COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-0725

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THOMAS W. REIMANN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Thomas Reimann appeals the denial of his postconviction motion under § 974.06, STATS. He claims the trial court erred by denying the motion without first giving him an evidentiary hearing. Because we agree with the trial court that Reimann's claims were procedurally barred, we conclude that no hearing was necessary. Accordingly, we affirm the order.

BACKGROUND

On April 17, 1990, Madison police arrested Reimann in his motel room pursuant to a valid warrant. Having observed two small pills on the floor and a syringe attached to a bloody napkin during the arrest, the police subsequently obtained a search warrant for the motel room, and recovered a sawed-off shotgun from under the bed. On August 19, 1990, Reimann entered no contest pleas to charges of unlawful possession of hydromorphone and possession of a firearm by a felon, in exchange for the dismissal of a third charge. He was sentenced to two concurrent six-year prison terms, to be served consecutively to a twenty-year prison term on a companion case.

On November 20, 1991, January 31, 1992, and March 2, 1994, through a succession of counsel, Reimann filed postconviction motions in the trial court seeking to withdraw his no contest pleas on the grounds that they were involuntarily given and that he had been denied the effective assistance of counsel. Specifically, he alleged that he had pleaded no contest only to protect his former wife, not realizing that she had already admitted that the shotgun was hers. The trial court denied Reimann's plea withdrawal motions, along with several other motions, in an order dated September 8, 1994. Reimann appealed that order and his judgment of conviction. After remanding for a trial court decision on Reimann's additional motion to reopen, we affirmed the judgment and order in ***State v. Reimann***, No. 94-2528-CR, unpublished slip op. (Wis. Ct. App. Oct. 17, 1996). Our opinion concluded that Reimann had failed to allege any special circumstances which would show that he had placed particular emphasis on protecting his former wife when deciding to enter his plea. Furthermore, since Reimann did not inform counsel of his alleged reason for accepting the plea

bargain, counsel had no opportunity to respond, effectively or otherwise, to Reimann's decision.

On January 14, 1997, we rejected Reimann's attempt to seek habeas corpus relief in this court on the basis of alleged ineffective assistance of postconviction counsel. *See* ***State v. Rothering***, 205 Wis.2d 675, 678, 556 N.W.2d 136, 138 (Ct. App. 1996) (holding that the trial court is the proper forum in which to seek habeas corpus relief based upon the actions of postconviction/pre-appellate counsel). Reimann filed the § 974.06, STATS., motion which is the subject of this appeal on August 13, 1997, raising multiple new claims of error and seeking a modification of his sentence or other relief (presumably including plea withdrawal).

STANDARD OF REVIEW

A defendant is entitled to a hearing on a postconviction motion when he alleges facts which, if true, would entitle him to relief. *See* ***State v. Bentley***, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996). No hearing is required, though, when a defendant presents only conclusionary allegations or the record conclusively demonstrates that he is not entitled to relief. *See* ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972). Although the ultimate decision on whether to allow a plea withdrawal lies within the trial court's discretion, we will independently determine whether the facts alleged in a motion were sufficient to warrant a hearing. *See* ***Bentley***, 201 Wis.2d at 310, 548 N.W.2d at 53.

ANALYSIS

Section 974.06(1), STATS., permits a defendant to challenge a sentence "upon the ground that the sentence was imposed in violation of the U. S. Constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack" after the time for seeking a direct appeal or other postconviction remedy has expired. Section 974.06(4) limits the use of this postconviction procedure, however, in the following manner:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

The purpose of subsection (4) is "to require criminal defendants to consolidate all their postconviction claims into one motion or appeal." ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 178, 517 N.W.2d 157, 161 (1994). Successive motions and appeals, including those raising constitutional claims, are procedurally barred unless the defendant can show a "sufficient reason" why the newly alleged errors were not previously or adequately raised. ***Id***. at 185, 517 N.W.2d at 164. Newly discovered evidence or the unforeseen effect of subsequent law may provide such a sufficient reason. *See* ***id***. at 182 n.11, 517 N.W.2d at 162 (discussing and, in part, overruling ***State v. Klimas***, 94 Wis.2d 288, 288 N.W.2d 157 (Ct. App. 1979)).

Reimann concedes that he was aware of all the facts and law which form the basis for his present allegations of error at the time he filed his prior postconviction motions and his direct appeal. He asserts, however, that his fear of criminal prosecution for intimidation of a witness provides a sufficient reason why he did not earlier raise his present claims, which are: (1) a detective falsely testified at the preliminary hearing that he had not strip-searched Reimann; (2) Reimann and his ex-wife each had valid prescriptions for Dilaudid; (3) police failed to give Miranda warnings before searching his car; (4) the Dilaudid tablets found actually belonged to a police informant; (5) Reimann's ex-wife admitted that the shotgun was in her possession; and (6) he did not know that the weapon was under the legal length. He bases his assertion of a sufficient reason to delay making his present claims on allegations that he placed a phone call to his ex-wife on counsel's phone and persuaded her not to testify.

Reimann's argument is as disingenuous as it is unpersuasive. First, even if fear of additional prosecution might have provided an incentive for pleading no contest rather than going to trial, it in no way explains why Reimann did not raise the present allegations of error as soon as he decided to seek withdrawal of his plea. Nor does Reimann's alleged witness intimidation effort bear any relation to most of the issues which Reimann now seeks to raise in his § 974.06, STATS., motion. Finally, we disagree, as a matter of public policy, that the purported need to shield oneself from additional criminal charges constitutes a sufficient reason to allow a successive postconviction motion. In short, based upon the record before it, the trial court properly determined that Reimann had no sufficient reason for failing to consolidate his new claims of error with those he had previously raised. Reimann's motion was properly denied without a hearing as procedurally barred.

By the Court.—Order affirmed.

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