COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2097-CR **Cir. Ct. No. 1995CF955367**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROY JAMES JONES,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Fine, Kessler, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Roy James Jones, *pro se*, appeals from an order denying his WIS. STAT. § 974.07 (2005-06)[1] motion and from an order denying his

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

motion for reconsideration. To the extent that Jones was challenging the sufficiency of the evidence to support the judgment of conviction, the circuit court denied relief on the ground that Jones's claim was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The circuit court also denied Jones's request that the circuit court order postconviction deoxyribonucleic acid (DNA) testing pursuant to § 974.07. Because the circuit court did not err in either respect, we affirm.

BACKGROUND

¶2 In 1997, a jury found Jones guilty of one count of first-degree sexual assault of a child; two counts of first-degree sexual assault of a child while armed; two counts of kidnapping while armed; one count of sexual assault; and one count of attempted sexual assault. All counts were subject to the habitual criminality enhancer. The victims of Jones's crimes were Aleisha H. and Easter B. The court imposed sentences totaling 143 years.

¶3 In his direct appeal under WIS. STAT. RULE 809.30, Jones claimed that he was denied his constitutional right to a speedy trial; that the evidence at trial was insufficient to sustain the guilty verdicts; and that the sentence was excessive and unduly harsh. We affirmed. ***State v. Jones***, No. 1998AP685-CR, unpublished slip op. (WI App June 29, 1999). The supreme court denied Jones's petition for review.

¶4 On December 30, 2002, Jones filed his first WIS. STAT. § 974.06 motion for postconviction relief. In that motion, Jones contended that "there is no such offense as 'attempted sexual assault via an act of attempted sexual intercourse.'" The circuit court denied the motion in a January 3, 2003 order. Jones did not appeal that order.

¶5 On June 7, 2004, Jones filed a second WIS. STAT. § 974.06 motion. In that motion, Jones challenged the effectiveness of trial counsel in several respects and further argued that his appellate counsel was ineffective for not challenging the effectiveness of trial counsel. Jones also raised several claims of error that were not tied to the effectiveness of counsel. The circuit court denied the motion in a June 10, 2004 order. Jones moved for reconsideration, and the circuit court denied that motion in a June 25, 2004 order. Jones appealed, and this court affirmed. ***State v. Jones***, No. 2004AP1836, unpublished slip op. (WI App Dec. 20, 2005).

¶6 Jones next filed the postconviction motion that gives rise to this appeal. Although Jones refers to WIS. STAT. § 974.07 in the motion, the majority of the motion challenges the sufficiency of the evidence. Additionally, Jones contended that his trial attorney provided ineffective assistance when he did not introduce witnesses from a "privacy lab" to testify about a pubic hair analysis. Finally, Jones asserted that the DNA testing that was done in this case was "illegal" and that "mistakes were made [by] the state crime lab" and that the prosecutor committed "misconduct' in order to "railroad" him. Apparently, Jones wants the circuit court to order that the DNA testing be repeated. As noted, the circuit court denied the motion and a reconsideration motion.

DISCUSSION

¶7 A defendant cannot raise an argument in a subsequent postconviction motion that was not raised in a prior postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. A defendant must "raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." ***Id.*** at 185; *see also* WIS. STAT. § 974.06(4) "Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived … in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion," absent sufficient reason.).

> [A] criminal defendant [is] required to consolidate all postconviction claims into his or her original, supplemental, or amended motion. If a criminal defendant fails to raise a constitutional issue that could have been raised on direct appeal or in a prior § 974.06 motion, the constitutional issue may not become the basis for a subsequent § 974.06 motion unless the court ascertains that a sufficient reason exists for the failure either to allege or to adequately raise the issue in the appeal or previous § 974.06 motion.

State v. Lo, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756 (citations omitted).

