

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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No. 98-2122

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM SPEENER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER and TIMOTHY G. DUGAN, Judges.¹ *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¹ Judge Miller presided over Speener's trial, sentencing and his original postconviction motion. Judge Dugan presided over Speener's § 974.06, STATS., postconviction motion.

¶1 PER CURIAM. William Speener appeals, *pro se*, from a judgment of conviction, following a jury trial, for two counts of first-degree sexual assault of a child and one count of exposing his genitals, and from an order denying his motion for postconviction relief pursuant to § 974.06, STATS. On appeal, Speener argues that both his trial counsel and his postconviction counsel rendered ineffective assistance. First, Speener claims that his trial counsel was ineffective for: (1) failing to object to the admission of “other acts evidence” at trial; (2) failing to object when Speener was denied his right to be present during a critical stage of the trial; (3) failing to object to false testimony and prosecutorial misconduct; (4) failing to secure Speener’s release after his statutory and constitutional right to a speedy trial was violated; (5) failing to move for discovery, including failing to request the State’s witnesses’ police records; (6) failing to investigate prior false allegations against the defendant; (7) failing to produce defense witnesses; (8) failing to effectively cross-examine the victim’s mother; and (9) failing to investigate alleged welfare fraud by the State’s witnesses. Second, Speener claims that his postconviction counsel was ineffective for failing to raise the following issues in the postconviction motion: (1) the speedy trial violation; (2) Speener’s absence during a critical stage of the trial; (3) alleged welfare fraud by the State’s witnesses; and (4) prior false allegations against Speener. We determine that all of Speener’s ineffective assistance of trial counsel claims are barred by *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994). Although Speener’s claims of ineffective assistance of postconviction counsel survive the procedural bar of *Escalona-Naranjo*, we are satisfied that Speener received the effective assistance of postconviction counsel and, therefore, we affirm.

I. BACKGROUND.

¶2 Speener was convicted by a jury of two counts of first-degree sexual assault of a child and one count of exposing his genitals. Speener, represented by a new attorney, filed a postconviction motion seeking reversal of his conviction and a new trial based on the ineffective assistance of trial counsel. The trial court conducted a *Machner*² hearing regarding the ineffective assistance claim. After the *Machner* hearing, the trial court denied Speener's postconviction motion.

¶3 Speener, still represented by postconviction counsel, filed a direct appeal from the order denying his postconviction motion. In his direct appeal, Speener again claimed that trial counsel was ineffective for a number of reasons. In an unpublished opinion, *see State v. Speener*, No. 97-0281-CR, unpublished slip op. (Wis. Ct. App. Feb. 3, 1998), this court affirmed the judgment of conviction and the order denying Speener's postconviction motion.

¶4 Then Speener, acting *pro se*, filed a § 974.06, STATS., postconviction motion raising numerous claims of error. In his § 974.06 postconviction motion, Speener argued that: (1) he was arrested and his house was searched without either a warrant or his consent; (2) his conviction was procured in violation of his statutory and constitutional right to a speedy trial; (3) his conviction was obtained based on false testimony and prosecutorial misconduct; (4) his conviction was obtained despite the fact that neither he nor his attorney was present during a "critical stage of his trial"; (5) the State erroneously amended the charges based on testimony obtained from the victim who was never sworn in at the preliminary hearing and, therefore, was not under oath when testifying; (6) he received

² *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

ineffective assistance of trial counsel; and (7) he received ineffective assistance of “appellate counsel.”³ The circuit court assigned to the motion construed it simply as a motion alleging that “appellate counsel was ineffective for failing to raise claims of trial counsel’s ineffectiveness.” The circuit court denied Speener’s motion, finding that because Speener’s trial counsel was not ineffective, his postconviction counsel could not be ineffective for failing to raise these issues. Speener now appeals from the circuit court’s denial of his § 974.06 postconviction motion.

II. ANALYSIS.

¶5 Several principles governing § 974.06, STATS., postconviction motions control the disposition of Speener’s appeal. First, the scope of a § 974.06 motion is limited to jurisdictional or constitutional issues. *See State v. Escalona-Naranjo*, 185 Wis.2d 168, 177, 517 N.W.2d 157, 160 (1994). “The motion must not be used to raise issues disposed of by a previous appeal.” *Id.* (quoted source omitted). Procedurally, a § 974.06 motion follows a motion for a new trial and any subsequent appeals. *See id.* The purpose of § 974.06(4)⁴ is to force criminal

³ Although Speener claims that he received the ineffective assistance of “appellate counsel,” we conclude that he is raising a claim of ineffective assistance of “postconviction counsel.” Wisconsin law distinguishes between postconviction and appellate counsel when addressing ineffective assistance of counsel claims. Generally, a claim of ineffective assistance of appellate counsel is raised by filing a habeas petition with the appellate court that heard the appeal. *See State v. Knight*, 168 Wis.2d 509, 520, 484 N.W.2d 540, 544 (1992). However, when an ineffective assistance claim is predicated on counsel’s failure to pursue a claimed error in a postconviction motion, such claim should be raised either by a habeas petition or by § 974.06, STATS., motion. *See State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 681 556 N.W.2d 136, 139 (Ct. App. 1996). Because Speener has pursued the latter under § 974.06, and appears to be relying on *Rothering*, we shall address his claim as one for ineffective assistance of postconviction counsel.

