COURT OF APPEALS DECISION DATED AND FILED

July 27, 2004

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-3131

Cir. Ct. No. 99CF006114

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Michael A. Martin appeals, *pro se*, from orders denying his original and "supplemental" WIS. STAT. § 974.06 (2001–02) motions

for sentence modification.[1] Martin claims that: (1) the Wisconsin DNA collection statute, WIS. STAT. § 973.047, violates the Fourth Amendment's prohibition against unreasonable searches and seizures; (2) section 973.047 is an *ex post facto* law; and (3) his trial counsel rendered ineffective assistance when the lawyer allegedly failed to advise Martin on what plea to enter. Martin also alleges that the trial court erred when it concluded that: (1) he could not file a "supplemental" § 974.06 motion after he filed a notice of appeal and the record was sent to this court; and (2) he could not seek sentence modification under § 974.06. We affirm.

I.

¶2 Michael A. Martin was charged with escape from the Milwaukee County House of Correction. *See* WIS. STAT. § 946.42(3)(a) (1999–2000). According to the complaint, he was released on November 15, 1999, to go to work and did not return. Martin claims in his brief that he voluntarily turned himself in approximately three years later, on June 24, 2003, "to resolve all outstanding criminal matters pending against him in the State of Wisconsin." The State does not dispute this assertion. He pled guilty to escape, and the trial court sentenced him to six months in the House of Correction, consecutive to any other sentence, and ordered him to provide a DNA sample.

[1] Martin's notice of appeal does not indicate that he is appealing from the order denying his "supplemental" WIS. STAT. § 974.06 motion. Indeed, Martin filed his "supplemental" § 974.06 motion after he filed his notice of appeal. Nevertheless, we have jurisdiction over the appeal by virtue of WIS. STAT. RULE 808.04(8).

All references to the Wisconsin Statutes are to the 2001–02 version unless otherwise noted.

¶3 Martin did not file a direct appeal. On October 31, 2003, he filed a *pro se* WIS. STAT. § 974.06 motion for sentence modification. Martin alleged that his trial counsel rendered ineffective assistance at the combined plea and sentencing hearing when the lawyer did not advise him on which plea to enter, and that the Wisconsin DNA collection statute, WIS. STAT. § 973.047, under which he was required to submit a DNA sample, was unconstitutional. The trial court denied Martin's motion, concluding that his ineffective-assistance claim was "entirely conclusory," and that he did not show prejudice. It also determined that his constitutional challenge to § 973.047 was "entirely without merit."

¶4 Martin filed a *pro se* notice of appeal on November 14, 2003. On November 26, 2003, he filed a motion requesting the preparation of his transcripts at public expense. The trial court denied the motion, noting that Martin was not entitled to transcripts because his opportunity for pursuing postconviction relief under WIS. STAT. § 809.30 had expired and he had not made a showing of an "arguably meritorious claim for relief."

¶5 After his request for transcripts was denied, Martin filed with this court a "supplemental motion for *ex parte* provisional remedy of mandamus" on December 9, 2003. (Uppercasing omitted.) In this motion, he appeared to seek review of the trial court's decision to deny him transcripts. We denied Martin's motion on December 18, 2003, and noted that transcripts were not required because Martin's first WIS. STAT. § 974.06 motion was denied without a hearing. We also concluded that because "[t]he [trial] court denied the motion without benefit of transcripts, … the issue on appeal will be whether the [trial] court properly denied the motion given the record before it and the allegations of the motion."

¶6 In the meantime, Martin filed a "supplemental" WIS. STAT. § 974.06 motion on December 2, 2003, for postconviction relief. In this motion, he requested "the same relief requested in his original Motion for Postconviction Relief." He also claimed that his lawyer was ineffective because the lawyer did not tell Martin of his right to remain silent at sentencing, and that the trial court erred when it denied his first § 974.06 motion without an evidentiary hearing. The trial court denied the motion on December 16, 2003. It again concluded that Martin's claims were entirely conclusory and opined that, after a notice of appeal is filed and the record is sent to the appellate court, a defendant may not file additional § 974.06 motions. The record was sent to us on January 12, 2004.

II.

