COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2245 **Cir. Ct. No. 1995CF950767**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EMMETT KAPRIES DUNLAP,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Emmett Dunlap appeals an order denying his WIS. STAT. § 974.06 motion for a new trial.[1] The circuit court denied Dunlap's motion

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

without an evidentiary hearing, concluding Dunlap failed to assert a sufficient reason for failing to raise his arguments previously, as required by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Dunlap argues his appellate attorney's ineffective assistance and Dunlap's unawareness of the potential issues constituted sufficient reasons. We reject Dunlap's argument, and affirm.

BACKGROUND

¶2 Dunlap proceeded to a jury trial in August of 1995 on charges of first-degree intentional homicide and false imprisonment. He was acquitted on both charges, but was convicted of the lesser-included offense of second-degree intentional homicide (coercion defense). We affirmed Dunlap's conviction on a no-merit direct appeal in February 1999. Our opinion considered six potential appellate issues identified in the no-merit report submitted by Dunlap's appointed counsel. The opinion also considered Dunlap's response, which asserted an additional issue. We determined that none of the potential issues had arguable merit. Our supreme court denied Dunlap's petition for review in August 1999.

¶3 In 2000 and 2001, Dunlap filed a series of pro se challenges to his conviction. He first filed a habeas petition in this court under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), arguing his appellate counsel was ineffective for failing to make certain arguments. He also filed a mandamus petition in the supreme court seeking to assert the same claims. The mandamus petition was denied as duplicative in November 2000. We denied the ***Knight*** petition in October 2000, after concluding Dunlap's claims were legally insufficient and "conclusory." The supreme court denied review in December of 2000. Shortly thereafter, Dunlap filed another habeas corpus petition in this court

arguing insufficiency of the evidence and ineffective assistance of appellate counsel. We denied the petition in March 2001, reasoning we had already considered and rejected the sufficiency issue in Dunlap's no-merit direct appeal and addressed the ineffective assistance claim in the previous ***Knight*** habeas petition. Dunlap also filed a WIS. STAT. § 974.06 motion, using a modified form on which he check-marked all but one of the form's listed grounds for challenging a conviction. The circuit court summarily denied the "generalized" motion as "entirely conclusory" in November 2001.[2]

¶4 In August 2013, represented by counsel, Dunlap filed a second WIS. STAT. § 974.06 motion, which is the subject of this appeal. He asserted his right to confrontation was violated when a codefendant refused to answer questions midway through his direct examination as a state rebuttal witness.[3] Dunlap asserted three reasons as "sufficient" to overcome the ***Escalona*** bar for failure to raise his claim earlier. First, Dunlap was previously unaware of the issue. Second, the no-merit procedure was not properly followed because the issue had obvious merit, but neither counsel nor the court addressed the issue. Third, Dunlap's appellate counsel was ineffective for failing to identify and raise the issue on direct appeal. The circuit court denied Dunlap's motion without reaching

[2] Additionally, Dunlap filed a "Notice of Intent To Pursue Post-Conviction Relief In Appeal Court," in the circuit court in December 2001, indicating he planned to argue ineffective assistance of trial counsel and misconduct by the trial court and prosecutor. Dunlap apparently did not pursue the matter further.

[3] Dunlap also presented a jury instruction issue in his motion and, initially, on appeal. However, he concedes in a supplemental reply brief that he could not demonstrate a sufficient reason for failing to raise that issue previously. Further, by failing to reply to the State's discussion of the claim's merits, Dunlap concedes that argument as well. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

the merits, determining Dunlap failed to identify a sufficient reason for not raising his claim in earlier postconviction filings. Dunlap appeals.

DISCUSSION

¶5 The sole issue on appeal is whether Dunlap identified a sufficient reason for failing to previously raise the confrontation issue presented in his most recent WIS. STAT. § 974.06 motion. A defendant cannot pursue claims in a § 974.06 motion that could have been raised in an earlier postconviction motion or appeal unless the defendant provides a sufficient reason for not raising them previously. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. This procedural bar may apply even if the direct appeal was a no-merit appeal. ***State v. Tillman***, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574. Whether the motion is procedurally barred pursuant to ***Escalona-Naranjo*** is a question of law we review de novo. ***Id.***, ¶14.

¶6 Dunlap first argues he did not raise the confrontation issue earlier because he was unaware of it until his current attorney identified the issue. Dunlap averred neither his trial nor postconviction counsel advised him his right to confrontation was violated at trial when his codefendant refused to continue testifying. Further, Dunlap asserted he would have pursued the issue in a direct appeal or a no-merit response if he had been aware of the issue.

