

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2007

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. 2005AP1399

Cir. Ct. No. 1992CF920898

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LANILE KIMBROUGH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
CHARLES F. KAHN, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. Lanile Kimbrough *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2005-06)¹ motion. The circuit court denied the motion on the ground that Kimbrough's claims were barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Because the circuit court did not err, we affirm.

BACKGROUND

¶2 In 1992, Kimbrough pled guilty to possession of a controlled substance, cocaine base, with intent to deliver, while armed. Kimbrough appealed, and his appellate attorney filed a no-merit report. *See* WIS. STAT. RULE 809.32. In the no-merit report, counsel discussed whether Kimbrough's guilty plea was entered intelligently, voluntarily and knowingly; whether the sentence was excessive; and whether trial counsel was ineffective. *State v. Kimbrough*, No. 93-1123-CRNM, unpublished slip op. at 2 (Wis. Ct. App. Nov. 2, 1993). Kimbrough filed a response to counsel's report in which he argued that the sentence was excessive and that his trial lawyer was ineffective for not raising several issues. *Id.* After an independent review of the record and consideration of counsel's report and Kimbrough's response, this court affirmed.

¶3 On October 2, 2000, Kimbrough filed a motion for postconviction relief under WIS. STAT. § 974.06. In that motion, Kimbrough argued that the more severe penalties for possession of cocaine base, over the penalties for possession of other forms of cocaine, unconstitutionally discriminated against African-

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

American defendants. The circuit court denied Kimbrough's motion. He did not appeal.

¶4 Kimbrough has filed two motions for sentence modification—on November 20, 1998 and on April 2, 2004. In both instances, the circuit court denied the motions because Kimbrough had shown neither an erroneous exercise of sentencing discretion nor a new factor. Kimbrough did not appeal either order.

¶5 On April 27, 2005, Kimbrough filed the WIS. STAT. § 974.06 motion that underlies this appeal. In that motion, Kimbrough raised a host of issues not argued in his direct appeal or previous postconviction motion. The circuit court denied the motion, and Kimbrough appeals.

DISCUSSION

¶6 A defendant cannot raise an argument in a subsequent postconviction motion that was not raised in a prior postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. *Escalona-Naranjo*, 185 Wis. 2d at 181-82. A defendant must “raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion.” *Id.* at 185; *see also* WIS. STAT. § 974.06(4) (“Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived ... in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion,” absent sufficient reason.).

[A] criminal defendant [is] required to consolidate all postconviction claims into his or her original, supplemental, or amended motion. If a criminal defendant fails to raise a constitutional issue that could have been raised on direct appeal or in a prior § 974.06 motion, the constitutional issue may not become the basis for a subsequent § 974.06 motion unless the court ascertains that

a sufficient reason exists for the failure either to allege or to adequately raise the issue in the appeal or previous § 974.06 motion.

State v. Lo, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756 (citations omitted).

¶7 “[D]ue process for a convicted defendant permits him or her a single appeal of [a] conviction and a single opportunity to raise claims of error....” *State ex rel. Macemon v. Christie*, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). Kimbrough has already had more than that single opportunity—in both his no-merit appeal and in his first WIS. STAT. § 974.06 motion. Therefore, he is procedurally barred from attempting to raise additional claims in this latest motion.²

¶8 In an effort to overcome the procedural bar of *Escalona-Naranjo*, Kimbrough contended in his postconviction motion that “only now after over a decade in prison” has he been able to “understand ... the constitutional ramifications of [his] incarceration.” In his appellate brief, Kimbrough suggests that the ineffectiveness of counsel, coupled with functional illiteracy and claimed incompetency, constitutes sufficient reason for failing to raise his issues previously.

¶9 Kimbrough has failed to set forth a sufficient reason for not including these latest claims in his previous postconviction litigation. Kimbrough posits conclusory allegations that have no basis in the record. This latest motion represents Kimbrough’s fifth challenge to some aspect of his judgment of

² The procedural bar may be applied when a defendant’s direct appeal was taken under WIS. STAT. RULE 809.32, the no-merit procedure. See *State v. Tillman*, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574.

conviction. As the supreme court has stated, “[w]e need finality in our litigation.” *Escalona-Naranjo*, 185 Wis. 2d at 185. The circuit court properly ruled that Kimbrough’s latest challenge to his conviction was procedurally barred.

By the Court.—Order affirmed.

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

