

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

January 27, 2000

Cornelia G. Clark  
Acting 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. 99-1026**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES L. CREAMER,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Dane County:  
SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 PER CURIAM. James L. Creamer appeals from the order denying his latest motion for postconviction relief. We affirm because the issues Creamer attempts to raise are procedurally barred.

## BACKGROUND

¶2 In 1995, Creamer was convicted of attempted homicide and attempted robbery by force, and sentenced to concurrent terms of forty-five and twenty years. He filed a postconviction motion under WIS. STAT. RULE 809.30 (1997-98),<sup>1</sup> alleging he had been denied his constitutional right to testify on his own behalf, he was denied his confrontation rights by the introduction of preliminary hearing testimony of the since-deceased victim, he was denied a fair trial by the D.A.'s failure to disclose evidence, the jury instructions were defective, trial counsel was ineffective for failing to seek a jury instruction on a lesser-included offense, and the jury instructions given were inadequate. The motion was denied in its entirety, and Creamer appealed. This court issued an opinion affirming the trial court's denial of postconviction relief on October 23, 1998.

¶3 On February 11, 1999, Creamer filed a second motion for postconviction relief, this time under WIS. STAT. § 974.06. In it, he renewed his claims of ineffective assistance of trial counsel and improper jury instructions, and added additional claims of ineffective assistance of postconviction and appellate counsel for failure to raise trial counsel's failure to request severance, error in the accuracy of the preliminary hearing transcript read at trial, improper use at sentencing of confidential statements made to his probation agent, and improper use of sentencing discretion. The trial court denied some of Creamer's claims as outside the scope of relief available under § 974.06, denied other claims as having been previously adjudicated, and denied the remaining claims as barred under

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<sup>1</sup> All further references to the statutes are to the 1997-98 version.

*State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). This appeal followed.

## STANDARD OF REVIEW

¶4 We will independently review whether claims are procedurally barred. See *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

## ANALYSIS

¶5 WISCONSIN STAT. § 974.06(1) 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.” *Escalona-Naranjo*, 185 Wis. 2d at 178. 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 185. Furthermore, issues which have already been considered on direct appeal cannot be raised in a subsequent motion for relief under § 974.06. *See State v. Rohl*, 104 Wis. 2d 77, 96, 310 N.W.2d 631 (Ct. App. 1981).

¶6 As the State notes, Creamer has offered no explanation, much less a sufficient one, as to why any issue other than counsel’s performance relating to requesting severance was not raised in his first postconviction motion and appeal. Therefore, Creamer’s claims of error regarding the accuracy of the preliminary hearing transcript read at trial, the use at sentencing of statements made to his probation agent, and improper use of sentencing discretion are clearly procedurally barred under *Escalona-Naranjo*.<sup>2</sup> Moreover, Creamer’s current allegation that the severance issue was not previously raised due to postconviction counsel’s ineffective assistance is undermined by counsel’s statement at the postconviction hearing, in Creamer’s presence, that he had discussed the issue of ineffective assistance of trial counsel relating to severance with his client who would be withdrawing that portion of his motion. There is no factual basis for arguing that a decision which Creamer himself earlier endorsed constituted ineffective assistance. Finally, Creamer’s remaining claims of ineffective assistance of trial counsel and improper jury instructions are procedurally barred because they were already raised and addressed in his prior appeal. The trial court properly denied Creamer’s attempted § 974.06 motion without a hearing.

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<sup>2</sup> In light of our conclusion, we need not consider whether these issues might also fall outside the proper scope of WIS. STAT. § 974.06.

*By the Court.*—Order affirmed.

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