¶7 Dunlap's unawareness argument fails for multiple reasons. First, the legal authority he cites does not support his position. Dunlap relies on ***State v. Allen***, 2010 WI 89, ¶¶43-44, 328 Wis. 2d 1, 786 N.W.2d 124, to argue unawareness of a legal or factual basis for appeal is a sufficient reason for failing to raise a claim in a no-merit response. However, ***Allen*** summarily rejected the argument that mere unawareness of a legal issue constituted a sufficient reason.

Id. Instead, ***Allen*** simply recognized existing precedent that "where a subsequent supreme court decision 'constituted a new rule of substantive law,' the defendant's lack of awareness of the legal basis for his claim could constitute a sufficient reason for not having raised the claim earlier." ***Id.***, ¶44 (quoting ***State v. Howard***, 211 Wis. 2d 269, 287-88, 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). Like the defendant in ***Allen***, Dunlap "does not point to any change in law that has made him aware of a claim now that he was not aware of at the time of" his no-merit appeal. *See* ***id.*** Dunlap also asserts he was unaware of the factual basis of his claim, but he develops no argument in support of this claim. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) ("We will not decide issues that are not, or inadequately, briefed."). Indeed, Dunlap does not assert he was unaware of his codefendant's obscenity-laced outburst at trial where he refused to testify further. Moreover, Dunlap's unawareness argument only addresses his no-merit appeal. He fails to develop an argument that his unawareness constituted a sufficient reason for failing to raise the confrontation issue in his first WIS. STAT. § 974.06 motion or the other three postconviction challenges he filed after his no-merit direct appeal. *See* ***id.***

¶8 Dunlap next argues he demonstrated a sufficient reason because the no-merit procedures were not properly followed in his direct appeal. In ***Allen***, 328 Wis. 2d 1, ¶62, the court observed, "The ***Escalona-Naranjo*** bar may be applied to a no-merit review only when the no-merit procedures are properly followed … and warrant sufficient confidence" in the no-merit decision. Further, the court held:

> [A] defendant must do more than identify an issue of arguable merit that the court of appeals did not discuss. To satisfy the "sufficient reason" standard, the defendant must do something to undermine our confidence in the court's

> decision, perhaps by identifying an issue of such obvious merit that it was an error by the court not to discuss it.

Id., ¶¶82-83. Dunlap alleges his original appellate attorney failed to adequately explain his options in light of counsel's determination that there were no issues of arguable merit. Dunlap argues the attorney should have informed him he had the option to either proceed pro se or retain private counsel at his expense. Alternatively, Dunlap argues his attorney and this court overlooked an issue of obvious merit when failing to address the confrontation issue Dunlap raised in his present WIS. STAT. § 974.06 motion.

¶9 Dunlap's second sufficient-reason argument fails for the same reason as his first. He altogether fails to explain why an allegedly sufficient reason for failing to raise an issue in his direct appeal would entitle him to more than one mulligan. Dunlap's present motion is not the first following his no-merit direct appeal; it is his *fifth* subsequent postconviction challenge. "The purpose behind WIS. STAT. § 974.06 is to avoid *successive* motions for relief by requiring a defendant to raise all grounds for relief in one motion." ***Id.***, ¶40. As Dunlap fails to develop an argument that the alleged no-merit failures constitute a sufficient reason for not raising the confrontation issue in his intervening postconviction challenges, we need not resolve whether the alleged failures would have constituted a sufficient reason in the first instance. *See* ***Flynn***, 190 Wis. 2d at 9 n.2.

¶10 Dunlap's final asserted sufficient reason is that his appellate counsel provided ineffective assistance—by failing to inform him he had the option to either proceed pro se or retain private counsel at his expense and by failing to file a merits brief arguing trial counsel was ineffective for failing to raise the confrontation issue at trial. "[I]neffectiveness of postconviction counsel *may*

constitute a sufficient reason as to why an issue that could have been raised on direct appeal was not." ***Allen***, 328 Wis. 2d 1, ¶85 (citing ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996)). Nonetheless, this argument fails for the same reason as the first two. The asserted ineffectiveness only could have entitled Dunlap to raise new issues in his first postconviction challenge after the no-merit appeal. It cannot permit him to pursue serial postconviction litigation when he could raise new issues all at once. "We need finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185.

