

**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. 2004AP2673

Cir. Ct. No. 2002CF3776

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LONNIE A. MAYER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM W. BRASH, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Lonnie Mayer, pro se, appeals an order denying his motion for an addendum to his presentence investigation report. Mayer argues the PSI should be amended because it did not include a legally-required risk assessment form and his sentence was therefore illegal because it was imposed

without “all relevant information.” We reject Mayer’s arguments and affirm the order.

BACKGROUND

¶2 A jury convicted Mayer of solicitation to commit battery to a witness and conspiracy to commit battery to a witness, contrary to WIS. STAT. §§ 939.30(1), 939.31 and 940.201(2) (2001-02). Mayer was sentenced to six years’ initial confinement and five years’ extended supervision on each count, to be served consecutively. Mayer filed a postconviction motion claiming that the trial court erred by refusing to instruct the jury on the entrapment defense and that the trial court should not have made his sentences run consecutively. The trial court denied the motion, and both the judgment and order were affirmed on direct appeal. *See State v. Mayer*, No. 03-2439-CR, unpublished slip op. (Wis. Ct. App. June 15, 2004). Mayer subsequently filed the underlying motion for a “PSI addendum.” The circuit court denied the motion and this appeal follows.

DISCUSSION

¶3 Mayer argues the PSI should be amended because it did not include what he claims is a legally-required risk assessment form. Mayer further contends that the absence of the form rendered his sentence illegal because it was imposed without “all relevant information.” Because Mayer did not raise this issue in earlier postconviction proceedings, we conclude his motion is procedurally barred

under WIS. STAT. § 974.06(4)¹ and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). In *Escalona-Naranjo*, our supreme court held that “a motion under sec. 974.06 could not be used to review issues which were or could have been litigated on direct appeal.” *Id.* at 172. The statute, however, does not preclude a defendant from raising “an issue of constitutional dimension which for sufficient reason was not asserted or was inadequately raised in his [or her] original, supplemental or amended postconviction motions.” *Id.* at 184.

¶4 The State notes that the *Escalona-Naranjo* bar generally applies to WIS. STAT. § 974.06 motions, which do not include challenges to the court’s sentencing discretion. See *State v. Grindemann*, 2002 WI App 106, ¶19 n.4, 225 Wis. 2d 632, 648 N.W.2d 507. Here, Mayer challenges his sentencing proceedings, but not on grounds that the trial court erroneously exercised its sentencing discretion. Rather, Mayer contends that the sentencing procedure was improper because the PSI did not include the risk assessment form. Although Mayer did not specifically invoke § 974.06 in making his motion, his request nevertheless falls under the ambit of that section because he is arguing that his

¹ WISCONSIN STAT. § 974.06(4) provides:

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.

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

sentence was illegally imposed. *See* WIS. STAT. § 974.06(1); *see also State ex rel. McMillian v. Dickey*, 132 Wis. 2d 266, 279, 392 N.W.2d 453 (Ct. App. 1986) (court looks beyond legal label affixed by defendant to treat the matter as if the right procedural tool was used). Mayer offers no explanation for his failure to raise the instant issue in his first postconviction motion and direct appeal. Therefore, we conclude the motion is procedurally barred under § 974.06(4) and the holding of *Escalona-Naranjo*.

¶5 Even, however, if the motion were not barred, Mayer has not demonstrated that the trial court is required to consider the risk assessment form in formulating the sentence, regardless whether the PSI author was required to complete the form. As we concluded in Mayer's direct appeal, the trial court addressed the pertinent sentencing factors, including the nature and seriousness of the crimes, the impact on the victim, Mayer's background, criminal history, risk to the community and treatment needs. *See State v. Echols*, 175 Wis. 2d 653, 681-82, 499 N.W.2d 631 (1993).

By the Court.—Order affirmed.

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

