COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 13, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2889

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID S. FREDERICK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. David Frederick appeals an order denying his motion under § 974.06, STATS., in which Frederick sought relief from a 1987 sexual assault conviction. The trial court concluded that Frederick's motion was barred under ***State v. Escalona-Naranjo***, 186 Wis.2d 169, 517 N.W.2d 157 (1994), and that, to the extent he raised issues of ineffective appellate counsel, that

issue had to be raised by a writ of habeas corpus with the court of appeals. *See* ***State v. Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992). The court also noted that Frederick was attempting to relitigate issues that had been previously decided against him. We affirm the order denying the postconviction motion, although we do so on other grounds.

The trial court correctly concluded that ***Escalona-Naranjo*** limits a defendant's right to successive postconviction proceedings and that ineffective assistance of appellate counsel is a matter to be determined by the court of appeals. Our inquiry does not end there, however, because § 974.06(4), STATS., allows the filing of an additional postconviction motion upon a showing of "sufficient reason" for failing to assert the matter in the original postconviction proceedings. The same factors that relate to the effectiveness of postconviction counsel might also constitute "sufficient reason" for Frederick's failure to raise the issue in his initial postconviction proceedings. *See* ***State ex rel. Rothering v. McAughtry***, 205 Wis.2d 668, 675, 556 N.W.2d 136, 139 (Ct. App. 1996). We conclude that, as a matter of judicial efficiency, it is more expedient to address Frederick's claims on their merits because the claims have no merit.

Frederick's arguments distill down to two substantive questions: (1) Is it a defense to a charge of sexual contact with a fourteen-year-old that she lied about her age? (2) Was Frederick competent to stand trial? Mistake as to the age of a minor is not a defense. *See* ***Kelley v. State***, 51 Wis.2d 641, 648, 187 N.W.2d 810, 814 (1971). The presumption that some form of scienter is to be applied to a criminal statute even if not expressed does not include sex offenses in which the victim's actual age is determinative. *See* ***Morissette v. United States***, 342 U.S. 246, 251 n.8 (1952). Because a mistake as to the victim's age is not a defense, Frederick's allegations of prosecutorial misconduct, lack of subject

matter jurisdiction, due process violations and ineffective assistance of counsel at all levels are without merit.

Frederick contends that he was incompetent to stand trial because he was suicidal, suffered from persisting manic-depressive illness, was dyslexic and had a minimal education. A person is incompetent to stand trial if he lacks substantial mental capacity to understand the proceedings or assist in his own defense. *See* § 971.13(1), STATS. The record of Frederick's plea hearing conclusively demonstrates that, despite his other mental and emotional problems, Frederick was competent as that term is defined in the statutes. As this court noted in Frederick's initial appeal:

> Frederick demonstrated that he fully understood the charge. The trial court personally addressed Frederick during the plea hearing, asking if he understood what the state would have to prove to convict him of second-degree sexual assault. He stated that he understood that the state would have to prove that he "had sexual intercourse or contact with a person between the ages of sixteen and twelve and that they could not consent to it at that age." The trial court asked him to define sexual contact, Frederick answered "touching a sexual organ."

Other than Frederick's present erroneous assertion that he is innocent because the victim lied about her age, Frederick has not identified any defect in his mental condition that would cast doubt on his competency to stand trial. Frederick's assertions that he did not understand the charge to which he pled guilty was rejected in Frederick's first appeal and will not be considered again.

By the Court.—Order affirmed.

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