

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 21, 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. 2006AP1390**

**Cir. Ct. No. 2000CF3389**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF–RESPONDENT,**

**v.**

**DONTE L. BROWN,**

**DEFENDANT–APPELLANT.**

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

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Donte L. Brown, *pro se*, appeals from an order denying a motion for postconviction relief filed under WIS. STAT. § 974.06 (2005–

06).<sup>1</sup> The circuit court denied the motion on the ground that Brown'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 A jury found Brown guilty of attempted first-degree intentional homicide. The court sentenced Brown to fifteen years of initial confinement and ten years of extended supervision. Brown appealed, and his appointed attorney filed a no-merit report. See WIS. STAT. RULE 809.32. In the no-merit report, counsel discussed four issues: (1) whether sufficient evidence supported the guilty verdict; (2) whether Brown's statement to police was erroneously admitted at trial; (3) whether Brown's right to a speedy trial was violated; and (4) whether a meritorious challenge to the jury array could be raised. *State v. Brown*, No. 02–3201–CRNM, unpublished slip op. at 2–5 (WI App Oct. 4, 2004). Brown filed a response in which he challenged the effectiveness of his trial attorney in five respects: (1) waiving Brown's right to a speedy trial; (2) allowing Brown to testify to the number of juvenile adjudications; (3) inadequately presenting an alibi defense; (4) not raising a defense of not guilty by reason of mental disease or defect; and (5) advising Brown not to accept a plea bargain offered by the State before trial. *Id.* at 3–5. Additionally, this court considered whether the circuit court erroneously exercised its sentencing discretion. *Id.* at 5–6. After an independent review of the record and consideration of the no-merit report and Brown's response, we affirmed.

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

¶3 Brown then filed the WIS. STAT. § 974.06 motion that gives rise to this appeal. In the motion, Brown argued that his trial attorney was ineffective during *voir dire* when he did not ask additional questions of a prospective juror who had indicated that she was acquainted with a detective identified as a potential witness. Brown also argued that his trial attorney was ineffective by not objecting when the circuit court granted the State’s request that an investigating detective be allowed to be present throughout the trial when other witnesses were excluded under WIS. STAT. § 906.15. Brown further contended that his postconviction attorney was ineffective for not raising these challenges to the effectiveness of his trial attorney. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681–682, 556 N.W.2d 136, 139 (Ct. App. 1996) (ineffective assistance of postconviction counsel for not challenging the effectiveness of the defendant’s trial attorney may be a sufficient reason to avoid the procedural bar of *Escalona–Naranjo*, 185 Wis. 2d at 185, 517 N.W.2d at 163-164. The circuit court denied Brown’s motion as procedurally barred. Brown appeals.

#### *Discussion*

¶4 We first reject Brown’s contentions that he was “abandond” [*sic*] by his appellate attorney when the attorney decided to file a no–merit report and that a no–merit appeal is not a “[c]onstitutional [f]irst [a]ppeal as of right.” The constitutionality of Wisconsin’s no–merit process was upheld by the United States Supreme Court in *McCoy v. Court of Appeals*, 486 U.S. 429 (1988). That Brown’s direct appeal was a no–merit appeal under WIS. STAT. RULE 809.32 does not make it any less of a meaningful appeal.

¶5 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 181–182, 517 N.W.2d at 162. A defendant must “raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion.” *Id.*, 185 Wis. 2d at 185, 517 N.W.2d at 163–164; *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, 16, 665 N.W.2d 756, 763 (citations omitted). “[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, 86 (Ct. App. 1998).

¶6 The procedural bar may be applied when a defendant’s direct appeal was taken under WIS. STAT. RULE 809.32, the no–merit procedure. *State v. Tillman*, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 167–168, 696 N.W.2d 574, 579. In his response to the no–merit report, Brown raised several challenges to the effectiveness of his trial attorney. Brown has not shown any reason why these latest arguments could not have been raised at that time.

¶7 The procedural bar, however, “is not an ironclad rule” and in considering whether to apply it when the prior appeal was taken under WIS. STAT. RULE 809.32, we “pay close attention to whether the no merit procedures were in fact followed.” *Tillman*, 2005 WI App 71, ¶20, 281 Wis. 2d at 168–169, 696 N.W.2d at 579–580. Additionally, we “must consider whether that procedure, even if followed, carries a sufficient degree of confidence warranting the application of the procedural bar under the particular facts and circumstances of the case.” *Ibid*. Therefore, as we did in *Tillman*, we next consider whether to apply the procedural bar of *Escalona–Naranjo* to the issues now raised by Brown.

¶8 Brown’s first issue involves a prospective juror’s acquaintance with one of the investigating detectives. In our order summarily affirming Brown’s judgment of conviction, we stated

The final issue addressed by the no–merit report is whether a challenge to the jury array lacks merit. After reviewing the record, we agree with counsel’s conclusion that there is nothing to support an argument that there was anything improper about jury selection. We agree with counsel that a challenge on this basis also lacks arguable merit.

*Brown*, No. 02–3201–CRNM, unpublished slip op. at 5. Because we addressed jury selection in his direct appeal, Brown cannot relitigate the issue. See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991) (“A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.”).

¶9 We next consider Brown’s contention that his trial attorney was ineffective for not objecting to the State’s request that a detective be present throughout the trial when other witnesses were excluded under WIS. STAT. § 906.15. A defendant claiming the denial of effective assistance of counsel must

establish both that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If an objection would have been overruled, the failure to voice the objection does not constitute deficient performance. See *State v. Traylor*, 170 Wis. 2d 393, 405, 489 N.W.2d 626, 631 (Ct. App. 1992).

¶10 The detective's presence at counsel table during trial was authorized by WIS. STAT. § 906.15(2)(c) (A witness exclusion order does not authorize the exclusion of "[a] person whose presence is shown by a party to be essential to the presentation of the party's cause."). If Brown's trial attorney had objected to the State's request that a detective be allowed to sit at counsel table to assist in the prosecution, the objection would have been overruled. Therefore, Brown's trial attorney was not ineffective.

*By the Court.*—Order affirmed.

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

