



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

DISTRICT I

June 17, 2019

To:

Hon. David L. Borowski
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

Jennifer Renee Remington
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John Barrett
Clerk of Circuit Court
821 W. State Street, Room G-8
Milwaukee, WI 53233

Tony Eppenger 227769
Stanley Correctional Inst.
100 Corrections Dr.
Stanley, WI 54768

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

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

2018AP1900

State of Wisconsin v. Tony Eppenger (L.C. # 1990CF903187)

Before Brash, P.J., Brennan and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Tony Eppenger, *pro se*, appeals an order denying his motion brought pursuant to Wis. STAT. § 974.06 (2017-18).¹ Eppenger argues that his trial counsel was ineffective for failing to raise an adequate provocation defense at trial. He also contends that his argument is not subject to the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

(1994). Based on the briefs and record, we conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21. We affirm.

Eppenger was convicted of first-degree intentional homicide in 1991. With the assistance of counsel, he moved for a new trial. The circuit court denied the motion. On appeal, we affirmed his conviction. In 2009 Eppenger filed a *pro se* document in the circuit court that he incorrectly labeled a “***Knight*** petition.”² He argued that he received constitutionally ineffective assistance of trial counsel for six different reasons related to jury selection. He also argued that he was denied the right to a fair trial and he received constitutionally ineffective assistance of appellate counsel. On the State’s motion, the matter was transferred to the criminal division because it was, in fact, a motion for postconviction relief brought pursuant to WIS. STAT. § 974.06. The matter was then dismissed for failing to comply with local court rules. Eppenger filed a new *pro se* postconviction motion that complied with court rules raising the same arguments. The circuit court denied the motion. On appeal, we affirmed in a twelve-page opinion that addressed the merits of Eppenger’s claims. In 2018 Eppenger filed the current motion for postconviction relief. The circuit court denied the motion.

“[A]ny claim that could have been raised on direct appeal or in a previous WIS. STAT. § 974.06 ... postconviction motion is barred from being raised in a subsequent § 974.06 postconviction motion, absent a sufficient reason.” *State v. Lo*, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756 (footnote omitted); *Escalona-Naranjo*, 185 Wis. 2d at 185. Eppenger first contends that his reason for failing to previously raise his current argument is that he received

² *State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992).

ineffective assistance of counsel. Be that as it may, in the proceedings where Eppenger was represented by counsel, Eppenger has not explained his own failure to raise the issue in his previous *pro se* challenges to the conviction. The second reason Eppenger proffers for failing to previously raise the argument is what he characterizes as his below average intellectual abilities. However, Eppenger has not explained how this problem prevented him from previously raising the issue, especially in light of the fact that he raised numerous issues in prior *pro se* filings. In sum, Eppenger has not provided a sufficient reason for failing to previously raise the argument and his current action is, therefore, procedurally barred by WIS. STAT. § 974.06(4) and *Escalona-Naranjo*, 185 Wis. 2d at 185.³

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

³ As for the merits of Eppenger's argument, he contends that his lawyer should have raised an adequate provocation defense. We note that Eppenger's defense to the homicide charge was that he did not commit the crime. An adequate provocation defense would have been inconsistent with that defense.