

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 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. 2006AP1913

STATE OF WISCONSIN

Cir. Ct. No. 1997CF975395

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICKEY JEROME CRITTON,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JOSEPH R. WALL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mickey Critton appeals *pro se* from orders denying his postconviction motions. Critton contends the trial court erred in ruling that his claims were procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Because Critton was required to raise all claims for relief

in his original postconviction motion or appeal, and because his claim that he received ineffective assistance of counsel does not satisfy the “sufficient reason” exception to this rule, we affirm.

BACKGROUND

¶2 This is the third time we have been asked to decide an appeal in this matter. In Critton’s direct appeal following his conviction,¹ he sought a new trial, claiming: (1) the trial court erred when it denied his suppression motion; (2) there was insufficient evidence to support the drug conviction; and (3) the trial court erroneously exercised its sentencing discretion. We affirmed this judgment and postconviction order. *See State v. Critton*, No. 99-2033-CR, unpublished slip op. (WI App Aug. 3, 2000).

¶3 In October 2001, Critton filed another *pro se* postconviction motion seeking to vacate the judgment and alleging ineffective assistance of counsel. Specifically, he argued that his trial counsel was ineffective for: (1) failing to investigate and timely litigate the suppression motion; (2) not advising him of the consequences of waiting for a ruling on the suppression motion instead of simply accepting the State’s plea offer; and (3) not properly advising him of the sentencing guidelines, and not objecting when the trial court considered the federal sentencing guidelines at sentencing. The trial court denied the motion and denied Critton’s motion to reconsider its denial. With the assistance of a State Public Defender, Critton appealed these issues and the additional issue that his postconviction counsel in the original appeal provided ineffective assistance.

¹ In 1998, Critton pled guilty to being a felon in possession of a firearm and a jury found him guilty of possession of cocaine with intent to deliver.

¶4 This court acknowledged that because Critton had already completed his direct appeal, that his second appeal could be procedurally barred. Despite that, we addressed the merits of the ineffective assistance issues in our opinion. We again affirmed the orders in Critton's case. *See State v. Critton*, No. 01-3254, unpublished slip op. (WI App Aug. 12, 2003). Following our decision, Critton petitioned for review to the Wisconsin Supreme Court, but his petition was denied.

¶5 In June 2006, Critton filed a postconviction motion to examine the reporters notes and for correction of the record. He also filed a motion under WIS. STAT. § 974.06 alleging that: (1) the trial court erred by holding the suppression motion hearing during the trial; (2) his trial counsel provided ineffective assistance; and (3) the court, the State, and Critton's attorney conspired against him by altering the trial transcripts. He asserted that these issues were not raised in his earlier motion due to the ineffective assistance of his postconviction counsel. The trial court denied the motions on the grounds that he was procedurally barred. Critton now appeals from those orders.

DISCUSSION

¶6 Critton contends the trial court erred in ruling that his motions were procedurally barred. He claims there is sufficient reason to overcome the procedural bar with respect to each issue. We are not persuaded.

¶7 Defendants are not permitted to pursue an endless succession of postconviction remedies:

We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

Escalona-Naranjo, 185 Wis. 2d at 185. Thus, claims which were raised previously, or could have been, but were not raised in a prior postconviction motion, or on direct appeal, are procedurally barred unless a sufficient reason for failing to raise the issue is presented. *Id.* “[D]ue process for a convicted defendant permits him or her a single appeal of that 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).

¶8 As noted, this is the *third* appeal to this court for Critton. Thus, absent a sufficient reason, any and all claims he attempts to raise are procedurally barred. Critton proffers a “sufficient reason” with respect to the first two issues. We briefly address each of Critton’s contentions in turn.

A. Suppression Issue.

¶9 Critton asserts that holding the suppression hearing during the trial constituted error because it forced him to either give up his right to remain silent, or give up his right to meaningfully litigate the suppression issue. Critton claims that a sufficient reason exists for his failing to raise this issue earlier—namely his trial counsel provided ineffective assistance and that problems with his postconviction counsel during the preparation of his appeal prevented him from being able to raise the suppression issue earlier.

¶10 Postconviction ineffective assistance of counsel may constitute a “sufficient reason” to avoid the procedural *Escalona-Naranjo* bar. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). When a defendant claims ineffective assistance of postconviction counsel on the basis of a failure to assert trial counsel’s ineffectiveness, however, the defendant must first establish that trial counsel provided ineffective assistance.

State v. Ziebart, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 (“to establish that postconviction or appellate counsel was ineffective, a defendant bears the burden of proving that trial counsel’s performance was deficient and prejudicial”).

¶11 It is unnecessary, for us to address the ineffective assistance claims because the suppression issue was previously raised in earlier proceedings. A challenge to the suppression issue was raised in Critton’s original postconviction motion *and* again in his second (*pro se*) postconviction motion. Critton, in this appeal, simply attempts to rephrase the suppression issue to make it new. His attempt to do so is not permissible. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Thus, his contention that this issue was not previously raised due to ineffective assistance of counsel is without merit. The issue *was* previously raised. Therefore, no sufficient reason exists to consider this issue again. It is procedurally barred.

B. Ineffective Assistance.

¶12 Critton’s next claim is that he received ineffective assistance of trial counsel and postconviction counsel. Specifically, he claims postconviction counsel was ineffective for failing to assert that his trial counsel was ineffective for not objecting to the handling of the suppression motion, for failing to ask questions to establish standing to assert a basis for the suppression motion, and for failing to adequately advise him of the consequences of accepting a plea versus proceeding to trial. Critton asserts that the “sufficient reason” for failing to raise these claims earlier related to communication problems with his postconviction counsel.

¶13 Again, we conclude that Critton's claims have already been addressed in his earlier postconviction motions. These issues, or ones substantially similar, were already raised and decided by this court. Thus, it logically follows that counsel cannot be ineffective for failing to raise issues which, in fact, were presented to this court. Accordingly, Critton's ineffective assistance claims are procedurally barred.

C. Motion to Modify Sentence.

¶14 Critton also contends that the trial court erred in denying his motion seeking to modify his sentence. He argues that the sentencing court relied on erroneous information and failed to award him credit for time served. Critton, however, raised this challenge to the sentence in his earlier postconviction motion. Critton proffers no sufficient reason for not including these particular sentencing contentions within the earlier sentencing claim. Accordingly, Critton is procedurally barred from re-raising a challenge to his sentence.

D. Motion to Correct the Record.

¶15 Finally, Critton claims the trial court erred when it summarily denied his motion seeking to correct the record. He claims that the transcript from his trial is defective. Critton argues that because WIS. STAT. § 809.15(3) permits a party to make a motion to correct the record when that party believes the record is defective, that he should be permitted to do so.

¶16 Critton is attempting to correct a record, which is almost nine years old. This is the first time he has raised this issue. This is the third time he is appealing to this court. If the record in this case was defective, Critton should have moved to make the correction the first time this case was in our court.

Failure to do so, without offering any sufficient reason, results in this claim being procedurally barred.

¶17 Based on the foregoing, we conclude that all of Critton's claims in this appeal are procedurally barred. Accordingly, we affirm.

By the Court.—Orders affirmed.

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

