

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 14, 2009

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. 2008AP411

Cir. Ct. No. 1995CF728

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANKIE J. GROENKE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Frankie J. Groenke appeals from a circuit court order denying his postconviction motion, filed pursuant to WIS. STAT. § 974.06

(2003-04).¹ In his postconviction motion, Groenke maintained that the attorney representing him in his first § 974.06 postconviction motion had been ineffective for failing to challenge inconsistencies between the facts of this case and the facts of another case of which he had been convicted. We agree with the circuit court that Groenke's motion was procedurally barred pursuant to *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (postconviction claims that could have been raised in prior postconviction or appellate proceedings are barred absent a sufficient reason for failing to raise the claims in the earlier proceedings). Therefore, we affirm the circuit court's order.²

¶2 Although Groenke proceeded to trial on the charges against him—two counts of armed robbery by use of a dangerous weapon as a party to a crime and two counts of attempting to intimidate a witness as a party to a crime—he ultimately decided to enter *Alford* pleas after jury selection was completed.³ He explained to the circuit court that he had decided to take this step because the court had ruled that “other acts” evidence from a similar recent conviction in Milwaukee county would be admissible at trial. Before sentencing, however, Groenke indicated that he wished to withdraw his pleas. As a result the circuit court ordered Groenke appointed new counsel. In his motion and at two evidentiary hearings, Groenke argued that he had not knowingly, intelligently, and voluntarily

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² Because we conclude that Groenke's motion was procedurally barred, we need not reach the merits of Groenke's motion. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary for court to decide non-dispositive issues).

³ See *North Carolina v. Alford*, 400 U.S. 25 (1970). In an *Alford* plea, the defendant enters a plea of guilty “while either maintaining his innocence or not admitting having committed the crime.” *State v. Garcia*, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995).

entered his pleas. The circuit court denied Groenke's motion and sentenced him to a total of fifty years in prison, which was to run concurrently with the seventy-year sentence he received on his Milwaukee County conviction.

¶3 Groenke filed a postconviction motion, which the circuit court denied. Groenke appealed, and this court affirmed the judgment of conviction and the postconviction order. Groenke then filed a postconviction motion under WIS. STAT. § 974.06 (2001-02), in which he challenged the effectiveness of the attorney who had represented him in his pre-sentence motion to withdraw his pleas. The circuit court denied the motion, and Groenke appealed, but he subsequently dismissed that appeal.

¶4 Groenke then filed a new WIS. STAT. § 974.06 motion. In this motion, which is the subject of this appeal, Groenke argued that the attorney who represented him in his first § 974.06 motion had been ineffective for failing to obtain and consider police reports relative to Groenke's first conviction in a separate county as a way of challenging the circuit court's "other acts" ruling. The circuit court held hearings, and the attorney in question testified that, contrary to Groenke's claim, he had obtained the police reports and he had used them in pursuing postconviction relief for Groenke. The circuit court denied the motion, reasoning, among other things, that the motion was barred by *Escalona-Naranjo*.

¶5 We agree. Whether *Escalona*'s procedural bar applies to a postconviction claim is a question of law entitled to independent review. *State v. Tolefree*, 209 Wis.2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). Under *Escalona*, claims of error that could have been raised in the direct appeal or in a previous motion under WIS. STAT. § 974.06 cannot be raised in a subsequent

§ 974.06 motion unless the appellant offers a sufficient reason for failing to do so earlier. *State v. Lo*, 2003 WI 107, ¶15, 264 Wis. 2d 1, 665 N.W.2d 756.

¶6 Although Groenke argues—correctly—that ineffective assistance of counsel can constitute a sufficient reason for failing to have raised post-conviction issues previously, see *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996), it does not follow that serial claims of ineffective counsel cannot be subject to the *Escalona* bar. Here, Groenke is raising for the third time a claim of ineffective assistance of counsel, a claim that involves the attorney who represented him in his first WIS. STAT. § 974.06 motion. He offers no reason, much less a sufficient reason, for his failure to raise the claims underlying his motion in his prior postconviction motions and appeals.

¶7 Finally, Groenke suggests that a claim of actual innocence, like the one he makes in his postconviction motion, escapes the *Escalona* bar. In applying *Escalona*, however, we look not at the issue presented, but whether the defendant articulates a sufficient reason for having failed to raise it in his or her prior postconviction and appellate proceedings. Because Groenke has not done that here, we affirm.

By the Court.—Order affirmed.

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

