

**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. 2004AP1579

Cir. Ct. No. 1992CF924162

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH LEE MOORE,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Joseph Lee Moore appeals from an order denying his postconviction motion primarily seeking to vacate his armed burglary sentence. We conclude that Moore's issues relate to the State's amending the information with an additional count of armed burglary on the day of trial, which

is an issue that was already rejected on its merits, and was procedurally barred in subsequent postconviction orders. Therefore, we affirm.

¶2 In 1994, a jury found Moore guilty of armed robbery, armed burglary and false imprisonment, as a party to each crime, and acquitted him of other charges. The trial court imposed two twenty-year and one two-year consecutive sentences. This court affirmed Moore's judgment of conviction in a no-merit appeal. See *State v. Moore*, No. 95-2857-CR-NM, unpublished slip op. (Wis. Ct. App. June 24, 1996). One of the potential issues raised by appellate counsel, argued by Moore in his response to the no-merit report, and rejected by this court, was the propriety of the State's amending the information on the morning of trial. See *id.* at 1-2.

¶3 Despite Moore's attempts to vary and disguise the issues he now raises from the eleventh hour amendment challenge we rejected in 1996, his essential challenge remains the same. 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). Insofar as Moore's variations of that eleventh hour amendment challenge are different from the precise challenge we rejected in 1996, Moore provides no reason for failing to concoct his "new" variation at that time. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994) (if a criminal defendant files a successive postconviction motion, he or she must allege a "sufficient reason" for failing to

raise the issue on direct appeal, or in a previous postconviction motion).¹ Consequently, any part of Moore's motion that is not barred by *Witkowski* is barred by *Escalona*.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

¹ Although Moore belatedly alleges that he “did not know the basis for the claim [previously],” his reason must be alleged in the postconviction motion itself, not initially in his appellate reply brief. See WIS. STAT. § 974.06(4) (2003-04). Moore alternatively alleges that the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), does not apply to challenges to illegal sentences pursuant to WIS. STAT. § 973.13 (2003-04). First, Moore's actual challenge is to the eleventh hour amendment; it is only disguised as a § 973.13 (2003-04) challenge. Second, legitimate sentencing challenges pursuant to § 973.13 (2003-04) involve sentences that exceed the statutorily prescribed maximum. None of Moore's sentences exceeded the statutorily prescribed maximums. Armed burglary, contrary to WIS. STAT. § 943.10(2) (1991-92), and armed robbery, contrary to WIS. STAT. § 943.32(2) (1991-92), are Class B felonies, each carrying a maximum potential penalty of twenty years. See WIS. STAT. § 939.50(3)(b) (1991-92). False imprisonment, contrary to WIS. STAT. § 940.30 (1991-92), is a Class E felony, carrying a two-year maximum potential penalty. See WIS. STAT. § 939.50(3)(e) (1991-92). The trial court imposed the maximum sentence for each offense; no sentence, however, exceeded the statutorily prescribed maximum.

