

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 05, 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. 2005AP3119

Cir. Ct. No. 2000CF4233

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SANDRA SILKEY-NABAREK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL B. BRENNAN, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Sandra Silkey-Nabarek appeals from a postconviction order denying her third motion for plea withdrawal. The issue is whether Silkey-Nabarek is procedurally barred from litigating her successive postconviction plea-withdrawal motion, her claims against successor trial counsel

and standby counsel, and her claim for a new trial predicated on newly discovered evidence. We conclude that Silkey-Nabarek has not alleged a sufficient reason to overcome the procedural bar to her third motion for plea withdrawal. Therefore, we affirm.

¶2 Silkey-Nabarek entered an *Alford* plea to the theft of more than \$2500 of movable property for embezzling more than \$85,000 from her employer, in violation of WIS. STAT. § 943.20(1)(a) (1999-2000).¹ Five weeks later, Silkey-Nabarek moved to withdraw her plea and proceed to trial on the charge. The prosecutor responded, “Your Honor, I’ve spoken to the victim in the case. And our position is if Ms. Silkey-Nabarek wants to go to trial, let’s just go to trial on this.” The trial court expressed its willingness to allow Silkey-Nabarek to withdraw her plea, however standby counsel, acknowledging that he was in no position to object to the motion, clarified why he “th[ought] it [would be] greatly against her interest to do that.” The trial court, very differently than described in appellant’s brief, patiently and extensively discussed standby counsel’s concerns, and Silkey-Nabarek ultimately decided against plea withdrawal.²

¹ An *Alford* plea waives a trial and constitutes consent to the imposition of sentence, despite the defendant’s claim of innocence. See *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970); accord *State v. Garcia*, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995) (acceptance of an *Alford* plea is discretionary in Wisconsin). The Honorable Victor Manian presided over extensive plea proceedings, imposed sentence, and entered the judgment of conviction. The Honorable Michael B. Brennan presided over numerous postconviction proceedings, and entered the postconviction order, which is the subject of this appeal. Many of the proceedings discussed, however, were handled by Judge Manian, even though to a great degree, they are technically beyond the scope of this appeal.

² On appeal, Silkey-Nabarek describes the trial court as “coerci[ng]” her not to withdraw her *Alford* plea.

¶3 Now represented by different trial counsel, Silkey-Nabarek proceeded to sentencing. Current trial counsel moved to withdraw because of her inability to represent Silkey-Nabarek.³ This trial counsel was also discharged, but remained in the courtroom as standby counsel. The trial court asked Silkey-Nabarek if she wanted additional time to talk with yet another lawyer. Silkey-Nabarek did not, she simply wanted to withdraw her plea and proceed to trial. At that point, the prosecutor expressed his prospective objection that since Silkey-Nabarek had absconded for several years, the State would suffer prejudice trying to refresh witnesses' recollections for trial. The trial court told Silkey-Nabarek that she would have to file a motion to withdraw her plea, and proceeded to impose and stay a six-year sentence in favor of a six-year probationary term, imposing a nine-month term in the House of Correction as a condition of that probation. As stated previously, Silkey-Nabarek had declined the trial court's offer of additional time before it imposed sentence.

¶4 The trial court then told Silkey-Nabarek about the form that would explain her postconviction rights, and asked standby counsel to also explain those postconviction rights to her. Standby counsel then filed a notice of intent to pursue postconviction relief, modifying the notice to explain her role as standby counsel; she also requested a re-evaluation of Silkey-Nabarek's financial status to

³ As counsel told the trial court,

[i]n my entire legal practice I have never spent so much time trying to develop a relationship with a client, a relationship where we could make the decisions that needed to be made. Ms. Silkey-Nabarek talks to me. We have conversations. They just don't lead to rational decision making.

re-determine if she would qualify for appointed counsel, and expressed the possibility that Silkey-Nabarek may seek to continue to represent herself.⁴

¶5 Almost one year after sentence was imposed, Silkey-Nabarek *pro se* moved for postconviction relief. The trial court summarily denied the motion, explaining that it would need transcripts of the pertinent proceedings to review the merits of that motion, and directed Silkey-Nabarek precisely how to proceed. (“*Silkey-Nabarek I*”).

¶6 Silkey-Nabarek then moved this court *pro se* for an extension of time to retain postconviction counsel and to order the pertinent transcripts. In response, this court referred Silkey-Nabarek to the state public defender to determine whether she was eligible for appointed counsel. Silkey-Nabarek failed to return the indigency forms sent to her by the public defender’s office. Consequently, this court afforded Silkey-Nabarek additional time to request appointed postconviction counsel and to order transcripts to pursue postconviction or appellate relief. Silkey-Nabarek then filed a *pro se* postconviction motion pursuant to WIS. STAT. RULE 809.30 (2003-04), seeking plea withdrawal, which the trial court denied. (“*Silkey-Nabarek II*”). Silkey-Nabarek did not appeal from that order.

¶7 Silkey-Nabarek filed another postconviction motion, claiming that absent ineffective assistance, she would not have entered an *Alford* plea. The trial

⁴ On appeal, standby counsel’s filed notice of intent to pursue postconviction relief is mischaracterized as evidence of counsel’s allegedly unethical conduct. Contrary to Silkey-Nabarek’s insinuations, our review of the record indicates that standby counsel’s conduct was eminently ethical and extremely conscientious.

court summarily denied this motion because she failed to establish that she was the victim of ineffective assistance. (“*Silkey-Nabarek III*”).

¶8 Silkey-Nabarek filed another postconviction motion, again seeking to withdraw her *Alford* plea, and also seeking a new trial predicated on the ineffective assistance of counsel, and newly discovered evidence. The trial court summarily denied the motion as barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). (“*Silkey-Nabarek IV*”). The trial court also noted that Silkey-Nabarek was aware of the allegedly newly discovered evidence when she filed *Silkey-Nabarek III*; thus, that claim, too, was barred by *Escalona*. She appeals from *Silkey-Nabarek IV*.

¶9 A postconviction movant must raise all grounds for postconviction relief on direct appeal or in his or her original, supplemental or amended postconviction motion unless, in a subsequent postconviction motion, he or she alleges a sufficient reason for failing to previously raise those issues. *See Escalona*, 185 Wis. 2d at 185; *see also* WIS. STAT. § 974.06(4) (2005-06). In her current motion, Silkey-Nabarek alleges no reason for failing to (adequately) raise those issues in her previous motions.⁵ Silkey-Nabarek’s failure to comply with the

⁵ In her appellate reply brief, Silkey-Nabarek alleges a variety of reasons (principally her *pro se* status) that she did not (adequately) raise these issues previously. First, it is too late on appeal to allege the reasons; they must be alleged in the postconviction motion. *See* WIS. STAT. § 974.06(4) (2005-06). Second, ignorance of the “sufficient reason” required by *Escalona* and § 974.06(4) does not remove the procedural bar. Many litigants are *pro se* when they pursue postconviction relief pursuant to § 974.06. Silkey-Nabarek repeatedly insisted upon ridding herself of highly competent trial counsel, and failed to return the indigency forms requested by the state public defender to assess her eligibility for appointed appellate counsel. Consequently, even if she had timely alleged her reasons for failing to previously (and adequately) raise these issues they would have been insufficient to overcome the procedural requisite of § 974.06(4). *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994).

procedural requisite of *Escalona* and § 974.06(4) bars her successive postconviction motion for plea withdrawal.

By the Court.—Order affirmed.

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

