COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP87 **Cir. Ct. No. 2000CF1679**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SYLVESTER TOWNSEND,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed.*

Before Curley, P.J., Fine, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Sylvester Townsend appeals from an order summarily denying his postconviction motion. The issues are whether the prosecutor engaged in misconduct for calling Townsend's wife to testify at his

trial, and whether trial and appellate counsel were ineffective for respectively failing to object to this testimony, and for failing to raise this issue in original postconviction and appellate proceedings. We conclude that Townsend's alleged reasons for failing to previously raise this issue are insufficient to overcome the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). Therefore, we affirm.

¶2 A jury found Townsend guilty of first-degree reckless homicide and two counts of first-degree recklessly endangering safety, each as a party to the crime. The trial court imposed fifty-six, ten- and ten-year concurrent sentences for these convictions. On direct appeal, Townsend unsuccessfully challenged the sufficiency of the evidence. *See* ***State v. Townsend***, No. 2002AP2941-CR, unpublished slip op. at 4 (WI App Nov. 11, 2003).

¶3 Townsend then filed his first postconviction motion pursuant to WIS. STAT. § 974.06 (2003-04), raising seven issues, including different prosecutorial misconduct and ineffective assistance claims than those he now raises. The trial court summarily denied the motion. This court affirmed that order, rejecting the seven issues Townsend raised, including his ineffective assistance of trial counsel claim for failing to object to the prosecutor's submission of a different line of allegedly inadmissible evidence. *See* ***State v. Townsend***, No. 2004AP2123, unpublished slip op. ¶32 (WI App June 14, 2005).

¶4 Townsend filed a second postconviction motion pursuant to WIS. STAT. § 974.06 (2005-06), alleging prosecutorial misconduct for offering testimony from Townsend's wife at trial, and correlative ineffective assistance claims against trial counsel for failing to object to this testimony, and against postconviction/appellate counsel for failing to pursue trial counsel's

ineffectiveness. The trial court summarily denied the motion as procedurally barred by ***Escalona*** and § 974.06(4).[1]

¶5 To avoid ***Escalona***'s procedural bar, Townsend must allege a sufficient reason for failing to have previously raised all grounds for postconviction relief on direct appeal or in his original postconviction motion. *See* ***Escalona***, 185 Wis. 2d at 185-86. Whether ***Escalona***'s procedural bar applies to a postconviction claim is a question of law entitled to independent review. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶6 In his second postconviction motion, Townsend alleged that he failed to previously raise this issue because: (1) he was unaware of a marital privilege until he read a recent case; and (2) his appellate counsel was ineffective for failing to timely raise that issue by postconviction motion or on direct appeal. In his appellate brief, Townsend belatedly alleged that he learned about the marital privilege when he read ***Crawford v. Washington***, 541 U.S. 36 (2004), in 2006.[2] Even if we were to accept Townsend's fully alleged reason as timely, it is not

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

The trial court denied Townsend's motion on June 1, 2007. Townsend moved for relief from that order because he claimed that he did not timely receive it, and did not become aware of it until he contacted the trial court clerk to inquire about the status of his motion. Consequently, the trial court vacated and reinstated its June 1, 2007 order on January 9, 2008, to allow Townsend to timely appeal. *See* ***Edland v. Wisconsin Physicians Serv. Ins. Corp.***, 210 Wis. 2d 638, 648, 563 N.W.2d 519 (1997). Notwithstanding the vacatur of the June 1, 2007 order to facilitate its appealability, the trial court's reasoning on the misconduct and ineffective assistance claims is in that order; the January 9, 2008 order addresses why it granted Townsend's motion for relief. This court has jurisdiction over the current appeal from the January 9, 2008 order, which vacated and reinstated the June 1, 2007 order *nunc pro tunc*.

[2] The "sufficient reason" to overcome the procedural bar must be alleged in the postconviction motion itself to afford the trial court the initial opportunity to evaluate the sufficiency of the movant's reason. *See* WIS. STAT. § 974.06(4).

sufficient to allow him yet another postconviction challenge for his belated discovery of a longstanding marital privilege. If we were to accept that ***Crawford***, decided in 2004, is a recent case, ***Crawford*** does not apply to Townsend's case, and even if it arguably did, it would not help him as ***Crawford*** does not retroactively apply to cases on collateral review. *See* ***Whorton v. Bockting***, 549 U.S. 406, ___, 127 S.Ct. 1173, 1177 (2007). Most significantly, however, Wisconsin's recognition of a marital privilege is not recent. Ignorance of the law is not a sufficient excuse to challenge a judgment of conviction a third time. If it were, the procedural bar of ***Escalona*** and WIS. STAT. § 974.06(4) would be eviscerated, as many if not most collateral challenges are raised by *pro se* litigants.

¶7 Townsend has not persuaded us to relax this procedural bar to accommodate his recent discovery of a longstanding marital privilege in what was then a two-year-old case.[3] ***Crawford*** addressed the statutory marital privilege recognized by the State of Washington. *See* WASH. REV. CODE § 5.60.060(1) (1994). Townsend then presumably discovered the Wisconsin statutory marital privilege that would arguably apply to him in WIS. STAT. § 905.05 (1999-2000). After discovering that statutory privilege, Townsend has not shown that: (1) his wife divulged "any private communication by [him] to [her] made during their marriage"; or (2) the testimony is not one of the exceptions to this privilege.[4] *See* § 905.05(1), (3) (1999-2000).

[3] ***Crawford v. Washington***, 541 U.S. 36 (2004), was decided March 8, 2004; Townsend alleges he discovered ***Crawford*** in 2006.

[4] Townsend alleged that his wife testified about their conversations. Her trial testimony (actual and that recounted through hearsay) was not about her conversations with Townsend, but about what she witnessed and knew in contexts other than from her conversations with him.

¶8 Townsend has had the benefit of a direct appeal in which he was represented, and a postconviction challenge in which he represented himself. His current allegations, although different from those he previously raised, are wholly inadequate to demonstrate a *prima facie* claim of marital privilege, much less prosecutorial misconduct, or ineffective assistance of trial or appellate counsel. Townsend's claims are procedurally barred by ***Escalona*** and WIS. STAT. § 974.06(4), and his barebones allegations are insufficient to compel us to deviate from that procedural bar.

By the Court.—Order affirmed.

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