⁴ Section 974.06(4), STATS., requires that:

All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended

(continued)

defendants to raise all postconviction claims in one motion or appeal. *See id.* at 178, 517 N.W.2d at 161. This procedural bar effectively prohibits “[s]uccessive motions and appeals, which all could have been brought at the same time.” *Id.* at 186, 517 N.W.2d at 164. Issues that have already been finally adjudicated, waived, or not raised in a prior postconviction motion, cannot be raised in a § 974.06 motion, unless there is “sufficient reason” for failing to raise them in the original, supplemental or amended motion. *See id.* at 181-82, 517 N.W.2d at 162; § 974.06(4), STATS.

A. Speener’s ineffective assistance of trial counsel claims are barred.

¶6 Under § 974.06(4), STATS., and *Escalona-Naranjo*, Speener is barred from raising his claims of ineffective assistance of trial counsel. Pursuant to § 974.06(4), and *Escalona-Naranjo*, Speener is barred from raising issues that he could have raised, but failed to, in his original postconviction motion, unless he provides sufficient reason for his failure to raise the issues in the prior proceedings. As noted, after he was convicted, Speener filed a postconviction motion for a new trial based on the ineffective assistance of trial counsel. After a *Machner* hearing, the trial court denied Speener’s motion, he appealed, and this court affirmed the trial court’s finding that Speener was not denied effective representation. Speener now makes new claims that trial counsel was ineffective for failing to raise several issues at trial. Speener does not offer any reasons, much

motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

less sufficient reasons, for his failure to raise these additional claims of ineffective assistance of trial counsel in the prior proceedings. Therefore, § 974.06(4) and *Escalona-Naranjo* prohibit him from raising these issues for the first time in these proceedings and we will not consider them.

B. Speener's ineffective assistance of postconviction counsel claims fail.

¶7 Unlike Speener's claims of ineffective assistance of trial counsel, his ineffective assistance of postconviction counsel claims survive the procedural bar contained in § 974.06(4), STATS., and *Escalona-Naranjo*. It is generally recognized that ineffective assistance of postconviction counsel constitutes sufficient reason for failing to raise a claim of error in a prior proceeding. *See, e.g., State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Therefore, Speener's claims regarding the ineffective assistance of postconviction counsel escape the procedural bar of *Escalona-Naranjo* and we must consider them here. Speener claims that his postconviction counsel was ineffective for not raising issues regarding the alleged speedy trial violation, the fact that Speener was not present during a critical stage of the trial, alleged welfare fraud by the state's witnesses, and alleged prior false allegations against Speener.⁵

⁵ Although it is unclear from the appellate brief submitted by Speener, we assume that he is claiming postconviction counsel was ineffective for failing to challenge trial counsel's failure to raise these issues at trial. We note that postconviction counsel would have been unable to raise these claimed errors as substantive issues because they were neither objected to, nor raised during trial and, therefore, could not be raised for the first time on appeal. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980); *State v. Hartman*, 145 Wis.2d 1, 9-10, 426 N.W.2d 320, 323 (1988) (failing to object at trial waives right to claim error on appeal). Thus, postconviction counsel's only recourse would have been to claim that trial counsel was ineffective for failing to raise these issues at trial. We shall address Speener's claim of ineffective assistance of postconviction counsel accordingly.

¶8 First, we note that, contrary to Speener’s assertions, the record establishes that postconviction counsel did argue both that trial counsel was ineffective for failing to object and move for Speener’s release when his speedy trial rights were violated and for failing to investigate or cross-examine the victim’s mother regarding prior false allegations made against Speener. In his original postconviction motion, Speener’s attorney claimed that trial counsel was ineffective for failing, *inter alia*, (1) to investigate or cross-examine the victim’s mother about prior false allegations; and (2) to object and to move for Speener’s release when his speedy trial rights were violated.⁶ Because these claims of error were raised and disposed of, Speener cannot now claim that postconviction counsel was ineffective for failing to raise these issues.

