

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 14, 2011

A. John Voelker
Acting 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. 2010AP425

Cir. Ct. No. 2006CF450

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAMELL E. STARKS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
KEVIN E. MARTENS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Tramell E. Starks, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 motion without a hearing. Starks had alleged that postconviction counsel was ineffective for failing to challenge trial counsel's performance. The circuit court ruled that Starks had not set forth viable

ineffectiveness claims against trial counsel, so the circuit court could not hold that postconviction counsel had been ineffective for not pursuing those claims. We conclude that Starks's motion is procedurally barred, so we affirm on different grounds. See *State v. Holt*, 128 Wis. 2d 110, 125, 382 N.W.2d 679, 687 (Ct. App. 1985).

¶2 Starks was charged with first-degree intentional homicide, as party to a crime, and possession of a firearm by a felon. A jury convicted him of the possession charge and of first-degree reckless homicide, a lesser-included offense of the intentional-homicide charge. Starks was sentenced to a total of thirty-six years' initial confinement and nineteen years' extended supervision. Starks had a direct appeal with no preceding postconviction motions; we affirmed. See *State v. Starks*, No. 2008AP790-CR, unpublished slip op. (WI App Dec. 23, 2008).

¶3 On December 17, 2009, Starks attempted to file a *pro se* postconviction motion under WIS. STAT. § 974.06. It was dismissed on January 4, 2010, for noncompliance with local rules. On January 6, Starks filed a *pro se* motion to vacate a DNA surcharge; the circuit court denied it the same day. On January 19, Starks refiled his § 974.06 motion. The circuit court denied that motion on February 1, 2010. Starks appeals.

¶4 WISCONSIN STAT. § 974.06 “compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion.” *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 163–164 (1994). The phrase “original, supplemental or amended motion” also encompasses a direct appeal. See *State v. Lo*, 2003 WI 107, ¶32, 264 Wis. 2d 1, 17, 665 N.W.2d 756, 764. A motion brought under § 974.06 is typically barred, if filed after a direct appeal, unless the defendant shows a sufficient reason why he

or she did not, or could not, raise the issues in a motion preceding the first appeal. *See Escalona*, 185 Wis. 2d at 185, 517 N.W.2d at 164.

¶5 Here, Starks’s main issue in his WIS. STAT. § 974.06 motion is alleged deficiencies of trial counsel that he believes resulted in an unfair trial. Claims of ineffective assistance of trial counsel must first be preserved by postconviction motion in the circuit court, *see State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677–678, 556 N.W.2d 136, 137 (Ct. App. 1996), so to avoid *Escalona*, Starks contends that postconviction counsel was ineffective for not challenging trial counsel’s performance.¹ Ineffective assistance of postconviction counsel may constitute a “sufficient reason” for not previously raising an issue. *See id.* at 682, 556 N.W.2d at 139. However, to demonstrate ineffective assistance of postconviction counsel here and overcome the procedural bar, Starks must show that trial counsel actually was ineffective. *See State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 480, 673 N.W.2d 369, 375. That was the analysis that the circuit court undertook.

¶6 Unlike the circuit court, we decline to reach the merits of the postconviction motion.² Prior to this WIS. STAT. § 974.06 motion, Starks filed a different postconviction motion seeking to vacate his DNA surcharge. The alleged

¹ Starks and the circuit court both make references to appellate counsel, possibly because the same attorney who handled the appeal would have been appointed to pursue any postconviction relief. However, as the State correctly points out, a challenge to appellate counsel’s performance does not belong in the circuit court. *See State v. Knight*, 168 Wis. 2d 509, 518–519, 484 N.W.2d 540, 544 (1992).

² We note, however, that to the extent there is overlap between the issues raised in the WIS. STAT. § 974.06 postconviction motion and issues actually addressed in Starks’s first appeal, those issues would also now be barred from relitigation. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991) (issues may not be relitigated no matter how artfully rephrased).

ineffective assistance of postconviction counsel might explain why the issues in the current motion were not raised prior to the direct appeal. Ineffective assistance of counsel however, does not explain why the issues in the current § 974.06 motion were not raised at the time of Starks's previous *pro se* motion. That is, under *Escalona*, the § 974.06 motion claiming ineffective assistance of postconviction and trial counsel is procedurally barred because the issues could have been raised at the same time as the motion to vacate the DNA surcharge.

¶7 In his reply brief, Starks assert that the DNA motion was meant simply to supplement the WIS. STAT. § 974.06 motion he filed in December. He submits that he was unaware the December motion was rejected as noncompliant until he mailed the DNA motion, and contends that we should consider the timing of his motions to avoid any procedural bars. We are, however, limited to the four corners of the motion, see *State v. Love*, 2005 WI 116, ¶¶27, 284 Wis. 2d 111, 124, 700 N.W.2d 62, 69, and Starks does not show his § 974.06 motion contained the same explanation. Indeed, Starks's argument underscores the very point of *Escalona*: finality in litigation, not successive motions and appeals.³ See *id.*, 185 Wis. 2d at 185, 517 N.W.2d at 163–164.

By the Court.—Order affirmed.

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

³ The State contends that Starks filed a first postconviction motion when he moved this court for reconsideration of its December 2008 decision. We disagree with this characterization of the reconsideration motion.

