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**DISTRICT II**

July 9, 2014

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

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2013AP2774

State of Wisconsin v. John M. Schwartz (L.C. #1980CF24)

Before Neubauer, P.J., Reilly, and Gundrum, JJ.

John Schwartz appeals pro se from an order denying his WIS. STAT. § 974.06 (2011-12)<sup>1</sup> motion for postconviction relief. The circuit court ruled that Schwartz's claims were barred for want of a sufficient reason as to why Schwartz had not raised his claims in his first § 974.06 motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm the order of the circuit court.

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

Schwartz was convicted of first-degree intentional homicide in 1980 after a jury trial. His conviction was affirmed on appeal. *State v. Schwartz*, No. 1981AP867-CR, unpublished slip op. (WI App Mar. 10, 1982). Schwartz filed a pro se WIS. STAT. § 974.06 motion for postconviction relief in November 1982. The denial of that motion was affirmed on appeal. *State v. Schwartz*, No. 1983AP803, unpublished slip op. (WI App June 6, 1984). Schwartz also filed a petition for a writ of habeas corpus and the circuit court's decision denying the petition was affirmed on appeal. *State ex rel. Schwartz v. State*, No. 2002AP1459, unpublished op. and order (WI App Feb. 5, 2003). In 2013, Schwartz filed his pro se § 974.06 postconviction motion that is the subject of this appeal. He alleged that he was denied the effective assistance of postconviction counsel because counsel failed to order the transcript of jury selection and failed to read that transcript before filing an appeal, that he was denied the effective assistance of trial counsel with respect to jury selection because counsel failed to assert the right to a seventh preemptory strike upon the seating of an alternate juror and counsel failed to object to the seating of three potentially biased jurors, and that the circuit court erroneously exercised its discretion during jury selection in not examining a particular juror who indicated he had "another conflict." No hearing was held on the motion and it was denied on the ground that it was barred by § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

A defendant's grounds for relief not raised in a prior postconviction motion may not become the basis for a WIS. STAT. § 974.06 motion unless the court ascertains that a sufficient reason exists for the failure to have raised those grounds earlier. See *Escalona-Naranjo*, 185 Wis. 2d at 181-82. Whether *Escalona-Naranjo*'s procedural bar applies to a postconviction claim is a question of law. *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App.

1997). Whether the procedural bar applies is the dispositive issue in this appeal and the only one we need to address.<sup>2</sup> See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

We look to whether Schwartz established a sufficient reason why he did not raise in his first WIS. STAT. § 974.06 motion the issues he raised in his second § 974.06 motion. See *State v. Thames*, 2005 WI App 101, ¶¶10-11, 281 Wis. 2d 772, 700 N.W.2d 285. Schwartz argues when he filed his first § 974.06 motion in 1982, he did not know that his postconviction counsel had not ordered and reviewed the transcript of the jury selection and that he did not know about postconviction counsel's ineffectiveness until he received a July 13, 2000 letter from the court reporter stating that the jury selection portion of the trial had not been ordered by counsel.<sup>3</sup> However, the record includes a transcript of the jury selection. That transcript was prepared and filed on October 1, 1981. The jury selection transcript was available before Schwartz filed his 1982 postconviction motion and he could have raised in that first motion the claims he made in his second § 974.06 motion.<sup>4</sup> Schwartz offers no reasonable explanation for waiting until 2000

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<sup>2</sup> Schwartz first argues the circuit court erred in denying his motion based on the determination that it did not have jurisdiction because Schwartz was challenging the conduct of appellate counsel. We need not address that alternative reason given by the circuit court when another issue is dispositive. Likewise, we will not deem the State to have conceded issues raised by Schwartz but not addressed in the State's brief because it is not necessary to reach those issues.

<sup>3</sup> The court reporter's July 13, 2000 letter references Schwartz's June 30, 2000 letter requesting a transcript of the jury selection. The court reporter indicated that the reporter's notes from the 1980 trial had been disposed of and the reporter could not produce a transcript of the jury selection from his notes. The letter further indicated that most of the jury trial had been transcribed for appeal purposes in 1981, "but the attorneys involved at that time did not request the jury selection to be transcribed. It was common practice back then to not transcribe jury selection, unless something unusual may have happened, that might have been an appealable issue." The letter concludes with the observation that a complete set of all the transcripts done in the case were sent to Schwartz.

<sup>4</sup> The transcript was prepared and filed after Schwartz's postconviction counsel filed the notice of appeal and after the transmittal of the record on appeal. The transcript was transmitted to the appellate court as a supplement to the record and remained with the record thereafter. Schwartz could have determined that the transcript was prepared and filed after the notice of appeal.

to request the jury selection transcript and no sufficient reason exists simply because Schwartz waited to do so. See *Thames*, 281 Wis. 2d 772, ¶15.

*Escalona-Naranjo*, 185 Wis. 2d at 185, emphasizes the need for finality in criminal litigation. The need for finality is not served if the lack of investigation by pro se litigants permits the filing of subsequent postconviction motions for relief.

Upon the foregoing reasons,

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

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