COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1875 **Cir. Ct. No. 1993CF933836**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE LEE ELLIS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Jimmie Lee Ellis, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 motion, which alleged ineffective assistance of counsel, and from an order denying his motion for reconsideration. The circuit

court concluded Ellis's § 974.06 motion was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 178, 517 N.W.2d 157, 161 (1994). We agree and affirm the orders.

BACKGROUND

¶2 The criminal complaint in this matter was filed on October 26, 1993, charging Ellis with one count of possession with intent to deliver cocaine as a second offense. The complaint alleged that during the course of an investigation, an officer stopped Ellis and was patting him down for weapons when the officer encounter "a small lump" in Ellis's pants pocket. The officer believed the lump to be a controlled substance and, upon removing it from Ellis's pocket, discovered thirty-six "corner cut baggies" of cocaine. Ellis told police the drugs belonged to someone else.

¶3 On November 23, 1993, Ellis's attorney filed a motion to suppress all evidence seized, arguing the officers' detention of Ellis and the weapons frisk lacked probable cause, and both the frisk and subsequent search violated his constitutional rights. The hearing on this motion was rescheduled when Ellis, who was released on bond, failed to appear. It appears that a bench warrant may have been issued and that Ellis's whereabouts were unknown until August 1994.

¶4 On August 26, 1994, a new attorney filed a new motion to suppress, alleging the same bases as the prior suppression motion. A motion hearing was set for October 4, 1994. However, the circuit court never ruled on the suppression motion. Instead, Ellis entered a guilty plea. In November 1994, he was sentenced to six years' imprisonment out of a maximum possible thirty years' imprisonment. Counsel obtained an extension for filing a notice of intent to pursue postconviction relief through December 20, 1994. No notice of intent, postconviction motion, or

notice of appeal was filed at that time. On February 15, 1995, Ellis filed a *pro se* notice of intent, but it does not appear he ever sought an extension of the December 20 deadline, and no direct appeal was pursued.

¶5 In November 2003, Ellis filed a *pro se* postconviction motion.[1] That motion, titled as a motion to modify sentence, actually sought to suppress evidence based on an allegedly improper frisk. The circuit court denied the motion because Ellis's guilty plea waived his challenge to the evidence[2] and, therefore, the motion lacked a basis for modifying the sentence. No appeal was taken.

¶6 In December 2005, Ellis again filed a motion to modify sentence; that motion's substantive challenge was to the sufficiency of the evidence in the

[1] By the time of his 2003 motion, Ellis had likely served the entire sentence imposed in this case, although it is not clear exactly when he would have been discharged from the sentence. On August 29, 2000, Ellis was charged with one count of possession with intent to deliver between five and fifteen grams of cocaine, as a second or subsequent offense, in Milwaukee County Circuit Court case No. 2000CF4323. Electronic docket entries indicate that Ellis was convicted upon a jury's verdict and sentenced, in 2002, to fifteen years' initial confinement and five years' extended supervision, consecutive to any other sentence. It thus appears that Ellis's postconviction activity in this case may be an attempt to obtain relief from the conviction in the 1993 case as a precursor to seeking some form of relief from the conviction in the 2000 case.

[2] Multiple cases state that a valid guilty plea waives nonjurisdictional defects and defenses that predate the plea, including alleged constitutional violations like an unlawful search. *See, e.g.*, ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302, 303 (Ct. App. 1994). The only narrow exception to this rule is WIS. STAT. § 971.31(10), which provides that "[a]n order denying a motion to suppress evidence … may be reviewed upon appeal from a judgment of conviction notwithstanding the fact that such judgment was entered upon a plea of guilty."

This statutory exception is "meant to apply in cases where 'the motion to suppress evidence is really determinative of the result of the trial,' because in such a situation there would be little question about the defendant's guilt if the evidence were introduced." ***State v. Pozo***, 198 Wis. 2d 705, 716, 544 N.W.2d 228, 232 (Ct. App. 1995). The exception does not apply here because, for whatever reason, Ellis entered his guilty plea without having the court rule on his suppression motion. Thus, there is no "order denying a motion to suppress" that Ellis could have challenged and, in any event, Ellis did not take direct appeal from his judgment of conviction. *See* WIS. STAT. § 971.31(10)

complaint. The circuit court denied the motion, again because of waiver resulting from the guilty plea. No appeal was taken.

¶7 In May 2008, Ellis filed a "motion to confess error," which again challenged the sufficiency of the criminal complaint. The circuit court denied the motion based on the guilty plea. In June 2008, Ellis filed another motion to confess error that challenged the sufficiency of the criminal complaint. The circuit court directed Ellis to its prior order denying the earlier motion to confess error. In August 2008, Ellis brought yet another "motion to confess error," alleging insufficient evidence adduced at the preliminary examination. The circuit court denied the motion, again based on waiver resulting from Ellis's guilty plea. The circuit court also deemed Ellis's motion frivolous. No appeals were taken.

¶8 In July 2009, Ellis filed a postconviction motion seeking a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). Ellis alleged trial counsel was ineffective for failing to move to withdraw his guilty plea. Ellis asserted that a plea withdrawal motion should have been sought based on: (1) insufficient probable cause in the criminal complaint, and (2) an unreasonable search and seizure. Ellis's motion stated he had not raised this ineffective-assistance argument previously because his claims were "not identified when the prior motions for postconviction relief [were] made." The circuit court denied the motion on the basis that Ellis's guilty plea waived the underlying challenges Ellis had raised, so any motion by counsel to withdraw the plea would have been unsuccessful. The circuit court further determined Ellis's motion "is technically barred by State v. Escalona-Naranjo" and Ellis "is not entitled to file successive motions seeking the same relief." Ellis now appeals.