¶8 "[D]ue process for a convicted defendant permits him or her a single appeal of [a] conviction and a single opportunity to raise claims of error." ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). Jones has already had more than that single opportunity—in both his direct appeal and in his first WIS. STAT. § 974.06 motion. Therefore, he is procedurally barred from attempting to challenge the sufficiency of the evidence or the effectiveness of trial counsel in this latest motion. Jones offers no sufficient reason, and we can discern none from the record, why those issues were not raised previously, either

in his direct appeal or in his previous § 974.06 motions.[2] As the supreme court has stated, "[w]e need finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. The circuit court properly ruled that Jones's arguments were procedurally barred.

¶9 To the extent that Jones's motion requests DNA testing under WIS. STAT. § 974.07, it is not subject to a procedural bar. Nonetheless, we affirm the circuit court's denial of the motion.

¶10 WISCONSIN STAT. § 974.07(7) applies to a defendant's request for forensic DNA testing at public expense. ***State v. Moran***, 2005 WI 115, ¶¶3, 55, 57, 284 Wis. 2d 24, 700 N.W.2d 884. Section 974.07(7)(a) addresses when a court "shall order" testing and § 974.07(7)(b) addresses when a court "may order" testing. In either instance, the evidence to be tested must "meet[] the conditions under sub. (2)(a) to (c)." Sec. 974.07(7)(a)3., (7)(b)3. Section 974.07(2) sets forth three conditions. First, the evidence must be relevant. Sec. 974.07(2)(a). Second, the evidence must be in the actual or constructive possession of a government agency. Sec. 974.07(2)(b). Third, the evidence must not have

> previously been subjected to forensic [DNA] testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

Sec. 974.07(2)(c).

[2] Jones's latest challenge to the sufficiency of the evidence appears virtually identical to the argument raised, and rejected, in his direct appeal. *See* ***State v. Jones***, No. 1998AP685-CR, unpublished slip op. at 10-11 (WI App June 29, 1999).

¶11 The State concedes, and we agree, that Jones has satisfied several of the statutory criteria. Jones claims innocence. WIS. STAT. § 974.07(7)(a). The evidence is relevant and in the State's possession. Secs. 974.07(2)(a) and (2)(b). And, it is reasonably probable that Jones would not have been prosecuted or convicted if DNA testing had excluded him as a source of semen found on either victim. Sec. 974.07(7)(a)2. However, Jones has not satisfied the final criterion found in Sec. 974.07(2)(c), and, therefore, his request for DNA testing was properly denied.

¶12 The record shows that evidence recovered from Aleisha H. was subjected to Restriction Fragment Length Polymorphism (RFLP) testing by the State. Those tests were inconclusive and a DNA profile of Aleisha H.'s assailant was not obtained. Testing performed on evidence recovered from Easter B. resulted in a "three probe match" with Jones.[3] The record also shows that evidence recovered from both victims was subjected to DNA tests at Jones's request. Although it is not clear whether those tests included a Polymerase Chain Reaction (PCR) test,[4] it is clear that Jones chose not to disclose the results of the DNA tests that were performed at his request. In this motion asking for court-ordered DNA testing, Jones did not elaborate on what other tests could have been performed, and equally important, why the court should now order additional testing when he declined to introduce the results of the tests performed at his

[3] The State's expert witness testified that three separate genetic locations matched and that the "chance of finding an unrelated person … having that same three probe match is 1 in 1 1/2 million in Blacks, 1 in 980,000 in Caucasians, 1 in 720,000 in southeastern Hispanics, and 1 in 2.1 million in southwestern Hispanics."

[4] The State's expert witness testified that "RFLP testing uses a larger amount of DNA than … PCR testing." For a discussion of the two tests *see* ***State v. Davis***, 2005 WI App 98, ¶¶31, 34, 281 Wis. 2d 118, 698 N.W.2d 823.

behest prior to trial. In short, Jones has not shown that there is "another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results." WIS. STAT. § 974.07(2)(c). Therefore, the circuit court did not err when it denied Jones's request for court-ordered DNA testing.

By the Court.—Orders affirmed.

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