COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP1843 **Cir. Ct. No. 1989CF229**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAMONTE GREGORY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Lamonte E. Gregory,[1] *pro se*, appeals from an order denying a WIS. STAT. § 974.06 (2005-06)[2] postconviction motion. The circuit court denied the motion as procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirm.

BACKGROUND

¶2 In 1991, Gregory pled guilty to one count of armed burglary and one count of obstructing. The circuit court sentenced Gregory to five years of imprisonment for the armed burglary, "consecutive to parole revocation sentence defendant now serving, credit for 170 days" and to a concurrent term of six months for the obstructing. Gregory did not appeal under WIS. STAT. § 974.02(1) and WIS. STAT. RULE 809.30.

¶3 On June 25, 1997, Gregory filed a "motion to correct or vacate" his sentence under WIS. STAT. § 974.06. In that motion, Gregory contended that he was not yet revoked when the circuit court imposed sentence in 1991, so the declaration that sentence should run "consecutive to parole revocation sentence … now [being] serv[ed]" constituted an illegal sentence. Gregory also filed a motion to modify sentence due to a change in parole policy. The circuit court denied Gregory's motions in a July 7, 1997 order. Gregory did not appeal.

¶4 On May 23, 2002, Gregory filed another motion to correct his sentence. Gregory again argued that his sentence was illegal because he was not

[1] On his brief and other correspondence, Gregory spells his first name "Lemont." Court records spell Gregory's first name "Lamonte."

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

"revocated" when the court imposed sentence. In a May 31, 2002 order, the circuit court denied the motion, citing ***State v. Cole***, 2000 WI App 52, ¶8, 233 Wis. 2d 577, 608 N.W.2d 432 ("parole revocation is not required before the court may issue consecutive sentences"). Gregory moved for reconsideration, and the circuit court denied that motion. Gregory appealed, and this court summarily affirmed. ***State v. Gregory***, No. 2002AP1779, unpublished slip op. (WI App June 4, 2003). The supreme court denied review.

¶5 On November 30, 2004, Gregory filed a third motion for sentence modification. In this motion, as in his 1997 motion, Gregory argued that a change in parole policy warranted sentence modification. The circuit court denied Gregory's motion as procedurally barred under ***Escalona-Naranjo***.

¶6 Gregory then filed, with this court, a motion for an extension of time in which to file an appeal from the 1991 judgment of conviction. In the motion, Gregory claimed that his appointed appellate counsel was ineffective. This court construed the motion as a petition for a writ of habeas corpus. *See* ***State v. Evans***, 2004 WI 84, ¶59, 273 Wis. 2d 192, 682 N.W.2d 784 (a claim of ineffective assistance of appellate counsel must be raised in a petition for habeas corpus and cannot be addressed in a motion for an extension of time), *overruled on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. After receiving responses from the State and the State Public Defender (SPD), this court dismissed the petition and directed Gregory to file a petition in the circuit court pursuant to ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). ***State ex rel. Gregory v. Endicott***, No. 2005AP420-W, unpublished slip op. (WI App May 3, 2005).

¶7 In response to that order, Gregory filed the WIS. STAT. § 974.06 motion that gives rise to this appeal. Gregory alleged that his attorney was ineffective because he did not file a timely notice of appeal even though Gregory told his attorney that he wanted to appeal. In its order denying the motion, the circuit court first noted that Gregory did not provide any correspondence or documentation to support his factual allegations. The circuit court also stated, "[m]oreover, there is no reason stated why the defendant, who knew for many years that [his attorney] didn't file an appeal, did not set forth this claim in his prior motions for postconviction relief." The circuit court held that Gregory's claim was barred by ***Escalona-Naranjo***. Gregory appeals.

DISCUSSION

¶8 We first address our dismissal of Gregory's petition for habeas corpus and direction to seek relief in the circuit court.

