interest of justice. Hard focused on his

victim's statement that he was "not sure if the suspect had an erection [because he] did not see [his] penis." Hard claimed that the victim's statement constituted both a recantation and newly-discovered evidence, warranting a new trial. On November 23, 2009, the circuit court denied Hard's motion, noting:

In this instance, the victim's statement cannot reasonably be construed as a recantation. The fact that the victim told police that he was not sure if the defendant had an erection is not a statement the defendant did not have an erection or, more importantly, that the defendant did not have sexual contact with him. As the Court of Appeals stated in its August 11, 2009 decision denying the defendant's latest appeal, "a conviction for second-degree sexual assault of a child ... does not require the defendant to have an erection, nor does it require the victim to see the defendant's penis; sexual contact is all that is required, and the victim testified at trial to sexual contact.[]" Consequently, the court finds that the defendant has failed to set forth a sufficient claim for a new trial based upon newly-discovered evidence or in the interest of justice.

[(Citation omitted.)] Hard did not appeal that order.

**Ninth Postconviction Motion/Fifth Appeal:**

Hard responded with another motion for postconviction relief that challenged the circuit court's decision. The circuit court treated the motion as one for reconsideration and found that Hard's submission "sets forth nothing which would alter the court's prior decision." Hard appealed from the order denying reconsideration. This court again affirmed Hard's conviction concluding that his claims are barred by *Escalona-Naranjo*. [*State v. Hard*, No. 2010AP356, unpublished op. and order (WI App Nov. 30, 2010).] This court denied Hard's reconsideration motion. The supreme court again denied review. This court then denied a second reconsideration motion.

**Tenth Postconviction Motion:**

Hard then filed a "motion to withdraw not guilty plea." The circuit court denied the motion as barred by *Escalona-Naranjo* and noted that it was his tenth postconviction motion. Hard appealed that order, but never filed his brief so this court dismissed the appeal.

**Eleventh Postconviction Motion/Sixth Appeal:**

Finally, Hard filed his current motion entitled “Motion to Recall Motion for Postconviction Relief [sic] Based on Insufficient Evidence and Claims of Actual Innocence.” The circuit court denied his eleventh postconviction motion as barred by *Escalona-Naranjo*.... This appeal followed.

(Footnote and record citations omitted.)

**DISCUSSION**

Hard moved the circuit court for postconviction relief alleging that his conviction is based on insufficient evidence. We agree with the State’s assessment that Hard’s appellate brief sets forth numerous other claims that are difficult to decipher.

Insofar as Hard is arguing on appeal that the complaint was insufficient and that the evidence presented at trial was insufficient to support the jury’s verdict, this court has previously addressed (and rejected) those claims when we resolved Hard’s no-merit appeal. Thus, to the extent that Hard is repackaging issues that were previously raised, his arguments fail. “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).<sup>2</sup>

In addition, Hard’s current claims fail because he has not provided a sufficient reason for not raising them in his ten prior postconviction motions. The postconviction procedures of WIS. STAT. § 974.06 allow a defendant to attack his conviction after the time for appeal has expired.

---

<sup>2</sup> We note that Hard’s claim of “actual innocence” on appeal seems to amount to an artful rephrasing of his previous challenges to the sufficiency of the evidence (which necessarily implicates his innocence).

See *Escalona-Naranjo*, 185 Wis. 2d at 176. There is, however, a limitation: an issue that could have been raised on direct appeal or by prior motion is barred from being raised in a subsequent postconviction motion absent a sufficient reason for not raising the issue earlier. See *State v. Lo*, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. Allowing “[s]uccessive motions and appeals, which all could have been brought at the same time” is prohibited by WIS. STAT. § 974.06 and *Escalona-Naranjo*, which teaches that “[w]e need finality in our litigation.”<sup>3</sup> *Id.*, 185 Wis. 2d at 185.

Upon the foregoing reasons,

IT IS ORDERED that the circuit court’s order is summarily affirmed. See WIS. STAT. RULE 809.21(1).

---

*Diane M. Fremgen*  
*Clerk of Court of Appeals*

---

<sup>3</sup> The State is correct in noting that Hard’s argument that *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), conflicts with the Legislature’s intent when it enacted WIS. STAT. § 974.06 is without merit.