DISCUSSION

¶9 Ellis has slightly changed his argument on appeal. In the circuit court, he alleged trial counsel was ineffective for failing to seek plea withdrawal. On appeal, he alleges trial counsel was ineffective for counseling him to plead guilty. However, both motions have, at their core, challenges to the sufficiency of evidence supporting the criminal complaint and to the propriety of the police frisk that uncovered cocaine in Ellis's possession. Ellis has already raised those two issues in prior motions and, further, Ellis has an insufficient basis for failing to previously raise his ineffective-assistance-of-counsel claim.

¶10 As we have seen, Ellis was convicted in 1994. While WIS. STAT. § 974.06 permits some claims for relief to be brought after the time for direct appeal or other postconviction remedy has expired, *see* § 974.06(1), § 974.06(4) compels a prisoner to raise all grounds for relief in the "original, supplemental or amended motion" unless sufficient reason exists for not raising those grounds earlier. Here, Ellis responds to the State's invocation of the ***Escalona***/§ 974.06 procedural bar by claiming it is inapplicable because (1) his prior motions were not § 974.06 motions, and (2) his ground for relief "has not previously been presented because issues involving claims of ineffective assistance of counsel [were] not identified when the prior motions for postconviction relief [were] made."[3]

[3] Ellis's main brief asserted that he is not barred from raising his issues because "there is no indication that the State raised an 'Escalona-Naranjo' objection to the court during the postconviction motion hearing." However, Ellis's motion was denied without a hearing. In addition, Ellis's reply brief only claims his prior motions were not WIS. STAT. § 974.06 motions; his second argument was only raised in the circuit court.

¶11 The ***Escalona*** bar does not apply only to postconviction motions that specify their origins as WIS. STAT. § 974.06: "[I]f the 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 sec. 974.06 motion." ***Escalona***, 185 Wis. 2d at 181, 517 N.W.2d at 162 (emphasis added). Ellis's claim of error regarding the frisk was addressed after he raised it in his 2003 motion. His complaint of error regarding the sufficiency of the criminal complaint was addressed following his 2005 and 2008 motions. These claims cannot be re-raised at this time. *See* ***ibid***; *see also* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991) (issues cannot be relitigated "no matter how artfully" rephrased).[4]

¶12 If we assume that Ellis's ineffective-assistance-of-counsel argument is not simply a repetition of issues he previously raised, Ellis does not identify

[4] In addition, the procedural bar applies to grounds "knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction[.]" *See* WIS. STAT. § 974.06(4); *see also* ***State v. Lo***, 2003 WI 107, ¶39, 264 Wis. 2d 1, 20, 665 N.W.2d 756, 765. As we have seen, Ellis's challenges to the sufficiency of the complaint and the police frisk were waived by his guilty plea. *See* ***Aniton***, 183 Wis. 2d at 129, 512 N.W.2d at 303. Ellis does not assert his plea was invalidly entered.

sufficient reason for failing to raise that claim earlier.[5] In light of the fifteen years intervening between his conviction and his 2009 motion, his assertion he only recently discovered the ineffective-assistance issue is conclusory and self-serving.

By the Court.—Orders affirmed.

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

[5] In any event, Ellis fails to show counsel performed deficiently by advising Ellis to enter a guilty plea. *See* ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 729, 703 N.W.2d 694, 699 (ineffective assistance of counsel shown by both deficient performance and prejudice). Ellis asserts that he would have prevailed on his suppression motion, so the cocaine would have been suppressed and he would not have pled guilty. However, Ellis's claim he would have prevailed on the suppression motion is, at best, conclusory and ignores certain salient points unfavorable to his argument.

Ellis contends that officers did not see him engage in any drug transactions and, thus, had no probable cause to detain him. However, it appears that police had been surveilling a parking lot for an extended period of time, observing Ellis in a car with a companion. Ellis would get out of the car and stand near pay phones in the parking lot, while individuals would approach the car and give currency to Ellis's companion in exchange for a small object. When officers approached the car to conduct a field interview, the companion in the car appeared to engage in furtive movements. Ellis was still at the pay phones. Officers evidently stopped and frisked Ellis because he appeared to be, at a minimum, a lookout for the transactions. It is not at all evident that Ellis would have prevailed on his suppression motion, so we are not persuaded that counsel was deficient for advising a guilty plea.

Ellis also asserts that counsel should not have recommended a guilty plea because the criminal complaint did not sufficiently establish probable cause that Ellis possessed cocaine. In order for a complaint to be legally sufficient, "[t]he facts and reasonable inferences [therefrom] … must allow a reasonable person to conclude that a crime was probably committed by the defendant." ***State v. Payette***, 2008 WI App 106, ¶14, 313 Wis. 2d 39, 56, 756 N.W.2d 423, 431. Ellis argues the criminal complaint was insufficient because it did not rely on a chemist's identification of the cocaine. However, the complaint cited a positive cobalt thiocyanate field identification test. That test sufficiently establishes probable cause for purposes of a criminal complaint. *See* ***State v. Jackson***, 161 Wis. 2d 527, 528-529, 468 N.W.2d 431, 431 (1991). Since any challenge to the sufficiency of the complaint would have failed, counsel was not ineffective for counseling a guilty plea to a sufficient complaint. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235, 246–247 (1987) (counsel not ineffective for failing to raise meritless challenge).