

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 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. 2008AP609

Cir. Ct. No. 2002CF6201

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARLON O. EVANS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Marlon O. Evans appeals from an order summarily denying his third postconviction motion. The issue is whether recent affidavits constitute newly-discovered evidence, and thus, a sufficient reason to overcome the procedural bar of *State v. Escalona-Naranjo*, 185 Wis.2d 168,

185-86, 517 N.W.2d 157 (1994). We conclude that they do not because we have previously considered the significance of that same evidence directly in the context of ineffective assistance of counsel; re-litigating that same evidence now proffered indirectly by “new” witnesses is not a sufficient reason to overcome *Escalona*’s procedural bar. Therefore, we affirm.

¶2 A jury found Evans guilty of six counts of armed robbery as a party to each crime. The trial court imposed six concurrent sentences of forty-five years for each robbery, each comprised of thirty- and fifteen-year respective periods of initial confinement and extended supervision. Evans moved for postconviction relief, challenging the length of his sentence, and the effective assistance of his trial counsel for failing to present evidence from four alleged co-actors that Evans had not participated in the robberies.¹ On direct appeal, this court affirmed the judgment and postconviction order, rejecting the ineffective assistance and sentencing challenges, in addition to rejecting challenges to the admissibility of Evans’s confession and the sufficiency of the evidence. *See State v. Evans*, No. 2004AP2204-CR, unpublished slip op., ¶1 (WI App June 7, 2005).

¶3 Evans then moved for postconviction relief pursuant to WIS. STAT. § 974.06(4) (2005-06), challenging counsel’s effectiveness for failing to proffer (as opposed to merely referring to) Demetrius McGee’s letter arguably

¹ Evans alleged that his four co-actors, including Demetrius McGee, who is significant to this appeal, claimed that Evans had not participated in the robberies.

exonerating Evans.² The trial court conducted a *Machner* hearing during which trial counsel testified that all of the allegedly exculpatory letters were “a double-edged sword” because they were of questionable authenticity and contradicted earlier statements to police.³ Trial counsel also testified that McGee was represented by his own counsel who would not permit Evans’s counsel to talk to McGee. The trial court denied the second postconviction motion, ruling that trial counsel’s efforts were not deficient and that he was not ineffective for failing to proffer McGee’s letter arguably exonerating Evans. On appeal, this court affirmed. *See State v. Evans*, No. 2007AP30, unpublished slip op., ¶15 (WI App Oct. 16, 2007).

¶4 In his current postconviction motion, Evans proffers affidavits from two other witnesses who know McGee. Each witness swears that McGee told him that Evans did not participate in these crimes and that he (McGee) had lied when he previously implicated Evans.

¶5 To avoid *Escalona*’s procedural bar, Evans must allege a sufficient reason for failing to have previously raised all grounds for postconviction relief on direct appeal or in his original postconviction motion. *See Escalona*, 185 Wis. 2d at 185-86. Whether *Escalona*’s procedural bar applies to a postconviction claim is

² Evans’s initial ineffective assistance claim was summarily rejected for counsel’s failure to proffer corroborative letters or affidavits. *See State v. Evans*, No. 2004AP2204-CR, unpublished slip op., ¶¶4, 7 (WI App June 7, 2005). In this (second) motion, Evans alleged specifically that McGee admitted that “he [McGee] was lying on the petitioner [Evans] and that the petitioner [Evans] was not involved in the charged offenses.”

All references to the Wisconsin Statutes are to the 2005-06 version.

³ An evidentiary hearing to determine counsel’s effectiveness is known as a *Machner* hearing. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

a question of law entitled to independent review. *See State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶6 Evans alleges that he could not have previously raised this issue because these two affidavits are very recent. He further alleges that these are new witnesses and he was “totally unaware” that McGee was “openly admitting” that he had previously lied about Evans’s involvement, thus, attempting to distinguish this claim from his previously litigated ineffective assistance claims.

¶7 McGee’s hearsay evidence from two witnesses who recently surfaced is not newly-discovered when the same substantive evidence from McGee himself was previously available, raised and litigated, albeit in a slightly different context. *See Evans*, No. 2007AP30, unpublished slip op., ¶15. Evans’s reason – that this evidence is newly discovered – is insufficient because it is the same substantive claim, packaged differently. “New” witnesses presenting “old” evidence is not a sufficient reason to overcome *Escalona*’s procedural bar. *See Escalona*, 185 Wis. 2d at 185-86.

By the Court.—Order affirmed.

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

