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110 EAST MAIN STREET, SUITE 215  
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MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
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**DISTRICT II**

April 22, 2015

To:

Hon. David M. Reddy  
Circuit Court Judge  
Walworth County Courthouse  
P.O. Box 1001  
Elkhorn, WI 53121-1001

Sheila Reiff  
Clerk of Circuit Court  
Walworth County Courthouse  
P.O. Box 1001  
Elkhorn, WI 53121-1001

Thomas J. Balistreri  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Daniel A. Necci  
District Attorney  
P.O. Box 1001  
Elkhorn, WI 53121-1001

Brian J. Conaway 175906  
Chippewa Valley Corr. Treatment Facility  
2909 E. Park Ave.  
Chippewa Falls, WI 54729

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

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2014AP902

State of Wisconsin v. Brian J. Conaway (L.C. # 2008CF412)

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

Brian J. Conaway appeals pro se from an order denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We affirm the order of the circuit court.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version.

In December 2009, Conaway was convicted following guilty pleas to five counts of burglary to a building or dwelling. The circuit court imposed an aggregate sentence of seven years of initial confinement followed by five years of extended supervision.

Represented by counsel, Conaway filed a motion for postconviction relief based upon his trial counsel's failure to challenge his bindover. The circuit court denied the motion without a hearing. Conaway appealed that decision along with an earlier decision denying his suppression motion. This court affirmed. *State v. Conaway*, No. 2011AP1144-CR, unpublished op. and order (WI App Mar. 6, 2013).

In January 2014, Conaway filed a pro se motion for postconviction relief pursuant to WIS. STAT. § 974.06. In it, he raised a host of new legal arguments relating primarily to the State's use of Global Positioning System (GPS) tracking in his case and the entry of his guilty pleas.<sup>2</sup> In addition, he alleged ineffective assistance of postconviction counsel for failing to investigate certain evidence. The circuit court concluded that a majority of Conaway's claims were procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). However, the court did schedule a hearing on the ineffective assistance claim.

At the subsequent hearing, the circuit court asked Conaway to confirm on the record why he was alleging ineffective assistance of postconviction counsel. Conaway reiterated his allegation that counsel had failed to investigate certain evidence. Specifically, he complained

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<sup>2</sup> These arguments included (1) the State's use of GPS tracking violated Conaway's First Amendment right to freedom of association; (2) the State lacked statutory authority to use a GPS device; (3) the State withheld evidence related to fingerprint tests and GPS data; (4) the circuit court lacked probable cause to authorize the GPS tracking; and (5) Conaway entered his pleas under duress.

that counsel had failed to investigate fingerprint tests and GPS data obtained in his case. The circuit court then placed counsel under oath and allowed the parties to examine him. Counsel testified that Conaway had not requested the fingerprint tests until well after counsel had filed his postconviction motion. Counsel further testified that he did not believe that either the fingerprint tests or the GPS data was relevant given Conaway's guilty pleas. The court accepted counsel's testimony as credible and denied Conaway's motion. This appeal follows.

Whether a defendant's claims are procedurally barred by *Escalona-Naranjo* presents a question of law that we review de novo. *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). A claim of ineffective assistance of counsel, meanwhile, presents a mixed question of law and fact. *State v. Carter*, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695. We uphold the circuit court's findings of fact unless clearly erroneous, but "the ultimate determination of whether counsel's assistance was ineffective is a question of law, which we review de novo." *Id.*

On appeal, Conaway contends that the circuit court erred in denying his motion for postconviction relief. We disagree.

Like the circuit court, we conclude that the majority of Conaway's claims are procedurally barred by *Escalona-Naranjo*. Under *Escalona-Naranjo*, 185 Wis. 2d at 185-86, any claims that could have been raised in a prior postconviction motion or direct appeal cannot form the basis for a subsequent motion under WIS. STAT. § 974.06 unless the defendant

demonstrates a sufficient reason for failing to raise them earlier. Here, Conaway failed to satisfy this standard.<sup>3</sup>

We also conclude that Conaway failed to establish that his postconviction counsel was ineffective. When a defendant alleges that his counsel was ineffective for failing to investigate certain evidence, he must show with specificity what the investigation would have revealed and how it would have altered the result of the proceeding. See *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). As noted by the State, Conaway failed to show what evidence any investigation of fingerprint tests or GPS data would have uncovered or how any such evidence would have changed his decision to plead guilty.<sup>4</sup> Accordingly, we are satisfied that the circuit court properly denied his motion.

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*

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<sup>3</sup> Conaway did not offer a sufficient reason in his appellant's brief. The closest he got to offering one in his postconviction motion is a single sentence at the very end of the motion stating, "Conaway should not be barred under *Escalona* from raising these claims as he raised 'ineffective assistance [of] counsel' claim on his post-conviction counsel for not raising these claims." Conaway did not develop this allegation of ineffective assistance in his motion and effectively abandoned it at the subsequent motion hearing. A defendant must do more than merely identify issues that postconviction counsel failed to raise and assume that it establishes ineffective of counsel justifying another postconviction proceeding. Such an interpretation would vitiate the bar against successive postconviction motions and appeals set out in *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

<sup>4</sup> It is unclear that such evidence would have changed Conaway's decision to plead guilty. At the hearing on his postconviction motion, Conaway informed the court, "I am not trying to withdraw my plea here today at all."