¶11 In any event, we conclude appellate counsel was not ineffective, because there is no merit to the underlying confrontation claim. *See* ***State v. Maloney***, 2006 WI 15, ¶37, 288 Wis. 2d 551, 709 N.W.2d 436 (counsel is not ineffective for failing to pursue nonmeritorious claims that would have been denied). The State reached a plea agreement with Dunlap's codefendant, Milton Gordon, to secure his testimony against Dunlap. At trial, the State called Gordon as a rebuttal witness. He gave several minutes of testimony in which he incriminated Dunlap. However, Gordon then stated, "I'm not answering nothing." After the jury was excused, Gordon stated, "I ain't talking to nobody. Give me life. Fuck you all. Write that down. Folks trying to railroad me. Punk ass." That ended the proceedings for the day.

¶12 The following morning, the court, the prosecutor, Gordon's attorney, and Dunlap's attorney discussed how to proceed. Gordon's counsel confirmed Gordon would not testify further. The prosecutor indicated Gordon's refusal constituted a breach of the plea agreement, and the State would neither attempt to call him as a witness nor grant him immunity. The prosecutor asked that the court strike Gordon's testimony in its entirety. Dunlap's counsel did not request a mistrial, and joined in the request for a jury admonition. Both attorneys also

agreed the jury should be told the defense had nothing to do with Gordon's behavior. When the jury returned, the court instructed as follows:

> If you recall yesterday, Ladies and Gentlemen of the Jury, there was a witness that was on the stand.
>
> Through no fault of … any one of the parties, the State or the defense, that witness is not going to be available to … testify—give further testimony.
>
> [Y]ou are to disregard entirely all that person—all of that person's testimony—Mr. Gordon's testimony. That will be stricken from the record.

The court then gave standard instructions to the jury prior to closing arguments, including the following admonition: "During the trial the Court has ordered certain testimony to be stricken. Disregard all that stricken testimony."

¶13 Defendants have a constitutional right to confront and cross-examine the witnesses against him or her. ***Lee v. Illinois***, 476 U.S. 530, 539-40 (1986); ***State v. Rockette***, 2006 WI App 103, ¶20, 294 Wis. 2d 611, 718 N.W.2d 269. "The key inquiry for Confrontation Clause purposes is whether the declarant is present at trial for cross-examination, takes the oath to testify truthfully and answers questions asked of him or her by defense counsel." ***Rockette***, 294 Wis. 2d 611, ¶24. "'Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.'" ***Id.*** (quoting ***Crawford v. Washington***, 541 U.S. 36, 68-69 (2004)). The "'truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination.'" ***State v. King***, 205 Wis. 2d 81, 91, 555 N.W.2d 189 (Ct. App. 1996) (quoting ***Lee***, 476 U.S. at 541). Whether a defendant's right to confrontation has been violated under

a given set of facts is a question of law we review do novo. *See* ***Rockette***, 294 Wis. 2d 611, ¶19.

¶14 Dunlap complains he was denied an opportunity to confront Gordon about his testimony, which conflicted with Dunlap's testimony. Further, Dunlap emphasizes that because Gordon was not cross-examined, the jury did not learn Gordon was testifying pursuant to a plea deal and had four prior convictions.

¶15 Dunlap's confrontation argument has no merit. It clearly *would* have violated Dunlap's confrontation rights if Gordon's testimony implicating Dunlap had been admitted as evidence. But, that is not what occurred. Upon Gordon's refusal to continue testifying, he was struck as a witness. All of his testimony was struck from the record. Because the jury was instructed to entirely ignore Gordon and his testimony, there was no testimonial evidence introduced that Gordon had a right to test. We presume jurors follow the trial court's instructions. ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780.

¶16 Perhaps recognizing the weakness of his confrontation argument, Dunlap alternatively contends the failure of trial counsel to request a mistrial was plain error. "Plain error is 'error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. "Where a basic constitutional right has not been extended to the accused, the plain error doctrine should be utilized." ***Id.*** Regardless whether we address trial counsel's actions under the plain error or ineffective assistance rubric, the outcome is the same. Dunlap's argument that there was plain error because there was a confrontation violation is circular. Because Gordon's testimony was stricken from the record, there was no constitutional violation. Further, Dunlap does not develop any

argument that the court erroneously exercised its discretion by not granting a mistrial where none was requested or that it would have been obligated to do so had one been requested. *See* ***Flynn***, 190 Wis. 2d at 39 n.2.

By the Court.—Order affirmed.

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