

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 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.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0177

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

EUGENE F. OLSEN,

PETITIONER-APPELLANT,

V.

DANIEL R. BERTRAND, WARDEN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Crawford County:
MICHAEL KIRCHMAN, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Eugene F. Olsen appeals from an order summarily denying his petition for a writ of habeas corpus. He asks that we remand the petition for an evidentiary hearing. However, because the trial court properly

determined that the claim raised in the petition was procedurally barred by prior proceedings, we affirm.

¶2 Olsen was convicted in 1988 of armed burglary, first-degree sexual assault, endangering safety regardless of life, and being a felon in possession of a firearm, after he broke into a woman's home at night and raped her at gunpoint. He was sentenced as a repeat offender to consecutive prison terms totaling fifty-five years. He has since unsuccessfully sought relief from his convictions by a postconviction motion brought under RULE 809.30(2), STATS.; a direct appeal to this court; a postconviction motion brought under § 974.06, STATS.; a habeas corpus petition brought before this court under *State v. Knight*, 168 Wis.2d 509, 520, 484 N.W.2d 540, 544 (1992); and two successive habeas corpus petitions filed in the trial court.

¶3 Olsen's most recent habeas corpus petition, which is the subject of this appeal, alleged that his statement and evidentiary items seized by the police should have been suppressed because the record did not establish the police had permission to enter the residence outside of which Olsen was apprehended. His prior habeas corpus petition, which was not appealed, alleged, among other things, that consent to search the residence was unlawfully obtained or tainted by a prior illegal entry.¹

¶4 Courts generally do not entertain successive petitions for writs of habeas corpus which are based upon the same grounds or facts, or upon other

¹ Although the record from the prior habeas corpus action was not forwarded to this court on appeal, Olsen has included the relevant documents in an appendix, and the State urges us to rely upon them. Because there is no factual dispute between the parties about the validity of the documents supplied by Olsen, we will accept them for the purpose of this appeal.

grounds or facts which existed at the time of a prior habeas petition. *See Smith v. State*, 63 Wis.2d 496, 499 and 499 n.7, 217 N.W.2d 257, 258 and 258 n.7 (1974). Olsen argues that he is nonetheless entitled to be heard on his second petition for habeas corpus because the representation afforded to him for the first habeas corpus proceeding was ineffective.

¶5 We note, however, there is no constitutional or statutory right to counsel in a collateral habeas corpus proceeding. *See State ex rel. Payton v. Kolb*, 135 Wis.2d 202, 206-07, 400 N.W.2d 285, 286-87 (Ct. App. 1986). There cannot be a claim for ineffective assistance of counsel without an underlying right to counsel. *See A.S. v. State*, 168 Wis.2d 995, 1004-05, 485 N.W.2d 52, 55 (1992). The adequacy of counsel's representation in the prior habeas proceeding therefore has no bearing on our analysis of whether Olsen has forfeited any claims which should have been raised there.

¶6 Olsen has presented nothing which would indicate the facts supporting his current suppression claim were not known to him when he filed his previous habeas petition. Indeed, the facts should have been known to him before trial and each of his successive attempts at postconviction relief. We therefore conclude the trial court properly refused to consider the merits of the claim raised in the current petition.

By the Court.—Order affirmed.

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

