

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 12, 2008

David R. Schanker
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. 2007AP1375-CR

Cir. Ct. No. 2004CF2364

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

OTHA LEE SMITH,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer¹ and Fine, JJ.

¶1 PER CURIAM. Otha Lee Smith, *pro se*, appeals from an order denying a motion for sentence modification and from an order denying a motion

¹ This opinion was circulated and approved before Judge Wedemeyer's death.

for reconsideration. The trial court denied Smith's motions as barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirm, albeit on a slightly different rationale.

¶2 Smith was charged with, and pled guilty to, one count of burglary of an occupied building, as a habitual criminal. See WIS. STAT. §§ 943.10(1m) & (2)(e), 939.62 (2003-04).² Smith appealed, and his appointed attorney filed a no-merit report. See WIS. STAT. RULE 809.32. In the no-merit report, counsel discussed several issues: (1) whether the trial court erred when it denied Smith's request, made after the court had pronounced sentence, to allow his family members to address the court; (2) whether Smith's trial counsel was ineffective because he did not ask the court, at the proper time, if Smith's family members could address the court before sentencing; (3) whether the recusal of two judges from the case because they knew the victims reflected prosecutorial or judicial bias against Smith; and (4) whether Smith's trial counsel was ineffective for not moving for a change of venue. *State v. Smith*, No. 2005AP2179-CRNM, unpublished slip op. at 2-3 (WI App Apr. 26, 2006). Smith did not file a response to counsel's no-merit report. In addition to the issues discussed by counsel, this court considered whether the trial court erroneously exercised its sentencing discretion. *Id.* at 3. After an independent review of the record and consideration of the no-merit report, we affirmed the judgment of conviction.

¶3 Smith then filed the motions that give rise to this appeal. In his initial motion, Smith asked the trial court to modify his sentence under that court's

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

“inherent power” because his trial attorney was ineffective for not presenting mitigating evidence at sentencing through Smith’s family members. Smith also argued that his trial attorney should have moved for a change of venue after two judges recused themselves from the case.³ The trial court denied Smith’s motion as procedurally barred by *Escalona-Naranjo*. In his motion for reconsideration, Smith argued that his motion should not be barred because his postconviction counsel was ineffective for not raising the issues. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (allegation of ineffective assistance of postconviction counsel may be a sufficient reason to permit additional issues to be raised in a WIS. STAT. § 974.06 motion). The trial court denied Smith’s motion for reconsideration, and Smith appeals.

¶4 An issue previously considered on direct appeal cannot be reconsidered in a WIS. STAT. § 974.06 postconviction motion. *State v. Brown*, 96 Wis. 2d 238, 241, 291 N.W.2d 528 (1980). Contrary to Smith’s contention in this appeal, the two claims of error raised in the sentence modification motion were discussed by postconviction counsel, and they were considered and rejected by this court in Smith’s direct no-merit appeal. Therefore, Smith cannot raise the issues again, “no matter how artfully [he] may rephrase” them. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).⁴

³ Smith also asserted that he received ineffective assistance of appellate counsel. However, Smith did not make any separate argument as to his appellate attorney.

⁴ On appeal, Smith also contends that his trial attorney was ineffective when he moved to withdraw Smith’s previously entered plea of not guilty by reason of mental disease or defect. See WIS. STAT. § 971.15. Smith did not raise this issue in his sentence modification motion or the motion for reconsideration. Accordingly, we decline to address it. See *State v. Rogers*, 196 Wis. 2d 817, 826-27, 539 N.W.2d 897 (Ct. App. 1995) (an issue not raised in the trial court need not be addressed on appeal).

By the Court.—Orders affirmed.

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

