COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0611 **Cir. Ct. No. 97-CF-24**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES YOUNG-COOPER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Charles Young-Cooper appeals from the order denying his motion pursuant to WIS. STAT. § 974.06 (1999-2000). The issue on appeal is whether Young-Cooper established a claim of ineffective assistance of counsel. We conclude that Young-Cooper could have raised the issue in his previous appeal, therefore he is not entitled to raise the issue in a subsequent

motion for postconviction relief. Even on the merits, however, we conclude that Young-Cooper has not established that he received ineffective assistance of trial counsel. We affirm.

¶2 Young-Cooper pled guilty to four counts of forcing a child under the age of thirteen to view sexually explicit conduct. The court sentenced him to a total of forty years in prison. He subsequently moved to withdraw his guilty plea on the grounds, among other things, that he had received ineffective assistance of trial counsel. The court held a ***Machner***[1] hearing and then denied the motion. Young-Cooper appealed and this court affirmed. ***State v. Young-Cooper***, No. 98-2975-CR, unpublished slip op. (Wis. Ct. App. Oct. 20, 1999). Young-Cooper then filed a petition for review with the Wisconsin Supreme Court, but withdrew it in order to bring a new motion in the circuit court. Young-Cooper filed a petition for a writ of habeas corpus in the circuit court again alleging ineffective assistance of trial counsel. The court construed the petition to a motion under WIS. STAT. § 974.06, and denied the motion on the grounds that the issue had been previously raised and decided. Young-Cooper appeals.

¶3 In his current WIS. STAT. § 974.06 motion, Young-Cooper argued that he received ineffective assistance of trial counsel because his trial counsel did not advise him or the trial court that the statute of limitations had run on the counts to which he was pleading guilty. A defendant must raise all grounds of relief in his or her original, supplemental or amended motion for postconviction relief. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). The Wisconsin Supreme Court has stated:

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

> 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.

Id. at 185. If a defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a new postconviction motion, unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. ***Id.*** at 181-82.

¶4 We agree with the State that Young-Cooper could have brought this claim in his first appeal. The record establishes that Young-Cooper argued in the prior appeal that his counsel was ineffective because he did not have the dates in the amended information made more definite. This argument shows that, at the time of the first postconviction motion and appeal, Young-Cooper was aware of the uncertainty presented by the date range used in the information. Consequently, he could have raised the issue of whether certain counts were barred by the statute of limitations. Because he has not offered a sufficient reason for his failure to raise it in his original motion and appeal, he cannot raise it now.

¶5 Even if we were to consider the matter on the merits, however, we would affirm. In order to establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. Consequently, if counsel's performance was not prejudicial, the claim fails and this court need not examine the performance prong. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶6 We conclude that Young-Cooper has not established that his counsel's performance was deficient. Young-Cooper relies on the case of ***State v. Pohlhammer***, 78 Wis. 2d 516, 254 N.W.2d 478 (1977), to argue that his counsel should have argued to the court that it could not accept his plea because the counts were barred by the statute of limitations. On a motion for rehearing, the court in ***Pohlhammer*** stated:

> Where, as here, pursuant to a plea bargain a substituted and amended information is filed which charges not the commission of a lesser included offense but a new and different offense, prosecution of which is on its face barred by the applicable statute of limitations, trial courts are on notice that absent an express waiver of the statute of limitations' defense such an amended information is not to be accepted, a bargained plea of guilty to such information is not to be approved, and a plea of guilty to such an amended information may be withdrawn on motion of the defendant so to do.

State v. Pohlhammer, 82 Wis. 2d 1, 3, 260 N.W.2d 678 (1978). In the first ***Pohlhammer*** case, however, the court stated that it was adopting the rule of United States Court of Appeals for the Second Circuit, as announced in ***United States v. Doyle***, 348 F.2d 715 (2d Cir. 1965), that a defendant who pleads guilty may not raise on appeal the issue of his or her conviction being barred by the statute of limitations. ***Pohlhammer***, 78 Wis. 2d at 523.

¶7 If precedent may be read and reasonably analyzed in more than one way, then the law is unsettled. ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). "Counsel is not required to object and argue a point of law that is unsettled." ***Id.*** We conclude that the two ***Pohlhammer*** cases may reasonably be read and analyzed so as to lead to differing interpretations as to whether a guilty plea waives the statute of limitations defense. As in ***McMahon***, we conclude that while it may have been ideal for Young-Cooper's counsel to

raise the statute of limitations defense, the law on the issue is "murky enough" that counsel was not deficient for failing to raise the issue. *See* ***McMahon***, 186 Wis. 2d at 84.

¶8 Since trial counsel's performance was not deficient, Young-Cooper cannot establish ineffective assistance of counsel. We need not address the prejudice prong. We affirm the order of the trial court.

By the Court.—Order affirmed.

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