COURT OF APPEALS DECISION DATED AND FILED

August 16, 2007

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. 2006AP2226

Cir. Ct. No. 1999CF149

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS C. OWENS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: ROGER W. LeGRAND, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Thomas Owens[1] appeals from an order denying his second motion under WIS. STAT. § 974.06 (2005-06)[2] seeking postconviction relief from a 1999 conviction for burglary and theft. Owens attempts to raise claims of vindictive prosecution, ineffective assistance of counsel, improper remarks by the prosecutor and prejudice from the victim crying in the courtroom when the jury said it was deadlocked. The State contends that Owens' claims are procedurally barred, as well as lacking in merit. We agree with the State on both counts and affirm.

BACKGROUND

¶2 The charges were based upon allegations that a man had entered Peter Moe's apartment while Moe was in the shower. Upon being confronted by Moe's girlfriend, Nicole Zollman, the intruder identified himself as Thomas and told Zollman that he knew her boyfriend. Zollman told the intruder that he could wait for Moe, got him a glass of water, and went about her business. Shortly thereafter, Zollman noticed that her ring was missing from where it had been on a stereo moments before, and she went to get Moe. Moe came and said he did not know the intruder, and the intruder left quickly. Several items were then discovered missing.

¶3 A jury convicted Owens and he was sentenced in July of 1999 to eight months in jail on the theft count and probation on the burglary count. Aside

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[1] Owens asks this court to refer to him as John Doe. However, an appeal from a WIS. STAT. § 974.06 (2005-06) motion is not one of the categories of cases entitled to confidentiality.

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

from a series of sentence modification motions relating to the theft count, Owens did not challenge his conviction until more than five years later, after his probation on the burglary count was revoked in November of 2004. In 2005, Owens filed a postconviction motion under WIS. STAT. § 974.06, for the first time claiming that the complaint and information were deficient, the victim's identification was unduly suggestive, the prosecutor knowingly elicited false testimony, trial counsel was ineffective in several respects, and the State had delayed the prosecution to prejudice Owen. The trial court denied the motion and a subsequent request for reconsideration, and this court affirmed those decisions.

¶4 While his appeal from his first postconviction motion was pending, Owens was able to obtain additional transcripts and other materials from his case file from postconviction counsel. After we affirmed the trial court, Owens cited these additional materials to support a new postconviction motion under WIS. STAT. § 974.06. This second § 974.06 motion claimed: (1) vindictive prosecution; (2) ineffective assistance of counsel; (3) improper remarks by the prosecutor during closing argument; and (4) prejudice from the victim crying in the courtroom when the jury announced it was deadlocked.

DISCUSSION

¶5 WISCONSIN STAT. § 974.06(1) permits a defendant to challenge a sentence

> upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack

after the time for seeking a direct appeal or other postconviction remedy has expired. However, § 974.06(4) requires defendants "to consolidate all their postconviction claims into *one* motion or appeal." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994) (emphasis original). Successive motions and appeals, including those raising constitutional claims, are procedurally barred unless the defendant can show a "sufficient reason" why the newly alleged errors were not previously or adequately raised. ***Id.*** at 185. Furthermore, issues that have already been considered on direct appeal cannot be raised in a subsequent motion for relief under § 974.06. ***State v. Rohl***, 104 Wis. 2d 77, 96, 310 N.W.2d 631 (Ct. App. 1981).

¶6 We will independently review whether claims are procedurally barred. ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). Here, we conclude that Owens' claims are all barred in various respects.