A. WISCONSIN STAT. § 973.047

¶7 Martin attacks the constitutionality of the Wisconsin DNA collection statute, WIS. STAT. § 973.047.[2] The constitutionality of a statute is a question of

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[2] WISCONSIN STAT. § 973.047 provides:

> **Deoxyribonucleic acid analysis requirements. (1f)** If a court imposes a sentence or places a person on probation for a felony conviction, the court shall require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.
>
> **(1m)** The results from deoxyribonucleic acid analysis of a specimen provided under this section may be used only as authorized under s. 165.77 (3). The state crime laboratories shall destroy any such specimen in accordance with s. 165.77 (3).
>
> **(2)** The department of justice shall promulgate rules providing for procedures for defendants to provide specimens when required to do so under this section and for the transportation of those specimens to the state crime laboratories for analysis under s. 165.77.

law that we review *de novo*. ***State v. Borrell***, 167 Wis. 2d 749, 762, 482 N.W.2d 883, 887 (1992). All statutes reach us with the presumption that they are constitutional, and the party challenging the statute has the burden of showing that it is unconstitutional beyond a reasonable doubt. ***State v. McManus***, 152 Wis. 2d 113, 129, 447 N.W.2d 654, 660 (1989).

1. Fourth Amendment

¶8 Martin first alleges that WIS. STAT. § 973.047 violates the Fourth Amendment's prohibition against unreasonable searches and seizures. He argues that § 973.047 is "facially invalid because it authorizes suspicionless searches with the objective of furthering law enforcement purposes." (Internal quotation marks omitted.) We disagree.

¶9 Generally, a search is not reasonable under the Fourth Amendment unless it is carried out pursuant to a judicial warrant that is supported by probable cause. ***Griffin v. Wisconsin***, 483 U.S. 868, 873 (1987). There are a number of exceptions to this general rule, however, including the special needs exception. *See* ***New Jersey v. T.L.O.***, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). Under the special needs exception, the warrant and probable cause requirements are replaced with a showing of a neutral plan for execution, a compelling government need, the absence of less restrictive alternatives, and reduced privacy rights. ***Shelton v. Gudmanson***, 934 F. Supp. 1048, 1050 (W.D. Wis. 1996). Special needs searches are conducted for purposes other than solving and punishing crimes, and are deemed constitutionally permissible because they serve "'special needs, beyond the normal need for law enforcement.'" ***City of Indianapolis v. Edmond***, 531 U.S. 32, 37 (2000) (quoted source omitted).

¶10 The issue of whether WIS. STAT. § 973.047 falls within the special needs exception was recently discussed by the United States Court of Appeals for the Seventh Circuit in ***Green v. Berge***, 354 F.3d 675 (7th Cir. 2004). ***Green*** began by noting that all fifty states and the federal government have adopted DNA collection and data bank statutes that are similar to Wisconsin's, and that challenges to these statues "have almost uniformly been unsuccessful." ***Id.*** at 676. It observed that courts have upheld DNA collection statutes "because the government interest in obtaining reliable DNA identification evidence for storage in a database and possible use in solving past and future crimes outweighs the limited privacy interests that prisoners retain." ***Id.*** at 677. It then discussed the special-needs exception and concluded that § 973.047 falls within the exception:

> Wisconsin's DNA collection statute is, we think, narrowly drawn, and it serves an important state interest. Those inmates subject to testing because they are in custody, are already "seized," and given that DNA is the most reliable evidence of identification--stronger even than fingerprints or photographs--we see no Fourth Amendment impediments to collecting DNA samples from them pursuant to the Wisconsin law. The Wisconsin law withstands constitutional attack under the firmly entrenched "special needs" doctrine.