¶9 In ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992), the supreme court held that a claim of ineffective assistance of appellate counsel is properly raised by a petition for a writ of habeas corpus in the appellate court that heard the defendant's appeal. When the claimed ineffectiveness concerns postconviction representation in the circuit court, postconviction proceedings are a prerequisite to an appeal, and the claim of ineffectiveness of counsel should be first raised in the circuit court either by a petition for a writ of habeas corpus or a postconviction motion under WIS. STAT. § 974.06. ***Rothering***, 205 Wis. 2d at 679-81. However, "[c]ounsel's failure to commence an appeal under either RULE 809.30 or 809.32, regardless of whether such an appeal had to be preceded by a postconviction motion, can be challenged by a ***Knight*** petition in [the court of appeals] because counsel's inaction in [the court of appeals] is at

issue." ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 798-99, 565 N.W.2d 805 (Ct. App. 1997) (citation and footnote omitted), *overruled on other grounds by* ***Coleman***, 290 Wis. 2d 352, ¶29. Further, this court recently rejected the State's suggestion that ***Smalley*** "prescribes an optional procedure." ***State ex rel. Santana v. Endicott***, 2006 WI App 13, ¶5, 288 Wis. 2d 707, 709 N.W.2d 515 (Ct. App. 2005).

¶10 Given ***Smalley*** and ***Santana***, this court's dismissal of Gregory's petition was ill-founded. We take this opportunity to revisit Gregory's petition. Based on the undisputed facts, as established by documentary evidence, we now conclude that habeas relief is not appropriate.

¶11 Gregory claimed that his appointed attorney, Mark Lukoff, failed to properly inform him of his right to a no-merit report and improperly withdrew from representation by "closing" his file without filing a no-merit appeal. *See* WIS. STAT. RULE 809.32. Gregory also asserted that he "just recently discovered" that Lukoff did not file a no-merit report.

¶12 In its response to Gregory's petition, the SPD acknowledged that Lukoff did not file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30 and that Lukoff did not file a no-merit report under WIS. STAT. RULE 809.32. The SPD disputed, however, Gregory's claims that Lukoff did not inform Gregory of the no-merit option and that he "just recently discovered" that Lukoff had not filed a no-merit report.

¶13 In support of its position, the SPD submitted copies of correspondence between Lukoff and Gregory. In a December 18, 1991 letter to Gregory, Lukoff indicated that he saw "no issue of arguable merit that would permit … a motion to withdraw [the] plea, a motion to modify sentence, or an

appeal." After explaining the reasons for his conclusions, Lukoff advised Gregory that he had "four options"—(1) Lukoff would "simply close" his file if Gregory agreed that "there is nothing to do in your case"; (2) Gregory could hire an attorney to review the case; (3) Gregory could represent himself on appeal; or (4) Gregory "could have [Lukoff] file a No Merit Report." Lukoff then explained what would happen if Gregory asked for a no-merit report. Lukoff closed the letter with the following statement: "If I do not hear from you within thirty days, I will assume that you agree with my conclusion that the record does not contain any issue of arguable merit, and will close my file." The SPD submitted documentation that Lukoff closed the file on January 21, 1992.

¶14 Over three years later, on February 6, 1995, Lukoff received a letter from Gregory asking about his "appeal status." Lukoff replied by sending a copy of the December 18, 1991 letter, and noting that, because Gregory had not responded, Lukoff had closed the file and "no appellate proceedings [are] pending." On February 20, 1995, Lukoff received a letter from Gregory in which Gregory stated that he "recall[ed]" their meeting, but he denied receiving any letter, presumably because he was "sent out" to another institution shortly after the meeting.

¶15 Lukoff replied in a February 27, 1995 letter in which he told Gregory that he would file a no-merit report if Gregory wanted him to do so and if the court of appeals extended the filing deadline. Alternatively, Lukoff told Gregory that he could proceed *pro se* or hire an attorney to represent him. Lukoff asked Gregory to "tell [him] immediately which of these two options" he wanted to pursue. On March 15, 1995, Lukoff received a letter from Gregory, asking Lukoff to proceed with a "third" option—"to go ahead and file[] [an] appeal." Lukoff responded by reiterating that Gregory could represent himself or hire an

attorney or "have [Lukoff] file a No Merit Report if the Court of Appeals will extend the time for me to do so."

¶16 The next correspondence provided by the SPD in their response was a letter from Gregory to Lukoff, received on February 11, 1997. In that letter, Gregory notes that "it has been some time" since his last letter, and that Lukoff had told him "to let [Lukoff] know if [Gregory] had … some new information" about his case. Gregory went on to question the validity of his sentence because he had not yet been revoked when the circuit court ordered that his sentence run consecutive to a parole revocation sentence. The SPD notes that Lukoff was no longer a Public Defender appellate attorney, and suggests that Gregory may not have received a response to this letter. Finally, the SPD stated that Gregory wrote Lukoff on May 17, 2004, asking for a "copy of the no merit report order."

