

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 20, 2000

Cornelia G. Clark  
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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-0964**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MICHAEL SOLOMON,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Dane County:  
ROBERT A. De CHAMBEAU, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Michael Solomon appeals from the trial court's order denying his motion for postconviction relief. The issue is whether Solomon

is precluded from bringing these claims by WIS. STAT. § 974.06(4) (1997-98)<sup>1</sup> and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirm.

¶2 On June 13, 1994, Solomon was convicted of four counts of first-degree sexual assault and one count of attempted first-degree sexual assault, as a repeater. He was sentenced to eighty years of imprisonment and thirty years of probation, to be served consecutively.

¶3 On June 7, 1995, Solomon's attorney filed a motion to withdraw his plea. In the motion, Solomon's attorney argued that trial counsel was ineffective for failing to inform Solomon about the consequences of the newly-enacted Sexual Predator Law, WIS. STAT. ch. 980 (1993-94). That motion was later withdrawn at Solomon's request.

¶4 On January 3, 1997, Solomon filed a motion to modify his sentence. The trial court rejected Solomon's claim that he was entitled to resentencing based on the allegation that the initial determination of probable cause was not timely made and the presentence investigation report contained erroneous information. Solomon did not appeal that order.

¶5 On August 24, 1998, Solomon filed a petition for writ of habeas corpus pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). He argued that his appellate counsel was ineffective for not pursuing an appeal and for not raising the issue of ineffective assistance of trial counsel. We denied the petition, noting that Solomon's claims centered on the activities of counsel prior to initiating an appeal and, therefore, the proper avenue to seek redress of those

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

claims was in the trial court because it was in a better position to evaluate what had occurred. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 678-79, 556 N.W.2d 136 (Ct. App. 1996).

¶6 On January 8, 1999, Solomon filed another postconviction motion, this time under WIS. STAT. § 974.06. He argued that his appellate counsel was ineffective for not pursuing an appeal and for not raising the issue of ineffective assistance of trial counsel on the grounds that trial counsel should have: (1) argued that the charges were multiplicitous; (2) argued that the determination of probable cause had not been timely made; and (3) argued that the presentence investigation report contained erroneous information. The trial court denied the motion.

¶7 We, too, conclude that Solomon is not entitled to relief. In prior motions, Solomon argued that there was false information in the presentence investigation report and that the determination of probable cause was not timely made. He now recasts these arguments in terms of ineffective assistance of trial and appellate counsel for failing to raise these issues. To the extent that the underlying issues have previously been addressed, this court will not again consider them. *See* WIS. STAT. § 974.06(4); *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (no matter how artfully rephrased, an appellant may not relitigate matters previously decided).

¶8 The supreme court has held that where a defendant's claim for relief could have been, but was not, raised in a prior postconviction motion or on direct appeal, the claim may not be raised in a later postconviction motion absent a sufficient reason for failing to previously raise the claim. *See Escalona-Naranjo*, 185 Wis. 2d at 185. Solomon has not given a sufficient reason for failing to raise

the issue of ineffective assistance of counsel based on his contention that counsel should have argued that the charges were multiplicitous. Solomon could have raised this issue when he filed his first postconviction motion in the trial court on January 3, 1997. Thus, this claim is procedurally barred by WIS. STAT. § 974.06(4) and *Escalona-Naranjo*, 185 Wis. 2d at 185.

¶9 Finally, we address Solomon's claim that his appellate counsel was ineffective for failing to commence an appeal or file a no merit report. Solomon has overlooked the fact that his appointed attorney filed a postconviction motion on his behalf. That motion was withdrawn *because Solomon requested that it be withdrawn*. No claim of ineffective assistance of appellate counsel for failure to prosecute an appeal lies in these circumstances.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