Green, 354 F.3d at 679; *see also* ***Shelton***, 934 F. Supp. at 1051 ("Although the state's DNA testing of inmates is ultimately for a law enforcement goal, it seems to fit within the special needs analysis the Court has developed for drug testing and searches of probationers' homes, since it is not undertaken for the investigation of a specific crime.") (upholding a prior version of § 973.047). We agree. The only authority that Martin cites to the contrary is ***United States v. Kincade***, 345 F.3d 1095 (9th Cir. 2003). ***Kincade*** held that forced blood extraction from parolees under the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135a, violated the Fourth Amendment unless the extraction

was supported by individualized reasonable suspicion. ***Kincade***, 345 F.3d at 1104. ***Kincade*** was vacated, however, when the Ninth Circuit ordered an *en banc* consideration. ***United States v. Kincade***, 354 F.3d 1000 (9th Cir. 2004). We agree with the rationale of ***Green***, and Martin has not shown, beyond a reasonable doubt, that § 973.047 violates the Fourth Amendment.

2. *Ex Post Facto* Law

¶11 Second, Martin alleges that WIS. STAT. § 973.047, as it was applied to him, violates the constitutional provisions against *ex post facto* laws.[3] The State argues that Martin waived this issue on appeal because he did not present it to the trial court. We disagree with the State. Generally, an appellate court will not review an issue that is raised for the first time on appeal. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145 (1980). We may, however, review new arguments on an issue that has been raised before the trial court. *See* ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 505, 331 N.W.2d 320, 324 (1983). Martin raised this issue before the trial court when he claimed that § 973.047 was unconstitutional. Moreover, we give *pro se* litigants who are incarcerated some leeway. ***Waushara County v. Graf***, 166 Wis. 2d 442, 451–452, 480 N.W.2d 16, 19–20 (1992). Thus, we now turn to the issue of whether § 973.047 is an *ex post facto* law.

¶12 Martin claims that the application of WIS. STAT. § 973.047 retroactively punishes him because it became effective after he committed his

[3] Article I, Section 9, Clause 3 of the United States Constitution provides, as relevant: "[n]o … ex post facto law shall be passed"; article I, section 12 of Wisconsin Constitution provides, as relevant: "[n]o … ex post facto law … shall ever be passed."

crime. He is correct in his assertion that the statute, as amended, became effective after he committed his crime. *See* 1999 Wis. Act 9, §§ 2288i, 3202k; WIS. STAT. § 165.76(1). Section 973.047, as it was applied to Martin, however, is not an *ex post facto* law. An *ex post facto* law is any law:

> which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed.

State v. Thiel, 188 Wis. 2d 695, 703, 524 N.W.2d 641, 644 (1994) (quoted source and internal quotation marks omitted). The challenge in this case is based on the second element, *i.e.*, that § 973.047 makes Martin's punishment for escape more burdensome. To challenge § 973.047 as an *ex post facto* law, Martin must prove that the legislature had a punitive intent in enacting the law. *See* ***Thiel***, 188 Wis. 2d at 706, 524 N.W.2d at 645. He cannot meet this burden.

> Both federal and state courts have uniformly concluded that statutes which authorize collection of blood specimens to assist in law enforcement are not penal in nature. Rather, "the blood sample is taken and analyzed for the sole purpose of establishing a data bank which will aid in future law enforcement."

Gilbert v. Peters, 55 F.3d 237, 238–239 (7th Cir. 1995) (analyzing similar statute; quoted source omitted). We agree. Martin does not offer any evidence showing that Wisconsin's DNA collection statute was established for anything other than future law enforcement purposes. Thus, Martin fails to show that § 973.047, as it was applied to him, is an *ex post facto* law.

B. Ineffective Assistance

¶13 Martin contends that his trial counsel was ineffective because the lawyer did not advise Martin on what plea to enter. According to Martin, he "assumed" that he was to plead no contest, but his lawyer told the trial court and the prosecutor that Martin was going to plead guilty. Martin thus alleges that when he told the trial court that he was going to plead no contest, the trial court "immediately became enraged and informed Martin that the entry of such a plea betrayed his familiarity with the system." Martin claims that he was prejudiced because he was subject to a "palpably hostile sentencing environment" that resulted in an "upward departure" from the trial court's "usual 30-to-90 day sentences for walkaways."

¶14 The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to prove: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. It is not enough, however, "for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." ***Id.*** at 693. The defendant's burden is to show that counsel's errors "actually had an adverse effect on the defense." ***Id.***

¶15 Our standard for reviewing this claim involves mixed questions of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The

legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present questions of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Id.***, 466 U.S. at 697.