¶17 In assessing claims of ineffective assistance of appellate counsel, this court applies the two-element test set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Under ***Strickland***, a criminal defendant must show both deficiency of counsel's performance and the prejudice resulting from that deficient performance. ***Id.*** If a defendant fails to make an adequate showing as to one element, the court need not address the other. ***Id.*** at 697.

¶18 The first element requires the defendant to show that counsel's performance was deficient. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To be effective, counsel's performance must be at a level of representation at or above an objective standard of reasonableness, and "'counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" ***State v. Johnson***, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986) (citation omitted).

¶19 In ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 516 N.W.2d 362 (1994), the supreme court stated that a valid waiver of the right to appeal requires that the waiver decision be made by the defendant. *See* ***id.*** at 617. The supreme court opined that "no formalized waiver procedures are required," but stated that "it must be apparent the defendant 'either suggested, acquiesced in or concurred with the decision to dismiss the appeal.'" ***Id.*** (citation omitted). If the requirements are met, it would then be presumed "that a waiver of the rights to appeal was made voluntarily, knowingly, and intelligently." *See* ***id.*** In this regard, once a defendant is informed of the no-merit report option, "the defendant will be presumed to have validly waived the [n]o-[m]erit option unless the defendant activates the [n]o-[m]erit report requirement by actually disagreeing with counsel's advice and expressing the desire to appeal. Once a defendant is so informed it is incumbent upon the defendant to actually express disagreement." *See* ***id.*** at 617-18. In addition once a defendant is informed of the right to a no-merit report, "there is no need that he be repeatedly informed." ***Id.*** at 610.

¶20 Returning to the documentary facts of this case, it is undisputed that Lukoff told Gregory of his options under ***Flores*** in the December 18, 1991 letter. Gregory did not respond, and accordingly, Lukoff's closing of the file was justified. *See* ***State ex rel. Van Hout v. Endicott***, 2006 WI App 196, ¶24, 296 Wis. 2d 580, 724 N.W.2d 692 ("A defendant cannot remain mute in the face of a request from counsel for direction or when his or her rights to appeal and to counsel are at stake."). In the February 20, 1995 letter, Gregory admitted that he "recall[ed]" the in-person discussion with Lukoff, the discussion that was memorialized in the December 18, 1991 letter, thereby undercutting Gregory's claim that Lukoff did not inform him of his right to a no-merit report. Moreover, even if Gregory did not receive that letter, as he later claimed, Lukoff gave

Gregory a second opportunity to have a no-merit report filed in 1995. Gregory responded by explicitly directing Lukoff to "file an appeal" despite Lukoff's assessment that an appeal would lack arguable merit. Gregory also told Lukoff that he "would not have had you file a [no] merit thats [sic] for sure." Gregory's contention that Lukoff did not inform him of his right to a no-merit report is defeated by the undisputed documentary evidence. That same evidence also establishes that Gregory explicitly rejected Lukoff's 1995 offer to file a no-merit report. Thus, Gregory's current assertion that he "just recently discovered" that Lukoff had not filed a no-merit report must be rejected.

¶21 Our May 3, 2005 order in ***State ex rel. Gregory v. Endicott***, No. 2005AP420-W, incorrectly directed Gregory to seek relief in the circuit court. Revisiting Gregory's petition at this time, we nevertheless conclude that Gregory is not entitled to relief. The undisputed documentary evidence establishes that Lukoff informed Gregory of the right to a no-merit report; that Gregory acquiesced in the closing of the file; and when given another opportunity in 1995 to have a no-merit report filed, Gregory explicitly rejected the offer. Thus, Gregory is not entitled to habeas relief in the form of the restoration of his direct appellate rights.

¶22 We next turn to the circuit court's order appealed from. The circuit court denied Gregory's motion as procedurally barred by ***Escalona-Naranjo***. The circuit court's reliance on ***Escalona-Naranjo***, however, was misplaced. Gregory was not entitled to relief from the circuit court not because of the procedural bar of ***Escalona-Naranjo***, but rather because the argument of ineffective assistance of counsel arising from the failure to file an appeal under WIS. STAT. RULE 809.30 or WIS. STAT. RULE 809.32 had to be directed to this court. *See* ***Smalley***, 211 Wis. 2d at 798-99; ***Santana***, 288 Wis. 2d 707, ¶5. Therefore, we agree that

Gregory was not entitled to relief in the circuit court, and the circuit court's order is affirmed. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (This court may affirm a circuit court order if the right result, even if the circuit court engages in erroneous reasoning.).

By the Court.—Order affirmed.

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