

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 7, 2006

Cornelia G. Clark
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. 2004AP1748

Cir. Ct. No. 1999CF2491

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NIGEL R. BURGESS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN A. FRANKE, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Nigel R. Burgess appeals *pro se* from an order denying his postconviction motion for plea-withdrawal. The issue is whether Burgess entered a valid guilty plea. We conclude that Burgess's third

postconviction motion is procedurally barred by WIS. STAT. § 974.06(4) (2003-04).¹ Therefore, we affirm.

¶2 In 1999, Burgess pled guilty to first-degree reckless homicide, contrary to WIS. STAT. § 940.02(1) (1999-2000). The trial court imposed a twenty-five-year sentence.² In 2003, Burgess filed a *pro se* postconviction motion challenging the trial court's jurisdiction, which the trial court denied on its merits. Ten months later, Burgess filed a second *pro se* postconviction motion, seeking plea-withdrawal. The trial court summarily denied the motion as procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), and as conclusory, and thus insufficient to warrant an evidentiary hearing. See *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Two months later, Burgess filed a third *pro se* postconviction motion, seeking plea-withdrawal for the second time. The trial court summarily denied the motion as procedurally barred. Burgess appeals from the trial court's three postconviction orders, however, only his appeal from the third order is timely.³

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² This sexual assault occurred in November of 1999 prior to Truth-In-Sentencing, which replaced indeterminate with determinate sentencing for offenses committed after December 31, 1999. 1997 Wis. Act 283. Consequently, the trial court imposed an indeterminate sentence.

³ Postconviction proceedings pursuant to WIS. STAT. § 974.06(6) are civil and consequent appeals are therefore governed by WIS. STAT. § 808.04. Section 808.04(1) requires the filing of a notice of appeal within ninety days of entry of the final order from which the appeal is sought. The postconviction orders were entered May 7, 2003, March 5, 2004, and May 11, 2004. Burgess filed his notice of appeal on June 28, 2004. Consequently, only his appeal from the May 11, 2004 order is timely.

¶3 In his postconviction motion, Burgess seeks to withdraw his guilty plea, claiming it was entered unknowingly, unintelligently and involuntarily.⁴ The trial court denied the motion, ruling that it does not entertain successive postconviction motions raising the same issues and seeking the same relief.⁵

¶4 WISCONSIN STAT. § 974.06(4) requires a criminal defendant to raise all grounds for postconviction relief in his or her original, supplemental or amended postconviction motion. If a criminal defendant files a successive postconviction motion, he or she must allege a “sufficient reason” for failing to raise the issue previously. *See* § 974.06(4); *Escalona*, 185 Wis. 2d at 185. Burgess’s third postconviction motion is procedurally barred by § 974.06(4) because he has failed to allege any reason for failing to previously challenge his guilty plea on this basis.⁶

By the Court.—Order affirmed.

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

⁴ Although it is the postconviction allegations that we review, Burgess shifts arguments on appeal and challenges his guilty plea as void on jurisdictional grounds.

⁵ The basis of the trial court’s denial is also valid for the jurisdictional challenge Burgess raises in his appellate briefs.

⁶ Insofar as Burgess arguably raised this precise challenge in his previous plea-withdrawal motion, it is barred because a successive postconviction motion may not be used to resurrect previously rejected issues. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

