COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1026 **Cir. Ct. No. 2000CF5204**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR E. VASQUEZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed*.

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 WEDEMEYER, J. Victor Vasquez appeals from an order denying his motion for postconviction relief under WIS. STAT. § 974.06(4) (2005-06).[1]

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

Vasquez claims that he should be granted a new trial because the State introduced hearsay statements of a key witness that violated Vasquez's rights under the Confrontation Clause, as defined in ***Crawford v. Washington***, 541 U.S. 36 (2004). Vasquez also claims that he was held without an initial appearance for more than forty-eight hours, in violation of ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991). He states that because his confession was given after the forty-eight hour mark, it was illegally obtained and therefore should be suppressed.

¶2 Additionally, Vasquez asserts that his claims should not be procedurally barred by WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because he has shown sufficient cause for not raising his postconviction relief claims in his original appeal. First, he argues ***Crawford*** represents a change in procedural criminal law and ought to be retroactively applied. Second, his trial counsel was ineffective because he did not attempt to suppress the illegally obtained confessions, which leads to his claim that his postconviction counsel was ineffective for failing to raise an ineffective trial counsel claim. Because the Supreme Court definitively held in ***Whorton v. Bockting***, 127 S. Ct. 1173, 1177 (2007), that ***Crawford*** should not be applied retroactively, and because ***Riverside*** does not apply when the defendant, as in the case at hand, is arrested pursuant to a valid warrant, Vasquez has failed to assert sufficient cause under WIS. STAT. § 974.06(4) and ***Escalona-Naranjo***. His claims are procedurally barred and we therefore affirm.

BACKGROUND

¶3 On October 5, 2000, Victor Vasquez shot and killed Norberto LeBlanc a.k.a. Pedro J. Ortiz-Martinez in the parking lot of a supermarket. He was arrested at 2:50 p.m. on October 9, 2000. On October 11, 2000, at 10:35 a.m., it was determined that there was probable cause for Vasquez's arrest in a sworn show-up report. In the next three days, Vasquez was interrogated by the police six times.[2]

¶4 Eyewitness Priscilla Chairez testified at trial that on October 5, 2000, when she was coming out of the grocery store, she heard gunshots and saw a Hispanic male with a gun in his hand near the victim's car. When Chairez was further questioned by the prosecutor, she testified that she had described the man as a Puerto Rican in a statement at the scene, but that she "wasn't really sure" whether he was a Hispanic or Puerto Rican. The State then called Detective Mark Walton to corroborate Chairez's testimony that she reported seeing a Puerto Rican male near the car. Defense counsel made no hearsay objection to this testimony. Ultimately, Vasquez was convicted of first-degree intentional homicide and

[2] His first interview was on October 9, 2000, at 8:21 p.m. The second interview was on October 10, 2000, at 1:10 a.m. Vasquez stated that he had a disagreement with the victim over $4000. The third interview was on October 10, 2000, at 9:26 p.m. During this interview, he stated that his "life was over" and that he could do "at least twenty years." The fourth interview was on October 10, 2000, at 11:54 p.m. At this interview, Vasquez asked the police to "please tell the District Attorney that he is very sorry that he killed Pedro." He then stated that he wanted to collect his thoughts and would make a complete statement the next day. The fifth interview was on October 11, 2000, at 1:35 a.m. Vasquez asked to stop the interview because he had a headache. The sixth interview occurred on October 11, 2000 from 2:02 p.m. to 4:45 p.m. He gave a complete statement about the killing at that time.

possession of a firearm by a felon, both as a habitual criminal, and sentenced to life in prison.

¶5 Following his conviction, Vasquez filed a series of appeals. He began with a direct appeal, in which he claimed that his trial attorney was ineffective for failing to try to remove a "subjectively biased" juror. This court affirmed his conviction. He then filed a *habeas corpus* petition. This court denied his petition, concluding that his claims did not accurately reflect the trial court record, were inadequately developed, and should have been raised first in the trial court.

¶6 On March 27, 2007, Vasquez filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06(4). The trial court denied the motion. Vasquez now appeals.

DISCUSSION

¶7 Vasquez's first claim is that he is entitled to a new trial because his right to confront a witness was violated, as defined in ***Crawford***, by the introduction of hearsay testimony. Vasquez claims that the introduction of Detective Walton's testimony was "testimonial hearsay." He states that it was important that Chairez was "not sure" about the ethnic background of the shooter because "Puerto Ricans generally have a much darker complexion" than persons

of Hispanic descent.[3] He asserts that Chairez was "unavailable" for cross-examination regarding this issue, and therefore his right to confrontation was violated.