¶16 As we have seen, the issue on appeal is "whether the [trial] court properly denied [Martin's first WIS. STAT. § 974.06] motion given the record before it and the allegations of the motion." *See, e.g.*, ***State v. Aderhold***, 91 Wis. 2d 306, 314, 284 N.W.2d 108, 112 (Ct. App. 1979) (courts of review are limited to the record). We conclude that it did.

¶17 The trial court had before it Martin's allegations, as set out above.[4] There was no transcript of the plea/sentencing hearing. Under these circumstances, we agree with the trial court that Martin failed to show prejudice. Without the transcript of the hearing, the trial court could not, beyond mere speculation, conclude that Martin's alleged no-contest plea had an adverse effect on his sentence. That is, Martin did not demonstrate that the trial court imposed the sentence that it did because Martin allegedly entered a no contest plea. *See* ***Strickland***, 466 U.S. at 695 ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). A trial court may, in the exercise of its discretion, deny an ineffective-assistance claim when the defendant

[4] The State claims that the trial court also had Martin's guilty-plea questionnaire and waiver-of-rights form before it. This form was not attached to Martin's WIS. STAT. § 974.06 motion and the trial court did not refer to it in the order denying the motion. Accordingly, we do not know if the trial court relied on the form in making its decision. Thus, we do not rely on it here. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980) (court of appeals may not decide issues of fact).

presents only conclusory allegations. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309–310, 548 N.W.2d 50, 53 (1996). The trial court properly did so here.

C. *"Supplemental" Postconviction Motion*

¶18 Martin alleges that the postconviction court erred when it concluded that he could not file a WIS. STAT. § 974.06 motion after he filed his notice of appeal and the record was sent to this court. He claims that the record in this case had not been transmitted to the court of appeals when he filed his "supplemental" motion, thus the trial court still had the power to consider it. While Martin is correct that the filing of the notice of appeal did not deprive the trial court of the power to decide his "supplemental" motion because the record was still with the trial court, *see* WIS. STAT. § 808.075(3) (in case not appealed under WIS. STAT. § 809.30, trial court retains the power to act on all issues until the record is transmitted to the court of appeals), his motion was nonetheless barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¶19 WISCONSIN STAT. § 974.06 does not "create an unlimited right to file successive motions for relief." ***State ex rel. Dismuke v. Kolb***, 149 Wis. 2d 270, 273, 441 N.W.2d 253, 254 (Ct. App. 1989). Where a defendant's claim for relief could have been, but was not, raised in a prior postconviction motion or on direct appeal, the claim is procedurally barred absent a sufficient reason for failing to previously raise it. ***Escalona***, 185 Wis. 2d at 185, 517 N.W.2d at 163–164. Martin did not offer a sufficient reason to the trial court for his failure to raise all of his claims in his first § 974.06 motion and he does not do so on appeal. Accordingly, any claims raised for the first time in his second § 974.06 motion were procedurally barred, and the trial court did not err when it denied Martin's "supplemental" § 974.06 motion. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382

N.W.2d 679, 687 (Ct. App. 1985) (we may affirm the trial court if it reached the right result for the wrong reason).

D. Sentencing

¶20 When the trial court denied Martin's first WIS. STAT. § 974.06 motion, it ruled that "[a] motion to modify sentence may not be brought under section 974.06." On appeal, Martin "disagrees and suggests that modification as a matter [of] equity is tantamount to correcting the sentence." (Internal quotation marks and brackets omitted.) Martin is incorrect. "[Section] 974.06 … is not a remedy for an ordinary rehearing or reconsideration of sentencing on its merits. … [O]nly the constitutional or jurisdictional questions can be raised by the remedy afforded in [§] 974.06." ***State ex rel. Warren v. County Court***, 54 Wis. 2d 613, 617, 197 N.W.2d 1, 3 (1972). In this case, the trial court recognized and addressed Martin's constitutional claims. It correctly noted that a defendant may not seek sentence modification under § 974.06, absent some constitutional infirmity not present here. For all of the reasons set out above, the trial court properly denied Martin's § 974.06 motion.

By the Court.—Orders affirmed.

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