

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2015AP1265

Cir. Ct. No. 1989CF892595

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALPHONSO HUBANKS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
STEPHANIE ROTHSTEIN, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 PER CURIAM. Alphonso Hubanks, *pro se*, appeals the circuit court orders denying his WIS. STAT. § 974.06 (2015-16) motion without a hearing

and denying reconsideration.¹ The postconviction court concluded that Hubanks' claims were procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and that his allegations were conclusory. We affirm.

I. BACKGROUND

¶2 This court has previously summarized the relevant facts and procedural history of Hubanks' case. For purposes of this appeal, it suffices to state that in 1990, a jury found Hubanks guilty of the following crimes: four counts of first-degree sexual assault; armed robbery; and abduction, all as a party to a crime. Hubanks subsequently filed a WIS. STAT. RULE 809.30 postconviction motion, which the circuit court denied. He appealed and we affirmed. *See State v. Hubanks*, 173 Wis. 2d 1, 496 N.W.2d 96 (Ct. App. 1992). The Wisconsin Supreme Court denied Hubanks' petition for review and the United State Supreme Court denied certiorari review.

¶3 In 1997, Hubanks filed a WIS. STAT. § 974.06 motion alleging, among other things, that his postconviction/appellate counsel was ineffective for not raising trial counsel's ineffectiveness. The postconviction court denied both the motion and the reconsideration motion that followed. Meanwhile, Hubanks also filed a *Knight* petition.² We consolidated our resolution of the *Knight* petition with Hubanks' appeal from the postconviction court's orders. We then denied Hubanks' petition and affirmed. *See State v. Hubanks*, Nos. 1997AP3261-

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² *See State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

W, 1997AP3319, 1997AP3624, unpublished slip op. (WI App Mar. 23, 1999). The Wisconsin Supreme Court denied Hubanks' petition for review.

¶4 In 2015, Hubanks, *pro se*, filed the motion underlying this appeal. He made three arguments: (1) he was incompetent to stand trial in 1990; (2) he was denied the effective assistance of trial and appellate counsel; and (3) he was denied the right to a direct appeal because of an incomplete transcript of *voir dire*.

¶5 The postconviction court denied Hubanks' motion without a hearing. The court concluded that Hubanks' claims were procedurally barred under *Escalona* and that his allegations were conclusory. Hubanks moved the court to reconsider and argued that *Escalona* only bars claims that were strategically withheld. That motion was also denied. This appeal follows.

II. DISCUSSION

¶6 The postconviction procedures of WIS. STAT. § 974.06 allow a convicted offender to attack a conviction after the time for a direct appeal has expired. See *Escalona*, 185 Wis. 2d at 176. The opportunity to bring postconviction motions, however, is not limitless. Section 974.06(4) requires a prisoner to raise all constitutional and jurisdictional grounds for postconviction relief in his or her original, supplemental, or amended motion. See *id.*; see also *Escalona*, 185 Wis. 2d at 185. If a convicted offender did not raise his or her grounds for postconviction relief in a prior postconviction proceeding, or if prior litigation resolved the offender's claims, they may not become the basis for a subsequent postconviction motion under § 974.06 unless the offender demonstrates a sufficient reason for failing to allege or adequately raise the claims in the prior proceeding. *Escalona*, 185 Wis. 2d at 181-82. A court determines the sufficiency of an offender's reason for serial litigation by examining the four

corners of his or her postconviction motion. *See State v. Allen*, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

¶7 Hubanks’ motion offered no explanation, much less a “sufficient reason,” for his failure to have previously raised the present claims. Consequently, his claims are barred. *See Escalona*, 185 Wis. 2d at 181-82.

¶8 In his motion for reconsideration, Hubanks argued that *Escalona* bars only those issues that a defendant strategically withheld in prior appeals or motions for postconviction relief. Hubanks is wrong. There is no legal support for this proposition. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (“Arguments unsupported by references to legal authority will not be considered.”).

¶9 Even if we were to broadly construe Hubanks’ motion to assert that his alleged incompetency constituted a reason, this claim would still fail. Hubanks submits that the trial of an incompetent defendant violates due process and constitutes a plain error that can be raised at any time and is not barred. *See State v. Debra A.E.*, 188 Wis. 2d 111, 135, 523 N.W.2d 727 (1994) (“Defendants who are incompetent at the time they seek postconviction relief should, after regaining competency, be allowed to raise issues at a later proceeding that could not have been raised earlier because of incompetency.”). The problem for Hubanks is that his allegations as to his incompetency fall short. As summed up by the postconviction court in its written decision:

[T]he allegations set forth by the defendant are conclusory and do not warrant relief of any kind. The defendant alleges various shortcomings of counsel regarding [the defendant’s] mental health, such as failing to raise competency during the proceedings and failing to investigate his mental health as a basis for a plea of not guilty by reason of mental disease or defect. However, he

has failed to show that [he was] unable to understand the proceedings, consult with counsel, and assist in the preparation of his defense, and, in addition, he fails to show by any medical documents that he was unable to appreciate the wrongfulness of his conduct or conform his conduct.

We agree. *See* WIS. CT. APP. IOP VI(5)(a) (Nov. 30, 2009) (“When the [circuit] court’s decision was based upon a written opinion ... of its grounds for decision that adequately express the panel’s view of the law, the panel may incorporate the [circuit] court’s opinion or statement of grounds, or make reference thereto, and affirm on the basis of that opinion.”).

¶10 Insofar as Hubanks alleged that his postconviction counsel was ineffective for failing to raise his current claims, he fails to establish the claims he now raises are clearly stronger than those presented in his 1990 and his 1997 postconviction proceedings.³ *See State v. Romero-Georgana*, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).

³ In his postconviction motion, Hubanks argued that he was denied the effective assistance of his appellate counsel. However, “[a] defendant arguing ineffective assistance of appellate counsel .. may not seek relief under [WIS. STAT.] § 974.06 and must instead petition the court of appeals for a writ of habeas corpus.” *See State v. Starks*, 2013 WI 69, ¶35, 349 Wis. 2d 274, 833 N.W.2d 146 (emphasis omitted). The postconviction court construed this as a claim against postconviction counsel.

