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

April 27, 2000

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-2437**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MICHAEL A. SVEUM,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ

¶1 PER CURIAM. Michael Sveum appeals the denial of his postconviction motion under WIS. STAT. § 974.06 (1997-98).[1] He claims that the trial court erred by denying the motion without first giving him an evidentiary

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

hearing. Because we agree with the trial court that most of Sveum's claims were procedurally barred and that the record conclusively demonstrates that no relief was available on the rest of his claims, we conclude that no hearing was necessary. Accordingly, we affirm the order.

## BACKGROUND

¶2 In 1996, Sveum was convicted of stalking, harassment, violation of a harassment injunction, and criminal damage to property. The convictions were based on evidence presented at trial that, after his live-in girlfriend had moved out, Sveum had engaged in a pattern of behavior which included: closely observing her movements; monitoring her credit card, bank accounts and the mileage on her car; threatening to make her sorry, to blow her head off someday and to ruin her future relationships; hiding in the bushes; making frequent hang-up calls;[2] buzzing her doorbell whenever she brought dates home; obtaining duplicate keys to her new car; and damaging her car and those of her dates.

¶3 Sveum appealed his convictions, arguing that the trial court had erred in excluding some of the testimony of his alibi witness as hearsay and that the evidence was insufficient to show that Sveum had issued any credible threats or that his visual or physical proximity to the victim had induced fear in her on two or more days. We concluded that the hearsay issue had been waived and rejected his other claims.

¶4 After the supreme court denied review, Sveum filed a *pro se* writ for habeas corpus, arguing that the State had failed to disclose exculpatory phone

[2] The hang-up calls continued even after Sveum's ex-girlfriend had obtained an unlisted number.

records, and that trial counsel had failed to inquire about other acts evidence, had failed to request a continuance upon learning that other acts evidence would be offered, had failed to perform sufficient discovery to avoid surprise testimony at trial, had failed to adequately cross-examine witnesses, and had failed to offer the proper hearsay exception for the alibi witness's testimony. Sveum also argued that appellate counsel was ineffective for having failed to raise these alleged instances of ineffective assistance of trial counsel. We concluded that the evidence of Sveum's guilt was so overwhelming as to conclusively demonstrate that any errors which the State or trial counsel may have made were nonprejudicial, and that appellate counsel could not in any event have raised any issues of ineffective assistance of trial counsel which had not been preserved by postconviction motion.

¶5 Sveum next filed a *pro se* motion for postconviction relief under WIS. STAT. § 974.06(1), which is the subject of this appeal. The grounds for the motion were that: (1) the State had intentionally withheld exculpatory phone records; and that trial counsel (2) had failed to obtain the phone records; (3) failed to inquire about other acts evidence; (4) failed to request a continuance to prepare a defense to the other acts evidence; (5) failed to secure a pretrial discovery and inspection hearing; (6) failed to object to surprise evidence; (7) failed to adequately cross-examine prosecution witnesses; (8) failed to present the proper hearsay exception to get the exculpatory statement of the alibi witness admitted; (9) provided Sveum with bad advice about the strength of the State's case; (10) failed to adequately prepare defense witnesses; (11) failed to adequately investigate the case; and (12) failed to present two witnesses who had been

subpoenaed.[3] The trial court denied the motion without a hearing because it determined that it was procedurally barred by Sveum's prior litigation.

## STANDARD OF REVIEW

¶6 A defendant is entitled to a hearing on a postconviction motion when he alleges facts which, if true, would entitle him to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). No hearing is required when a defendant presents only conclusory allegations or the record conclusively demonstrates that he is not entitled to relief. *See* ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). We will independently determine whether the facts alleged in a postconviction motion are sufficient to warrant a hearing. *See* ***Bentley*** at 310; *see also* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997) (applying *de novo* review to asserted procedural bars to postconviction relief). We will also 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

¶7 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

[3] Sveum also filed a supplemental motion claiming that the trial court lacked subject matter jurisdiction because of a defect in the information, but he does not raise that issue on appeal.

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, 173, 517 N.W.2d 157, 159 (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 185. Furthermore, issues which have already been considered by the court of appeals cannot be raised in a subsequent motion for relief under WIS. STAT. § 974.06. *See* ***State v. Rohl***, 104 Wis. 2d 77, 96, 310 N.W.2d 631 (Ct. App. 1981).

¶8 Sveum's first eight issues were already finally adjudicated during his habeas corpus proceeding. Therefore, they are procedurally barred under ***Escalona-Naranjo***. Sveum's four remaining issues present new ways in which he alleges trial counsel's assistance to have been ineffective. However, Sveum presented the trial court with only conclusory assertions that these issues had not been previously raised due to the ineffective assistance of postconviction counsel and that the alleged errors were prejudicial. Having reviewed the overwhelming

evidence of guilt presented at trial, we continue to believe that the record conclusively demonstrates that none of the actions which Sveum contends trial counsel should have undertaken would have had any reasonable likelihood of changing the outcome of the trial. Therefore, the allegations were insufficient to warrant a hearing. *See* ***Nelson***, 54 Wis. 2d at 497-98.

*By the Court.*—Order affirmed.

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