¶7 Owens' first claim of vindictive prosecution is based on allegations that the investigating officer conducted a suggestive photo array, coached the victim to fabricate her testimony about the photo array, and withheld the police report which delayed the filing of the complaint and hindered Owens' ability to challenge the identification procedure. This was done, Owens alleges, in retaliation for the fact that he had subpoenaed the officer in relation to another case. Owens' second claim of ineffective assistance of counsel is based on allegations that counsel failed to fully impeach the victim's account of what name she told the investigating officer the intruder had given her. However, when we affirmed the denial of Owens' first postconviction motion, we rejected essentially these same claims. An appellant may not relitigate matters previously decided, no matter how artfully rephrased. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Owens cannot raise the validity of the identification

procedure or the accuracy of the victim's testimony for a second time by attempting to recast those issues in the context of vindictive prosecution or ineffective assistance of counsel. And, even if the issues had not already been decided, we see nothing in the materials Owens now presents that alters our view that these claims lack merit.

¶8 Owens has not previously raised his third claim that the prosecutor made improper remarks during closing argument or his fourth claim that he was prejudiced by the victim's crying in the courtroom. He argues that he was unable to do so because he encountered considerable difficulty attempting to retrieve his transcripts and case files from counsel before he filed his first WIS. STAT. § 974.06 motion. For the following reasons, we are not persuaded that Owens' failure to obtain the transcripts immediately upon request more than five years after his conviction was a sufficient reason for failing to include the claims in his first § 974.06 motion.

¶9 First, these two claims were not based on newly discovered evidence. They were based on things that happened at trial, in the presence of Owens and defense counsel. Therefore, Owens would already have known about these incidents when he filed his first WIS. STAT. § 974.06 motion. He could have argued the issues, along with an explanation of why he was unable to provide transcript citations. Alternatively, as the trial court noted, Owens could have waited until he was able to obtain the materials he needed, since there is no time limit on filing a § 974.06 motion. We note that this is not a situation in which the transcripts had never been produced or provided to the defense. Instead, it is a situation where postconviction counsel was provided with the transcripts

following Owens' conviction, but Owens chose not to purse postconviction relief until years later.[3] It is hardly surprising that it took some time to track down postconviction counsel's copies of transcripts from a case file that had been closed for well over five years.

¶10 In any event, even if we were to overlook the procedural bar to Owens' third and fourth claims, he would not prevail on the merits of either one. Owens objects to the prosecutor's statement during closing argument that the defendant "went upstairs thinking it's an unoccupied area and [was] caught in the act of taking property." He claims this statement was an improper reference to facts outside of the record because neither victim testified that they actually saw Owens with any of the items that were later found to be missing. We are satisfied, however, that the statement was simply a permissible inference from the fact that Owens was found on the second floor of an apartment where he had no business being. One of the main purposes of closing argument is to suggest inferences from the facts that came in during trial, and we see no error in the prosecutor's doing so here.

¶11 Finally, Owens alleges that when the jury came out to tell the court that they were deadlocked, "Zollman broke down in a loud emotional outburst in their presence and the trial court yelled to the jurors: 'Get back in there and get it right.'" Owens further contends that the incident is not included in the transcripts either because the court forgot to inform the court reporter to resume taking notes or because it was intentionally deleted or left out. This court decides matters on

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[3] Although Owens has not provided any explanation for why he waited over five years to challenge his conviction, it could be inferred from the timing of events that the impetus for his motion was the revocation of his probation.

the record before it. When there is a dispute as to the accuracy of the record, it is the responsibility of the party alleging the inaccuracy to bring a motion to supplement or correct the record within ten days after the clerk of the circuit court has sent the parties notice that the record has been assembled and is available for inspection. *See* WIS. STAT. RULE 809.15(2) and (3). The trial court can then hold a hearing to resolve the dispute and make findings as to whether the transcript is accurate or needs to be amended.

¶12 Here, Owens apparently made a motion to correct the record while his prior appeal was pending, but did not renew it during the pendency of this appeal. Moreover, he did not submit any affidavits from jurors, counsel, or anyone else involved in the trial to support his version of events. Therefore, this court simply has no factual basis to conclude that there actually was any outburst in front of the jury, much less that such an outburst affected the outcome of the trial.

By the Court.—Order affirmed.

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