

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 13, 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. 2008AP720

STATE OF WISCONSIN

Cir. Ct. No. 1989CF890510

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES ROGERS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
PAUL VAN GRUNSVEN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Charles Rogers, *pro se*, appeals from an order denying his postconviction motion and from an order denying his motion to reconsider. The circuit court concluded that Rogers's claims of plain error are

procedurally barred pursuant to *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirm.

BACKGROUND

¶2 A jury convicted Rogers in 1989 of first-degree intentional homicide and battery while armed. Rogers appealed, and his appellate attorney filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 783 (1967), and WIS. STAT. RULE 809.32 (1991–92). Rogers moved to dismiss the no-merit report, but otherwise did not file a response. This court summarily affirmed the convictions. See *State v. Rogers*, No. 1991AP2764-CRNM, unpublished slip op. (Wis. Ct. App. Apr. 21, 1992) (*Rogers I*).

¶3 In 1993, Rogers filed a petition for a writ of *habeas corpus* in the supreme court. His petition was denied. See *State ex rel. Rogers v. McCaughtry*, No. 1993AP1925-W, unpublished order (Wis. Aug. 17, 1993) (*Rogers II*).

¶4 In 1996, Rogers filed a petition for a writ of *habeas corpus* in this court pursuant to *State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540, 545 (1992) (to bring a claim of ineffective assistance of appellate counsel, a defendant must petition the appellate court that heard the appeal for a writ of *habeas corpus*). Rogers alleged that his appellate attorney was ineffective by failing to challenge the effectiveness of his trial attorney’s performance. We denied the petition because Rogers failed to allege errors by his trial attorney that could serve as a basis for his claim. See *State ex rel. Rogers v. McCaughtry*, No. 1996AP1818-W, unpublished slip op. (Wis. Ct. App. July 5, 1996) (*Rogers III*).

¶5 In 1997 and 2001, Rogers filed his second and third *Knight* petitions. We denied both petitions as meritless. See *State ex rel. Rogers v.*

McCaughtry, No. 2007AP2263-W, unpublished slip op. (Wis. Ct. App. Aug. 8, 1997) (*Rogers IV*); *State ex rel. Rogers v. Litscher*, No. 2001AP3132-W, unpublished slip op. (WI App. Feb. 8, 2002) (*Rogers V*).

¶6 In 2003, Rogers filed a motion in the circuit court for postconviction relief pursuant to WIS. STAT. § 974.06 (2001–02). His claims included ineffective assistance of trial counsel, prosecutorial misconduct, improper joinder of charges, and error in sending extrinsic materials to the jury room. Rogers also claimed to have newly discovered evidence of police misconduct. The circuit court denied the motion in its entirety, and this court affirmed. See *State v. Rogers*, No. 2003AP1448, unpublished slip op. (WI App. Mar. 4, 2004) (*Rogers VI*).

¶7 In 2008, Rogers filed the postconviction motion underlying the instant appeal. He again alleged that his constitutional rights were violated by instances of prosecutorial misconduct, police misconduct, and ineffective assistance of his trial attorney. Under the heading “judicial abuse of discretion,” he renewed his complaints that the circuit court violated his constitutional rights to due process and a fair trial by refusing to sever the two charges against him and by allowing extrinsic materials into the jury room. Rogers argued that all of his claims constitute “plain error,” and he moved the circuit court to vacate the judgment of conviction pursuant to WIS. STAT. RULE 901.03(4) (2005–06).¹ The circuit court denied the claims, and then denied Rogers’s motion for reconsideration. This appeal followed.

¹ All further references to the Wisconsin Statutes are to the 2005–06 version unless otherwise noted.

DISCUSSION

¶8 The circuit court concluded that Rogers's claims are procedurally barred. Whether claims are procedurally barred is a question of law that we review *de novo*. See *State v. Tillman*, 2005 WI App 71, ¶14, 281 Wis. 2d 157, 165, 696 N.W.2d 574, 578.

¶9 After the time for a direct appeal has passed, an imprisoned defendant may raise constitutional and jurisdictional claims for relief pursuant to WIS. STAT. § 974.06. See *State v. Evans*, 2004 WI 84, ¶¶32–33, 273 Wis. 2d 192, 214–215, 682 N.W.2d 784, 795, *overruled on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶29, 290 Wis. 2d 352, 368–369, 714 N.W.2d 900, 908. Defendants are not permitted, however, 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, 517 N.W.2d at 163–164. Thus, claims that were raised previously, or that could have been but were not presented in a prior appeal or postconviction motion, are procedurally barred unless the defendant offers a sufficient reason for failing to pursue the issue earlier. *Id.*, 185 Wis. 2d at 185, 517 N.W.2d at 164. The procedural bar to second or subsequent postconviction motions applies whether the defendant pursued a conventional appeal under WIS. STAT. RULE 809.30 or a no-merit appeal pursuant to WIS. STAT. RULE 809.32. See *Tillman*, 2005 WI App 71, ¶19, 281 Wis. 2d at 167–168, 696 N.W.2d at 579.

