

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 26, 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. 2005AP3014**

**Cir. Ct. No. 1998CF980074**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GREGORY STEVEN LOPEZ,**

**DEFENDANT-APPELLANT.**

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Gregory Steven Lopez appeals from an order denying a motion for postconviction relief filed under WIS. STAT. § 974.06

(2005-06).<sup>1</sup> The trial court denied the motion on the ground that Lopez’s claims were barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree, and accordingly, we affirm.

## BACKGROUND

¶2 Lopez pled guilty to two counts of second-degree sexual assault of a child and one count of enticing a child for purposes of engaging in sexual contact. *See* WIS. STAT. §§ 948.02(2) and 948.07(1) (1997-98). The trial court imposed consecutive twenty-year prison sentences on all three charges. The trial court stayed the sentence on one of the sexual assault charges and imposed a ten-year term of probation, to run consecutively to the other sentences.

¶3 Lopez filed a WIS. STAT. RULE 809.30(2)(h) postconviction motion for sentence modification, contending that the sentence was unduly harsh. The trial court denied the motion. Lopez appealed, and this court affirmed. *State v. Lopez*, No. 1998AP3483-CR, unpublished slip op. (WI App Mar. 13, 2000). In our opinion, we reviewed the trial court’s sentencing comments, noting that the trial court “consider[ed] the seriousness of Lopez’s crimes and the apparent harm to the victim” and further “took note of Lopez’s good qualities and the undisputed fact that Lopez’s actions were related, at least in part, to an alcohol problem.” *Id.* at 3. We rejected Lopez’s challenge to the sentence, holding that the trial court properly exercised its sentencing discretion and that the sentence was “not so harsh or unconscionable as to shock public sentiment and violate the judgment of

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

reasonable people concerning what is right and proper under the circumstances.” *Id.* at 4 (citation omitted). The supreme court denied review.

¶4 On March 4, 2002, Lopez, acting *pro se*, filed a motion for postconviction relief under WIS. STAT. § 974.06. In his motion, Lopez moved to withdraw his plea due to the ineffectiveness of trial counsel, namely, the failure of trial counsel to challenge the charges as multiplicitous. To avoid the procedural bar of *Escalona-Naranjo*, Lopez further asserted that postconviction counsel was ineffective for not challenging the effectiveness of trial counsel. See *State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App. 1996). Lopez also asked the trial court for sentence modification.

¶5 Consistent with *Rothering*, the trial court addressed the merits of Lopez’s motion, concluded that the charges were not multiplicitous, and denied relief. As for Lopez’s request for sentence modification, the trial court stated that Lopez’s argument “is nothing more than an objection to his sentence on multiple sexual assault charges. There is nothing inaccurate about the defendant’s conviction for these separate crimes, and therefore, a modification of the sentence is not warranted.” Lopez appealed, and this court affirmed. *State v. Lopez*, No. 2002AP842, unpublished slip op. (WI App Oct. 22, 2002). On appeal, Lopez did not renew his challenge to the sentence. The supreme court denied review.

¶6 On August 29, 2005, Lopez filed a second postconviction motion under WIS. STAT. § 974.06. In his motion, Lopez, now represented by counsel, again challenged the sentence, contending that the trial court “failed to carefully explain” the sentence and that Lopez’s sentence was “disproportional[ly]” harsh compared to other defendants sentenced for comparable crimes in Milwaukee County. Lopez asserted that his proffered comparative sentence analysis was

newly discovered evidence. He also argued that “the overall equities of the case” should weigh against the application of the procedural bar. The trial court rejected Lopez’s arguments and denied his motion as barred by *Escalona-Naranjo*. Lopez appeals.

## DISCUSSION

¶7 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). The procedural bar is driven by the “need [for] finality in our litigation.” *Escalona-Naranjo*, 185 Wis. 2d at 185.

¶8 In his latest postconviction motion, Lopez argued that the trial court did not “carefully explain” the reasons for the sentence and that the sentence was

excessive, compared to similarly-situated defendants. On direct appeal, Lopez also challenged the adequacy of the trial court's explanation of the sentence. We rejected Lopez's argument and determined that the trial court properly exercised sentencing discretion. We also expressly rejected Lopez's argument that the sentence was harsh or excessive. 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). Because Lopez has already litigated the issues of whether the trial court erroneously exercised sentencing discretion and whether the sentence was harsh and excessive, he cannot raise those 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).

¶9 We further hold that Lopez's comparison of his sentence to the sentences of other defendants does not constitute a "sufficient reason" to avoid the procedural bar of *Escalona-Naranjo*. Lopez does not explain why this comparative sentence argument could not have been raised in his prior WIS. STAT. § 974.06 motion. As Lopez himself recognized in his first § 974.06 motion, ineffective assistance of postconviction counsel may be considered "sufficient reason" for failing to raise an issue previously. *Rothering*, 205 Wis. 2d at 681-82. However, the holding of *Rothering* does not extend to save Lopez's second collateral attack. We also discern nothing in the "overall equities" of this case to excuse Lopez from the procedural bar. This court has already rejected Lopez's argument that the sentence was harsh or excessive. This latest "spin" on the

argument does not alter our conclusion. Therefore, the trial court properly ruled that Lopez’s latest challenge to his sentence was procedurally barred.<sup>2</sup>

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

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<sup>2</sup> Lopez described this postconviction motion as a WIS. STAT. § 974.06 motion. “[I]n the alternative,” Lopez asked the trial court to “treat[]” his motion “as a Knight Motion to be heard by the Appellate Court,” and he asked the trial court to “transfer” the motion to the appellate court if the trial court “were to find this motion improper as a Section 974.06 motion.”

A claim of ineffective assistance of appellate counsel can be raised only in a petition for *habeas corpus*, filed with the appellate court that decided the appeal. See *State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). Therefore, the trial court correctly ruled that Lopez’s claim of ineffective assistance of appellate counsel was not before it. We are aware of no statutory mechanism for the “transfer” of a postconviction motion from the trial court to this court. Furthermore, to the extent that Lopez is complaining that a challenge to his sentence based on a comparative sentencing analysis was not raised in his WIS. STAT. RULE 809.30 appeal, we note that such a challenge would have required counsel to file a postconviction motion. Therefore, Lopez is actually complaining about the effectiveness of postconviction counsel, not appellate counsel, and that complaint should first be directed to the trial court under *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). See *State v. Evans*, 2004 WI 84, ¶34 n.12, 273 Wis. 2d 192, 682 N.W.2d 784, *overruled on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. As we have noted, Lopez has already filed a WIS. STAT. § 974.06 motion under *Rothering*. He is not entitled to successive *Rothering* motions. Cf. *Evans*, 273 Wis. 2d 192, ¶35 (a defendant is generally entitled to file only one *habeas* petition under *Knight*).



