COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2886 **Cir. Ct. No. 2000CF5888**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAROME A. POWELL,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Sharome Andre Powell, *pro se*, appeals an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion to vacate his no contest plea. The circuit court concluded Powell's motion was foreclosed by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree with the circuit court and affirm the order.

¶2 On November 29, 2000, Powell was charged with armed robbery with the use of force, theft of movable property, and attempted armed robbery with the use of force, all as party to a crime. The criminal complaint incorporated incriminating statements Powell had given to police about his own participation. Powell, represented by counsel, initially pled not guilty.

¶3 Following competency and other mental health exams, Powell pled guilty to the second and third counts on November 21, 2001, and he was sentenced on January 10, 2002. The armed robbery count had remained on the trial calendar, but Powell pled no contest to that charge on February 8, 2002. He was sentenced to eight years' initial confinement and four years' extended supervision, concurrent with the sentence for the other two charges. Powell did not pursue a direct appeal.

¶4 In February 2004, Powell, now appearing *pro se*, moved for a "Goodchild Evidentory" [sic] hearing,[2] alleging ineffective assistance of counsel

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), which discusses how to evaluate the voluntariness of confessions.

and a ***Brady*** violation.[3] Accompanying his request was a motion to suppress the statements he had given to police. The motion alleged police took a statement "which was not voluntary" because of "duress, physical and mental[.]" The trial court denied Powell's motion noting his pleas waived any challenges to the circumstances of his arrest, while the remaining claims were "entirely conclusory" and lacked a basis for relief. Powell did not appeal.

¶5 On September 11, 2007, Powell filed a motion for sentence modification, invoking both WIS. STAT. § 973.19 and the presence of new factors. His motion alleged the State had breached the plea agreement and he complained trial counsel was ineffective for not introducing enough mitigating factors. Powell also argued there was a new factor—witnesses who would testify Powell had no idea his co-actors were planning to commit any crimes. The circuit court denied the motion, holding that the sentencing transcript clearly showed there was no breach of the plea agreement and that the remaining claims were conclusory. Powell did not appeal.

¶6 On October 15, 2008, Powell filed a motion to vacate his no contest plea.[4] He complained his statements to police were involuntary and coerced and the circuit court therefore erred in relying on these involuntary admissions during sentencing. The court denied the motion. It concluded that to the extent Powell was raising the same issues he previously raised in 2004 or 2007, those issues

[3] Powell's motion references "Brady vs. United States Supreme Court." It appears he may have meant to cite ***Brady v. United States***, 397 U.S. 742 (1970), and he cited it in support of the proposition that a constitutional violation always results in immediate reversal. That argument is, of course, false: "most constitutional errors can be harmless." *See* ***Arizona v. Fulminante***, 499 U.S. 279, 306 (1991).

[4] Powell did not move to vacate his two guilty pleas.

were barred and, to the extent he was raising new issues, they were waived. Powell appeals.

¶7 WISCONSIN STAT. § 974.06 permits some claims for relief to be brought after the time for appeal or other postconviction remedy has expired. *See* § 974.06(1). However, "[a]ll grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion." *See* § 974.06(4). The purpose of subsec. (4) "is clear: to require criminal defendants to consolidate all their postconviction claims into *one* motion or appeal." ***Escalona***, 185 Wis. 2d at 178. If a "defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a [§] 974.06 motion" except if, in the case of a failure to previously raise the issue, the court finds sufficient reason for the failure. ***Escalona***, 185 Wis. 2d at 181-82.

¶8 Whether Powell's motion was procedurally barred by ***Escalona*** is a question of law we review *de novo*. *See* ***State v. Tillman***, 2005 WI App 71, ¶14, 281 Wis. 2d 157, 696 N.W.2d 574. Powell appears to argue that ***Escalona*** does not apply because: his 2004 motion was not a WIS. STAT. § 974.06 motion; his 2007 motion was "moot" because it was untimely, so we should not require him to have raised issues at that time; and ***State v. Loop***, 65 Wis. 2d 499, 502, 222 N.W.2d 694 (1974), permits him to raise a constitutional issue in a § 974.06 motion at this time.[5]

[5] ***State v. Loop***, 65 Wis. 2d 499, 502, 222 N.W.2d 694 (1974), was effectively overruled on other grounds by ***State v Thomas***, 2000 WI 13, 232 Wis. 2d 714, 605 N.W.2d 836. *See* ***State v. Weatherall***, 2009 WI App 41, ¶27, 316 Wis. 2d 772, 766 N.W.2d 241.

