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**DISTRICT II**

May 15, 2013

To:

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

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2012AP1411

State of Wisconsin v. Melvin L. Kellam (L.C. # 2005CF553)

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

Melvin L. Kellam 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 (2011-12).<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 2011-12 version.

In July 2009, this court affirmed Kellam's convictions of first-degree sexual assault with use of a dangerous weapon, armed robbery, intimidating a victim, and taking and driving a vehicle without the owner's consent. *State v. Kellam*, No. 2007AP2452-CR, unpublished slip op. ¶1 (WI App July 29, 2009). In doing so, we rejected Kellam's argument that the circuit court erred when it refused to suppress either the victim's out-of-court identification of Kellam or Kellam's inculpatory statements. *Id.* Likewise, we rejected his argument that the court erred when it refused to instruct the jury on the lesser included offense of second-degree sexual assault. *Id.*

In July 2010, Kellam moved for postconviction relief, asserting that his postconviction counsel was ineffective for failing to challenge his trial counsel's performance. Specifically, he argued that his trial counsel should have moved for a change of venue and should have objected to jurors who were allegedly sleeping during testimony. According to Kellam's motion, the judge was not present in the courtroom during the time period in which the jurors were allegedly sleeping. Ultimately, the circuit court determined that Kellam had failed to show ineffective assistance regarding the allegedly sleeping jurors because counsel had raised the issue at trial and the court addressed it. The court also determined that Kellam had failed to demonstrate any facts from which prejudice could be found from a failure to move for a change of venue. Accordingly, it denied Kellam's motion without a hearing.

In April 2012, Kellam again moved for postconviction relief. This time, Kellam argued that his trial counsel was ineffective for failing to object to the judge's decision to leave the courtroom during trial while the State played a videotape of an expert witness's testimony. Kellam maintained that the absence prejudiced him because if the judge had been present, he would have seen the allegedly sleeping jurors. The circuit court concluded that Kellam had

litigated this claim in his prior postconviction motion. Accordingly, it denied the motion without a hearing. This appeal follows.

“We need finality in our litigation.” *State v. Escalona–Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, any claim 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 the claim earlier. *Escalona–Naranjo*, 185 Wis. 2d at 185. Whether an appeal is procedurally barred from review pursuant to *Escalona-Naranjo* is a question of law which we review de novo. *State v. Tillman*, 2005 WI App 71, ¶14, 281 Wis. 2d 157, 696 N.W.2d 574.

Examining Kellam’s most recent postconviction motion, we conclude that it is procedurally barred from review. As noted by the State, Kellam has shown no reason why his latest claim of ineffective assistance of counsel could not have been raised in his prior postconviction motion.<sup>2</sup> Although Kellam now argues that his “lack of knowledge of the claim in his previous postconviction motion due to the novelty of the claim” constitutes a sufficient reason to excuse his failure to raise it earlier, we disagree. Conclusory allegations about a claim’s novelty and a litigant’s ignorance of the law do not amount to a sufficient reason to overcome the procedural bar of *Escalona-Naranjo*. Accordingly, the circuit court properly denied Kellam’s postconviction motion.

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<sup>2</sup> Kellam also claims that his most recent postconviction motion alleged that his right to due process was violated when the judge left the courtroom. Like the State, we can find no due process argument in Kellam’s motion. Accordingly, we will not address the issue further. See *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (issues not preserved generally will not be considered on appeal).

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*