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**DISTRICT II**

April 23, 2014

To:

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

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2013AP1287

State of Wisconsin v. Andrew C. Robinson (L.C. #2004CF1135)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Andrew C. Robinson appeals an order denying his Wis. STAT. § 974.06 (2011-12)<sup>1</sup> motion seeking postconviction relief in the form of a new trial. Because we agree with the circuit court that his claims are procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), we affirm.

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

In 2005, a jury found Robinson guilty of attempted first-degree homicide while using a dangerous weapon, first-degree sexual assault and mayhem, both as an act of domestic abuse, and child abuse. The trial court imposed a bifurcated sentence totaling eighty years. Robinson filed a pro se postconviction motion under WIS. STAT. RULE 809.30. The motion was denied after two hearings in February 2007. Robinson appealed. In June 2008, this court affirmed the judgment of conviction and the order denying postconviction relief. Robinson's subsequent petition for a federal writ of habeas corpus was denied in September 2012.

Included in the return the respondent prison warden filed in federal court were supplemental police reports containing statements of the two victims/witnesses that contradicted their trial testimony. Robinson contended he previously had been unaware of those reports. Alleging newly discovered evidence, Robinson filed the postconviction motion underlying this appeal. The circuit court denied the motion, citing the *Escalona-Naranjo* rule barring successive unjustified postconviction litigation. Robinson appeals.

WISCONSIN STAT. § 974.06 “does not ... create an unlimited right to file successive motions for relief.” *State ex rel. Dismuke v. Kolb*, 149 Wis. 2d 270, 273, 441 N.W.2d 253 (Ct. App. 1989). Accordingly, where a defendant's claims for relief have been finally adjudicated, waived, or not raised in a prior postconviction motion, they may not form the basis for a later § 974.06 motion unless the circuit court ascertains that a sufficient reason exists for the failure to raise the issue earlier. *Escalona-Naranjo*, 185 Wis. 2d at 181-82. Whether the claim is procedurally barred is a question of law this court reviews de novo. See *State v. Allen*, 2010 WI 89, ¶15, 328 Wis. 2d 1, 786 N.W.2d 124.

Robinson contends that if he had known of the supplemental police reports at the time of trial, he would have been better positioned to impeach the credibility of the two key witnesses against him. Conclusory allegations in a postconviction motion are insufficient to warrant an evidentiary hearing on newly discovered evidence claims. *See id.*, ¶91 (a defendant must allege specific facts, which if true, would constitute “sufficient reason” for failing to raise claims earlier and if he or she fails to do so, the claim may be summarily denied).

But even accepting for the sake of argument that he was unaware of these reports until after his conviction and that they were material and not cumulative, his claim still fails. Robinson does not say why he could not have obtained these discoverable reports drafted before he even was charged. To prevail on a claim based on newly discovered evidence, a defendant must prove by clear and convincing evidence that he or she was not negligent in seeking it. *See State v. Love*, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62.

An “a-ha” moment does not suffice. “‘Newly discovered evidence’ does not include a new appreciation of the importance of evidence previously known but not used.” *State v. Bembenek*, 140 Wis. 2d 248, 256, 409 N.W.2d 432 (Ct. App. 1987).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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