¶9 First, the ***Escalona*** bar is not limited to prior WIS. STAT. § 974.06 motions. That is, it is not necessary for prior motions to have been brought under § 974.06 for there to be a preclusion of issues, raised in a current motion, which were or which could have been raised in those prior motions. *See* ***Escalona***, 185 Wis. 2d at 181.[6]

¶10 Second, while Powell's WIS. STAT. § 973.19 motion for sentence modification, brought in 2007, does appear untimely,[7] the motion also alleged new factors in an attempt to justify modification. As Powell himself pointed out in that motion, a sentence modification motion based on a new factor is not subject to the same limitations as a § 973.19 motion. *See* ***State v. Noll***, 2002 WI App 273, ¶¶9-11, 258 Wis. 2d 573, 653 N.W.2d 895. His 2007 motion, therefore, is not "moot" because of untimeliness.

¶11 Third, ***Loop*** is inapplicable. That case held that lack of a direct appeal does not necessarily foreclose a defendant from later pursuing an alleged error of constitutional dimension via a WIS. STAT. § 974.06 motion. *See* ***Loop***, 65 Wis. 2d at 502. However, the defendant in that case—who did not pursue a direct appeal—had brought only a single § 974.06 motion, the denial of which he was appealing. That case did not, therefore, confront the procedural bar of § 974.06(4).

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[6] Powell also claims that ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), applies only to "those who have filed 3 or more motions raising while rephrasing the same issues addressed on direct appeal." ***Escalona*** is not so limited.

[7] Under WIS. STAT. § 973.19(1), a defendant must move for sentence modification within ninety days of entry of the sentence if transcripts have not been ordered or, if they have been ordered, within sixty days of the final transcript's service. *See also* WIS. STAT. RULE 809.30(2)(h).

¶12 Powell's fundamental basis for relief in his 2008 motion was that his incriminating statements to police were allegedly coerced. This issue was raised and rejected in 2004.[8] WISCONSIN STAT. § 974.06(4) and ***Escalona*** therefore bar relitigation of the issue. Likewise, anything in the 2008 motion that is *not* repetitive of the earlier motions could have and should have been raised in 2004 or 2007, and Powell fails to offer "sufficient reason" for not raising the issues previously.

¶13 In any event, Powell's claims would fail on the merits. He presently seeks to withdraw his plea but offers no evidence that the plea itself was invalid. There is a plea questionnaire/waiver of rights form in the record, and the colloquy appears adequate. Powell complains about a coerced statement but the court properly noted in 2004 that the valid pleas waived that challenge. *See* ***State v. Milanes***, 2006 WI App 259, ¶13, 297 Wis. 2d 684, 727 N.W.2d 94. Powell's argument that counsel was ineffective for failing to pursue suppression of his statements—an argument that appears to be raised for the first time on appeal—therefore fails as well, because Powell makes no showing that a suppression motion would have been granted.[9]

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[8] Powell's claims that ***Escalona*** is inapplicable because he presented an amended motion with proper argument on his previously rejected "Conclusory" claims. Powell's 2008 motion is not properly considered an amended version of the 2004 motion and, in any event, Powell's claim relating to the coerced statement was the one issue the court did *not* dismiss as conclusory. Instead, the court noted that such a challenge was waived by his plea.

[9] Arguments that are raised for the first time on appeal are generally not considered. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). In addition, to the extent Powell raises new claims—like sufficiency of the evidence and complaints about the prosecutor—in his reply brief, we ordinarily do not consider those, either. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). We do note, however, that a valid guilty or no contest plea waives all nonjurisdictional defects and defenses, including a challenge to sufficiency of the evidence and including defects of constitutional magnitude. *See* ***State v. Milanes***, 2006 WI App 259, ¶13, 297 Wis. 2d 684, 727 N.W.2d 94.

By the Court.—Order affirmed.

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