**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

September 9, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-0612**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LEWIS ALTMAN, JR.,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Lewis Altman, Jr. appeals from the denial of a postconviction motion under § 974.06, STATS. He seeks to withdraw his guilty pleas to several charges, claiming that he was denied effective assistance of trial and appellate counsel due to an alleged conflict of interest and multiplicitous

charges. We conclude that Altman's claims are procedurally barred and affirm the decision of the trial court.

Altman was charged with attempted first-degree intentional homicide, first-degree reckless injury and three counts of first-degree recklessly endangering safety, all with allegations of habitual criminality and use of a dangerous weapon, based upon an incident in which he fired shots from a vehicle he was driving in the direction of another vehicle. He entered guilty pleas to the attempted homicide charge and the three counts of reckless endangerment in exchange for the dismissal of the reckless injury charge and the penalty enhancers on the reckless endangerment charges.

After he was sentenced to twenty-eight years in prison on the attempted homicide charge and consecutive four-year terms on each of the reckless endangerment charges, Altman twice moved to withdraw his plea, claiming trial counsel should have moved to suppress his statement to police and investigated possible defenses before advising him to accept the plea agreement. The trial court denied Altman's motions, and we summarily affirmed the conviction and orders denying postconviction relief on direct appeal after counsel filed a no merit report. The supreme court declined to review our decision.

Altman then filed a series of pro se motions in the trial court, seeking the return of property seized at his arrest and a copy of his PSI report. Finally, he filed a postconviction motion under § 974.06, STATS., claiming that trial counsel was ineffective because his part-time work as a prosecutor of traffic charges for the City of Onalaska created an apparent conflict of interest and because he had failed to challenge the multiplicity of the reckless endangerment charges, and that appellate counsel was ineffective for failing to raise the issue of

trial counsel's effectiveness. The trial court determined that Altman's claims of ineffective assistance of trial counsel lacked merit and refused to consider the claim of ineffective assistance of appellate counsel. Altman appeals.

Section 974.06(1), STATS., permits a defendant to challenge a sentence "upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack" after the time for seeking a direct appeal or other postconviction remedy has expired. Section 974.06(4) limits the use of this postconviction procedure, however, in the following manner:

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

The purpose of subsection (4) is "to require criminal defendants to consolidate all their postconviction claims into one motion or appeal." ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 178, 517 N.W.2d 157, 161 (1994). Successive motions and appeals, including those raising constitutional claims, are procedurally barred unless the defendant can show a "sufficient reason" why the newly alleged errors were not previously or adequately raised. ***Id***. at 181-82, 517 N.W.2d at 162.

Broadly construed, Altman's argument is that the ineffective assistance of counsel constitutes a sufficient reason why he did not earlier challenge the alleged conflict of interest and multiplicity of the charges. *See, e.g.,* ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996) (suggesting that whether the ineffective assistance of appellate counsel constitutes a sufficient reason for failing to raise an issue is still an open question in this state); ***State v. Robinson***, 177 Wis.2d 46, 53, 501 N.W.2d 831, 834 (Ct. App. 1993) (holding that "the inability of the defendant's trial counsel to assert his own ineffectiveness constitutes a 'sufficient reason' under sec. 974.06(4), STATS., for not asserting the matter in the original" postconviction motion).

The trial court correctly noted that a claim of ineffective assistance of appellate counsel must be raised in this court by means of a petition for a writ of *habeas corpus* under ***State v. Knight***, 168 Wis.2d 509, 520, 484 N.W.2d 540, 544 (1992). However, a claim of ineffective assistance of postconviction counsel should be raised in the trial court. *See* ***Rothering***, 205 Wis.2d at 681, 556 N.W.2d at 139. Thus, the trial court should have considered whether counsel improperly failed to raise Altman's conflict of interest and multiplicitous charges issues in his initial postconviction motion prior to his direct appeal.

We are satisfied, however, that the trial court's analysis of why there was no conflict of interest and no multiplicitous charges answers in the negative the question of whether postconviction counsel was ineffective. Altman failed to show by clear and convincing evidence that there was any conflict between counsel's representation of him and of the City of Onalaska, and did not allege any specific manner in which counsel's performance was adversely affected by the purported conflict. *See* ***State v. Foster***, 152 Wis.2d 386, 392-93, 448 N.W.2d 298,

301 (Ct. App. 1989). The multiple charges against Altman were different in fact because each count referred to a different victim. Therefore, there was no double jeopardy violation. *See* ***State v. Anderson***, 219 Wis.2d 739, 750-751, 580 N.W.2d 329, 334 (1998). Counsel was not obligated to raise either of the meritless issues in a postconviction motion. Since postconviction counsel was not ineffective, appellate counsel could not have been ineffective for failing to raise the same issues, and a ***Knight*** petition would also have failed.

Because the appellant was not afforded ineffective assistance of counsel, there is no sufficient reason under ***Escalona-Naranjo*** to allow consideration of the plea withdrawal issues Altman attempted to raise in the postconviction motion which is the subject of this appeal.

*By the Court.*—Order affirmed.

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