¶8 He asserts that this claim is not procedurally barred under ***Escalona-Naranjo*** because he was able to give "good cause" as to why his confrontation clause issue was not raised earlier. Specifically, Vasquez claims that ***Crawford*** represented a change in the procedural criminal law that affected the fundamental reliability of the conviction, and therefore ought to be applied retroactively. We respectfully disagree.

¶9 WISCONSIN STAT. § 974.06(4) limits the ability of defendants to challenge convictions multiple times. The supreme court in ***Escalona-Naranjo*** interpreted the statute and held that defendants cannot bring successive postconviction motions on claims that could have been raised in a previous motion without a showing of a "sufficient reason" why the claims were not raised earlier. ***Id.***, 185 Wis. 2d at 181-82.

¶10 Whether a defendant has set forth a sufficient reason to overcome the procedural bar of ***Escalona-Naranjo*** is a question of law that the court reviews *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

[3] Vasquez fails, however, to point out that in addition to her testimony, Chairez also identified him.

¶11 A subsequent change in the law may be a sufficient reason for allowing a new issue to be raised by a WIS. STAT. § 974.06 motion. *See* ***State v. Howard***, 199 Wis. 2d 454, 461-62, 544 N.W.2d 626 (Ct. App. 1996), *aff'd*, 211 Wis. 2d 269, 564 N.W.2d 753 (1997), *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765. Vasquez alleges that ***Crawford*** creates a new law that may be applicable to the case at hand. However, the change in law in ***Crawford*** is not sufficient cause to overcome the ***Escalona-Naranjo*** bar for two reasons.

¶12 First, the Supreme Court held in ***Whorton***, that ***Crawford*** should not apply retroactively to cases on collateral review. ***Whorton***, 127 S. Ct. at 1177. Therefore, this argument is not available to Vasquez.

¶13 Second, this is not a ***Crawford*** case. ***Crawford*** establishes requirements for admission of testimonial statements of witnesses who are *absent* from trial. ***Id.***, 541 U.S. at 59. In this case, both Chairez and the detective were cross-examined by defense counsel. In addition, there is nothing in the record to indicate that Chairez was unavailable. Moreover, the detective's testimony was not hearsay, but rather was impeachment testimony that was admissible. See WIS. STAT. § 908.01(4)(a)1. ***Crawford*** does not apply and therefore Vasquez's first claim fails.

¶14 Vasquez's second claim is that his confession to the police should be suppressed because it was obtained during a time when he was unreasonably detained over forty-eight hours without a probable cause in violation of ***Riverside***.

He asserts that this claim is not barred by ***Escalona-Naranjo*** because his postconviction counsel was ineffective for failing to raise an ineffective trial counsel claim due to this failure to raise a ***Riverside*** violation. We respectfully disagree.

¶15 Ineffective assistance of postconviction counsel may constitute "a sufficient reason as to why an issue which could have been raised on direct appeal was not." ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). In order to successfully raise an ineffective assistance of counsel claim, Vasquez needs to show that the attorney's performance was deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Vasquez can show neither.

¶16 ***Riverside*** held that a judicial determination of probable cause to support a warrantless arrest must be made within forty-eight hours of the arrest. ***Riverside***, 500 U.S. at 55-56. Vasquez claims that he was held for more than forty-eight hours without a probable cause hearing, and since his confessions were obtained after that time frame, his confessions were illegally obtained and should have been suppressed.

¶17 Vasquez's claim fails for two reasons. First, ***Riverside*** applies in cases where the defendant has been arrested without a warrant. ***Riverside***, 500 U.S. at 47. Vasquez was arrested pursuant to a probation warrant that the trial court recognized as valid. Vasquez has never challenged the validity of this warrant. Therefore, ***Riverside*** does not apply.

¶18 Second, even if ***Riverside*** did apply, it would not support an ineffective assistance claim because it has not been violated. Vasquez was arrested at 2:50 p.m. on October 9, 2000. A trial court found probable cause for his arrest at 10:35 a.m. on October 11, 2000. Because the probable cause determination took place within forty-eight hours, ***Riverside*** was not violated.

¶19 Attorneys cannot be found ineffective for failing to pursue invalid arguments. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Because ***Riverside*** does not apply, Vasquez's trial attorney was not deficient. In addition, the result was not prejudicial, because even if Vasquez could have had his sixth interview suppressed, the police would still have his incriminating confession from the fourth interview. The same results would apply. Vasquez is unable to show the elements of the ***Strickland*** test; therefore, his trial counsel was not ineffective for failing to raise a ***Riverside*** claim.

¶20 Because neither his ***Crawford*** claim nor his ***Riverside*** claim has merit, Vasquez has failed to show cause that is sufficient to overcome the procedural bar set forth in WIS. STAT. § 974.06(4) and ***Escalona-Naranjo***. We therefore affirm the trial court's denial of the motion for postconviction relief.

By the Court.—Order affirmed.

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