¶9 Second, Speener does not adequately develop his argument that postconviction counsel was ineffective for failing to challenge trial counsel’s failure to cross-examine the State’s witnesses regarding alleged welfare fraud and, therefore, we will not consider his argument here. *See Barakat v. DHSS*, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398-99 (Ct. App. 1995) (reviewing court need not address “amorphous and insufficiently developed” arguments). There is no evidence in the record indicating that the State’s witnesses were ever accused or convicted of welfare fraud. Speener simply avers that postconviction counsel

⁶ In the notice of motion and motion for postconviction relief, postconviction counsel claimed that trial counsel was ineffective for failing to seek Speener’s release when his speedy trial rights were violated. At the *Machner* hearing, Speener’s trial counsel testified that “[t]he speedy trial delay was not going to get us Mr. Speener’s freedom in any event,” due to the fact that Speener was in custody on a separate and unrelated matter. Thus, postconviction counsel would not have been able to establish that trial counsel’s failure to pursue Speener’s release when his speedy trial rights were violated prejudiced Speener, *see Strickland v. Washington*, 466 U.S. 668, 690 (1984) (requiring that counsel’s claimed error must constitute deficient performance and prejudice for a finding of ineffective assistance). Postconviction counsel apparently abandoned the issue following the *Machner* hearing because following the hearing, postconviction counsel never raised the issue again.

“was provided with ... welfare fraud by the states [sic] witnesses,” and that counsel failed to “present[] pertinent issues, such as, [*inter alia*], welfare fraud by the states [sic] witnesses.” Speener neglects to discuss this issue any further, failing to provide this court with any additional information or argument regarding the alleged welfare fraud. Consequently, Speener has not adequately developed this argument and we need not consider it here.

¶10 Third, postconviction counsel was not ineffective for failing to challenge trial counsel’s failure to object to Speener’s absence during a “critical stage” of the trial. During its deliberations, the jury requested that the testimony of Guadalupe Olsen be read back. Although the discussion was not recorded, the trial court apparently acquiesced and the court reporter read back the testimony. The record suggests that Speener’s attorney was not informed of these developments until immediately before the jury returned to render its verdict, at which time he was given the opportunity, albeit brief, to review the jury’s request.⁷

⁷ On July 12, 1995, Speener’s case was called for the jury to render its verdict. The transcript of the proceedings reveals that the following took place immediately after the trial court informed both sides of the jury’s request:

THE COURT: The other thing you need to know while you are looking at them, for the sake of time, they’re essentially a single request, one note for certain information the Court found too broad and, therefore, asked them to be more specific and they were. In essence, they wanted testimony read back for [sic] Ms. Guadalupe Olson, and we did accommodate. That court reporter went back in and read back the portion. It was rather brief. Anything for the record?

[PROSECUTOR]: No, Your Honor.

[DEFENSE COUNSEL]: Nothing, Your Honor.

THE COURT: We’re ready for the jury.

The record does not conclusively indicate whether either side was present when the jury made its request. We assume that Speener correctly argues that neither side was present or consulted before the trial court granted the jury’s request to have the court reporter read back the testimony.

Speener's attorney failed to object and the trial court proceeded. Speener's postconviction counsel never argued that trial counsel was ineffective for failing to object when he was informed that the trial court read testimony back to the jury when neither he nor Speener had been consulted regarding the reading back of testimony and neither he nor Speener had been present for the rereading. Speener now claims that postconviction counsel was ineffective for failing to raise this claim. We disagree.

¶11 We note that the trial court should have afforded Speener the opportunity to oppose the jury's request, and if the trial court, nevertheless, ruled that the testimony could be read back, then he had the right to be present when the testimony was read back to the jury. *See* § 971.04, STATS. The trial court's decision to allow testimony to be read back and sending the court reporter into the jury deliberation room in Speener's absence was an error that warranted an objection from Speener's trial counsel.⁸ Nevertheless, even though Speener's trial counsel's failure to object arguably constituted deficient performance, we find that the second prong needed to establish a claim of ineffective assistance of postconviction counsel has not been met.

¶12 In order to demonstrate that trial counsel's failure to object to Speener's absence during this stage of the trial constituted ineffective assistance, postconviction counsel would have had to demonstrate that counsel's performance was deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 690

⁸ Although the trial court erred in granting the jury's request and permitting testimony to be read back without consulting defense counsel and outside of the defendant's presence, standing alone, the trial court's error was harmless. *See State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 232 (1985) (an error is harmless if there is no reasonable probability that the error contributed to the conviction).

(1984). As noted, trial counsel's failure to object to Speener's absence arguably constitutes deficient performance. However, we conclude that postconviction counsel would have been unable to demonstrate that trial counsel's failure to object was prejudicial. In other words, postconviction counsel could not demonstrate that, but for trial counsel's failure to object to Speener's absence, there was a reasonable probability that the result of the proceeding would have been different. *See id.* at 694. The brief rereading of a witness's testimony that the jury had already heard could not, in all likelihood, have changed the result of the trial. Therefore, because trial counsel's failure to object to Speener's absence was not prejudicial, we conclude that postconviction counsel would have been unable to demonstrate that trial counsel was ineffective. Consequently, we will not hold that Speener's postconviction counsel was ineffective for failing to raise this issue.

¶13 For the foregoing reasons, we affirm the judgment of the trial court and the order denying Speener's § 974.06, STATS., postconviction motion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