¶10 Rogers offers several reasons that a procedural bar should not be applied to his most recent postconviction motion. First, he asserts that *Escalona-Naranjo* and *Tillman* apply to motions brought pursuant to WIS. STAT. § 974.06, but do not apply to his claims of plain error, which he filed under the authority of WIS. STAT. RULE 901.03(4).² We disagree.

¶11 We look beyond the labels that *pro se* prisoners affix to their pleadings. *Lewis v. Sullivan*, 188 Wis. 2d 157, 165, 524 N.W.2d 630, 633 (1994) (“If necessary the court should relabel the prisoner’s pleading and proceed from there.”) (citation omitted). All of Rogers’s current claims are grounded on express allegations of constitutional violations and thus fall within the ambit of WIS. STAT. § 974.06. See *Evans*, 2004 WI 84, ¶33, 273 Wis. 2d at 215, 682 N.W.2d at 795. Accordingly, Rogers is barred from raising his claims absent a sufficient reason for serial litigation. See *Escalona-Naranjo*, 185 Wis. 2d at 185, 517 N.W.2d at 164.

¶12 Rogers alternatively asserts that he has a sufficient reason for bringing sequential attacks on his conviction because the original no-merit procedures were defective. When postconviction relief is initially sought through the no-merit process, we apply a procedural bar to later litigation only when the no-merit procedures were followed and when those procedures permit a sufficient degree of confidence in the outcome under the circumstances of the particular

² WISCONSIN STAT. RULE 901.03(4) is a provision of the Wisconsin evidence code addressing evidentiary rulings. It provides, “[n]othing in [Rule 901.03] precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.” *Ibid.*

case. *Tillman*, 2005 WI App 71, ¶20, 281 Wis. 2d at 168–169, 696 N.W.2d at 579–580.

¶13 We previously acknowledged that we erred during the no-merit proceeding in *Rogers I* when we mistakenly declined to review the potential issue of ineffective assistance of trial counsel. See *Rogers VI*, No. 2003AP1448, ¶3. We remedied our error over a decade ago. In *Rogers III*, Rogers had the opportunity to raise any claims that his trial attorney was ineffective. See *Rogers VI*, No. 2003AP1448, ¶¶4, 7 (discussing our resolution of *Rogers III*). Because the error in *Rogers I* was rectified by *Rogers III*, the error cannot serve as a basis for further litigation. Cf. *Seelandt v. Seelandt*, 24 Wis. 2d 73, 76, 128 N.W.2d 66, 68 (1964) (procedural error in prior proceeding rendered moot by following correct procedure in subsequent proceeding).

¶14 Rogers asserts that the no-merit proceeding suffered from additional inadequacies beyond the failure to review the effectiveness of his trial attorney. The claimed inadequacies do not entitle him to pursue his current claims.³

¶15 Rogers had an opportunity in *Rogers VI* to present any inadequacies allegedly infecting earlier proceedings as a basis for pursuing an additional postconviction motion. After considering his allegations, we determined that, as to “all claims of error besides the ineffectiveness of trial counsel issue, Rogers could have raised [the claims] in the no-merit proceedings and therefore cannot do

³ Rogers complains that the no-merit proceedings were procedurally suspect because: (1) we denied his motion to dismiss the no-merit report at the same time as we affirmed his convictions; (2) Rogers did not receive a copy of the opinion in *Rogers I* until the deadline for filing a petition for supreme court review had passed; and (3) *Rogers I* contains an inaccurate description of the circuit court proceedings.

so now.” *Rogers VI*, No. 2003AP1448, ¶7. Our holding governs this litigation. See *State v. Casteel*, 2001 WI App 18, ¶15, 247 Wis. 2d 451, 459, 634 N.W.2d 338, 343 (decision on a legal issue by an appellate court establishes the law of the case that must be followed in all subsequent proceedings).

¶16 Rogers next asserts that he is not procedurally barred from bringing his claims because *Rogers III* and *Rogers VI* were wrongly decided. Rogers appears to argue that alleged errors in resolving his prior litigation permit him to renew previously rejected claims.⁴ Rogers is wrong. Claims cannot be refiled or submitted with a new gloss merely because the losing party disagrees with the original outcome. To the contrary, “[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991).

¶17 Finally, Rogers requests that we reverse his conviction on the grounds that justice has miscarried or that the real controversy has not been fully tried. See WIS. STAT. § 752.35. Discretionary reversal is a formidable power that we exercise “sparingly and with great caution.” *State v. Williams*, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 858, 723 N.W.2d 719, 731. In Rogers’s case, many appellate courts have had the opportunity to review his claims of error and all have concluded that Rogers is not entitled to postconviction relief. Rogers has not persuaded us that we should reach a different conclusion.

⁴ Rogers acknowledges that “the 2003 proceedings [*Rogers VI*] ... were based on the same set of facts and circumstances as this case.” We observe that at certain points his 2008 submission matches the motion underlying *Rogers VI* word for word.

By the Court.—Orders affirmed.

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

