COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP186-CR **Cir. Ct. No. 2006CF1473**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMON EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT and JULIE GENOVESE, Judges. *Affirmed.*

Before Vergeront, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Raymon Evans appeals a judgment convicting him of being party to the crimes of armed robbery with threat of force and aggravated battery with intent to cause great bodily harm, each as a repeat offender, and an order denying his postconviction motion for plea withdrawal. He claims he is

entitled to an evidentiary hearing to determine whether he understood the elements of the crime, including party-to-the-crime liability. The State contends that Evans is procedurally barred from challenging his plea at this stage in the proceeding, either because he already litigated a prior plea withdrawal motion or because he failed to raise the issue on a prior postconviction motion. For the reasons discussed below, we conclude that the trial court properly denied Evans' second postconviction motion without a hearing.

¶2 Evans entered no contest pleas to the two felony charges at issue in exchange for the dismissal of five other felony charges. Prior to sentencing, he moved to withdraw his pleas on the grounds that he did not fully understand the elements of the crime and enhancement provisions—in particular, that he was entering his pleas as a repeat offender. The trial court denied the motion after making a factual finding that Evans' claimed misunderstanding was not credible.

¶3 The court sentenced Evans to consecutive terms totaling 22.5 years of initial confinement and 17.5 years of extended supervision. Evans filed a postconviction motion under WIS. STAT. RULE 809.30 (2007-08)[1] challenging the sentences on the ground that the court had failed to consider sentencing guidelines that were in effect at the time. The trial court granted the motion and vacated the initial judgment of conviction. Following a resentencing hearing, the court entered a second judgment of conviction reducing the initial confinement and extended supervision by half a year each.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 While preparing to file a no-merit report following the resentencing, counsel realized, based upon the recently issued decision ***State v. Hoppe***, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794, that the plea colloquy might have been deficient in a manner he had not previously identified. Counsel asked this court to extend the time for Evans to file a second, supplemental postconviction motion under WIS. STAT. RULE 809.30, acknowledging that the plea colloquy issue should have been raised in Evans' first postconviction motion. Counsel argued that his client should not be prejudiced by his oversight and that he could not in good conscience proceed to file a no-merit report after having indentified what he believed to be a nonfrivolous issue. Counsel did not mention in his motion that Evans had already filed a presentence plea withdrawal motion. This court granted the extension.

¶5 Evans proceeded to file a second postconviction motion seeking plea withdrawal on the grounds that the plea colloquy and plea questionnaire did not adequately establish that Evans understood all the elements of the crime, including party-to-the-crime liability, and that Evans did not in fact understand them. The trial court denied Evans' second postconviction motion following a hearing at which the parties were permitted to argue but Evans was not allowed to present evidence. The court reasoned that, after Evans was resentenced, "[a]ll other issues relating to the initial judgment of conviction, including his no contest pleas, [were] time-barred." The court relied primarily upon ***State v. Scaccio***, 2000 WI App 265, 240 Wis. 2d 95, 622 N.W.2d 449, but also cited ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and ***State v. Witkowski***, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991), to support its decision.

¶6 The trial court's opinion conflates several distinct procedural bars. We address the applicability of each to this case.

¶7 First, Evans' second plea withdrawal motion was not time-barred. This court explicitly granted an extension of the time for Evans to file an additional postconviction motion under WIS. STAT. RULE 809.30, and he filed his motion by that extended deadline.

¶8 Second, Evans' motion was not jurisdictionally barred under ***Scaccio***. ***Scaccio*** is one of a line of cases which address the scope of our jurisdiction over an appeal under WIS. STAT. RULE 809.30 from a judgment resentencing a defendant following the revocation of probation. ***Scaccio*** clarifies that the rule is that a defendant may not challenge his or her original judgment of conviction after the time to appeal that judgment has passed, not that a defendant is limited to only one direct appeal under WIS. STAT. RULE 809.30. ***Scaccio***, 240 Wis. 2d 95, ¶7. Thus, a defendant is entitled to appeal from a postrevocation sentence even if he already had a direct appeal, but may not raise issues relating to the underlying conviction in the subsequent proceeding. ***Id.***, ¶10. The logic behind this rule is that a postrevocation defendant already had an opportunity to raise any issues relating to the conviction in a first direct appeal. ***Id.***, ¶8 (citing ***State v. Drake***, 184 Wis. 2d 396, 515 N.W.2d 923 (Ct. App. 1994)).

