COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2670 **Cir. Ct. No. 2001CF1184**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONI J. TOSTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

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

¶1 PER CURIAM. Toni J. Toston appeals, *pro se*, from an order denying his third postconviction motion. The circuit court determined that his claims are barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree and affirm.

BACKGROUND

¶2 Toston pled guilty in 2001 to attempted first-degree intentional homicide while using a dangerous weapon, attempted armed robbery, and armed robbery, all as a party to a crime. The circuit court imposed an aggregate forty-five-year term of imprisonment. With the assistance of appointed counsel, he filed a postconviction motion and then pursued a direct appeal from the judgment of conviction and the order denying postconviction relief. We summarily affirmed. ***State v. Toston***, No. 2002AP2894-CR, unpublished slip op. (WI App Oct. 30, 2003).

¶3 Toston next began a series of collateral attacks on his conviction. In February 2006, Toston moved *pro se* to withdraw his guilty plea. The circuit court appointed counsel to represent him and conducted an evidentiary hearing on his claims. The circuit court denied relief, however, and Toston did not appeal. In May 2010, Toston filed another *pro se* postconviction motion seeking plea withdrawal, and the circuit court again denied relief. We dismissed Toston's appeal. *See* ***State v. Toston***, No. 2010AP1693-CR, unpublished order (WI App Aug. 27, 2010).

¶4 In November 2011, Toston filed the *pro se* postconviction motion underlying this appeal. He again sought plea withdrawal. The circuit court denied relief, and this appeal followed.

DISCUSSION

¶5 Toston filed his most recent postconviction motion pursuant to WIS. STAT. § 974.06 (2009-10).[1] Section 974.06 is the primary statutory mechanism for criminal defendants to challenge their convictions after the time for a direct appeal has passed. ***State v. Henley***, 2010 WI 97, ¶50, 328 Wis. 2d 544, 787 N.W.2d 350. The remedy, however, is limited, because "[w]e need finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. A defendant is therefore barred from pursuing claims under § 974.06 that could have been raised in an earlier postconviction motion or direct appeal absent a "sufficient reason" for not raising the claims previously. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

¶6 Toston has not proffered a sufficient reason why he could not fully present his current claims in his earlier postconviction litigation. Instead, he asserts that he has identified errors that he believes should be corrected. That assertion does not constitute a reason for failing to develop issues previously. His postconviction submission is therefore inadequate. *See* ***id.***

¶7 Toston argues, however, that we should not apply ***Escalona-Naranjo*** because he wishes to rely on the inherent authority of the court. In support of his position, he asserts: "limitations on postconviction relief described in ***Escalona*** do not apply to a case invoking a court's inherent authority." *See* ***Henley***, 328 Wis. 2d 544, ¶126 n.8 (Crooks, J., dissenting). His reliance on the ***Henley*** dissent is misplaced. "A dissent is what the law is not." ***State v. Perry***, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993).

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶8 The law in this state is stated by the majority in ***Henley***:

> [t]he fair administration of justice is not a license for courts, unconstrained by express statutory authority, to do whatever they think is "fair" at any given point in time. Rather, any conception of the fair administration of justice must include the principle of finality. Thus, while circuit courts do have inherent powers, we do not recognize a broad, inherent power to order a new trial in the interest of justice at any time, unbound by concerns for finality and proper procedural mechanisms.

Id., 328 Wis. 2d 544, ¶75 (footnote omitted).

¶9 Toston thus must pursue postconviction relief using the appropriate procedural mechanisms available. In this case, Toston invoked WIS. STAT. § 974.06 when he filed his postconviction motion "pursuant to" that statute. Toston, however, has not complied with the requirement, imposed by § 974.06 and developed in ***Escalona-Naranjo***, that he articulate a sufficient reason for serial litigation. Therefore, his claims are barred.

By the Court.—Order affirmed.

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