¶9 This, however, is not a postrevocation case. Because Evans succeeded in having the trial court set aside the sentences on his original judgment of conviction, he never had an opportunity to pursue a direct appeal from that vacated judgment.[2] The judgment entered after resentencing thus became the

[2] To further illustrate this point, we note that if the trial court had denied Evans' postconviction motion for resentencing, Evans would then have been entitled to appeal from both the postconviction order and from any adverse decisions already preserved by the judgment of conviction, such as the initial plea withdrawal motion. It cannot be the rule that a defendant who files a successful postconviction motion forfeits appellate issues that would be preserved for a defendant who had filed an unsuccessful postconviction motion.

final, appealable decision in this case with respect to the underlying conviction. This means that all issues properly preserved prior to entry of the resentencing judgment, or by timely postconviction motion following entry of that judgment, are properly within the scope of our jurisdiction over the present appeal. As we noted above, the second plea withdrawal motion was a timely postconviction motion from the judgment of conviction. Therefore, the second plea withdrawal motion is properly before us and not jurisdictionally barred by ***Scaccio***.

¶10 The next question raised by the circuit court's decision is whether Evans was barred by ***Escalona-Naranjo*** from filing a successive postconviction motion under WIS. STAT. RULE 809.30 without providing a sufficient reason why he could not have raised his plea withdrawal issue in his first postconviction motion.[3] Generally speaking, the ***Escalona-Naranjo*** doctrine requires the consolidation of all available postconviction issues into a single postconviction proceeding. The specific language of the case, however, discusses only postconviction motions filed under WIS. STAT. § 974.06, and not those filed under WIS. STAT. RULE 809.30. Since the State has not actually made an ***Escalona-Naranjo*** argument on appeal, we conclude this is not an appropriate case to address whether to extend the ***Escalona-Naranjo*** consolidation doctrine to the situation presented here, where a defendant has filed a second postconviction motion under WIS. STAT. RULE 809.30 after obtaining an extension from this court for that very purpose.

[3] Here, the proffered reason for the omission was an acknowledged oversight by counsel. We note that ineffective assistance of counsel generally qualifies as a sufficient reason for a prior failure to raise an issue. We need not address the adequacy of counsel's performance in this case, however, since we do not apply the ***Escalona-Naranjo*** doctrine.

¶11 The remaining question is whether Evans' second plea withdrawal motion was barred under ***Witkowski***. That case is often cited for the proposition that an appellant may not relitigate matters previously decided, no matter how artfully rephrased. ***Witkowski***, 163 Wis. 2d at 990. The ***Witkowski*** procedural bar is a variation of the "law of the case" rule that "[a] decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation." ***State v. Brady***, 130 Wis. 2d 443, 447, 388 N.W.2d 151 (1986) (citation omitted).

¶12 Evans contends that his second plea withdrawal motion raised a different issue than the first, because the first related to his understanding of the repeater sentence enhancers while the second related to his understanding of party-to-the-crime liability. We disagree with his characterization. While it is true that Evans' testimony at the ***Machner***[4] hearing on his first motion focused primarily on an assertion that he did not realize that the charges to which he was pleading contained repeater allegations, the affidavit attached to the motion averred that Evans "did not fully understand what the ramifications of the plea agreement meant," "did not understand all of what was happening in the process of the plea and the factors surrounding the plea," and "did not understand … the [e]ffect of the enhancement provisions *and the elements of the crime he pled to*" (emphasis added).

¶13 During its cross-examination of Evans at the ***Machner*** hearing, the State explicitly questioned him about the assertions in his affidavit that he did not

[4] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), discussed the procedures and standards for evaluating ineffective assistance of counsel claims.

understand the consequences of the plea or the elements of the crime charged, including party-to-the-crime liability. Evans twice acknowledged that counsel had talked to him about what the State would need to prove (although he denied any recollection about discussing party-to-the-crime liability or understanding it), and he could not identify any consequences of the plea that he did not understand, aside from the repeater allegations. The State also referred to a letter marked as Exhibit B, which was attached to the State's trial brief, in which the only misunderstanding Evans claimed to have about the elements of the crime related to the repeater allegations.

¶14 In its decision denying the first plea withdrawal motion, the court listed a number of things Evans claimed not to have understood or to recall discussing, beyond just repeater allegations. It then observed that Evans "could not keep his story straight as to why he wants to withdraw his plea." The court concluded that Evans' testimony was self-serving and unconvincing and that he failed to present a credible reason to believe his claim of misunderstanding. Given the broad allegation in Evans' affidavit that he did not understand the elements of the offense and the scope of the State's cross-examination as to whether Evans understood the elements of the offense other than the repeater allegations, including party-to-the-crime liability, we interpret the court's ruling to encompass the entire question whether Evans understood the elements of the offense.

¶15 Because the trial court had already determined in response to the first plea withdrawal motion that Evans understood the elements of the offense, Evans was barred under ***Witkowski*** from relitigating the issue simply by refining the nature of his alleged misunderstanding. Since the record conclusively demonstrated that Evans' second plea withdrawal motion was procedurally barred,

the trial court properly denied it without a hearing. *See generally* ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

By the Court.—Judgment and order affirmed.

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