COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2585-CR **Cir. Ct. No. 2001CF1754**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNY L. WARREN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Kenny L. Warren, *pro se*, appeals from an order that denied his postconviction motion filed pursuant to WIS. STAT. § 974.06

(2009-10).[1] The circuit court determined that Warren's claims lacked substantive merit and that they were procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We apply the procedural bar without reaching the merits of the claims. We affirm.

BACKGROUND

¶2 Warren pled guilty in 2001 to one count of first-degree reckless homicide by use of a dangerous weapon and one count of possessing a firearm while a felon. With the assistance of appointed counsel, he filed a postconviction motion for plea withdrawal on the ground that his trial counsel performed ineffectively, and he appealed to this court from the order denying postconviction relief. We reversed the order and remanded for a hearing regarding the effectiveness of Warren's trial counsel. *See* ***State v. Warren***, No. 2002AP2849-CR, unpublished slip op. (WI App Sept. 22, 2003). The circuit court concluded after the hearing that trial counsel was not ineffective. Warren appealed again, and we affirmed. *See* ***State v. Warren***, No. 2004AP632-CR, unpublished slip op. (WI App Aug. 16, 2005).

¶3 In 2010, Warren filed a postconviction motion to vacate a DNA surcharge imposed at sentencing. The circuit court granted Warren the relief he requested.

¶4 Warren filed the postconviction motion underlying this appeal approximately one month after he prevailed in his motion to vacate the DNA

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

surcharge. He sought plea withdrawal on several grounds or, alternatively, sentence modification. The circuit court concluded both that the claims lacked merit and that the litigation was procedurally barred. Warren appeals, renewing only his claims for plea withdrawal.[2]

DISCUSSION

¶5 "We need finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. Thus, a prisoner must "raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." ***Id.***

¶6 In this case, Warren filed two postconviction motions and pursued two appeals before launching the collateral attack on his conviction at issue here.

> If a criminal defendant fails to raise a constitutional issue that could have been raised on direct appeal or in a prior [WIS. STAT.] § 974.06 motion, the constitutional issue may not become the basis for a subsequent § 974.06 motion unless the court ascertains that a sufficient reason exists for the failure either to allege or to adequately raise the issue in the appeal or previous § 974.06 motion.

State v. Lo, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756. Therefore, this court will not entertain Warren's current claims unless he demonstrates a sufficient reason for failing to include them in his earlier litigation. ***Id.***

¶7 Warren states that he did not raise his current claims in his first postconviction motion because they "were omitted by postconviction counsel and Mr. Warren believes that those issues have arguable merit and [are] worthy of

[2] Warren does not pursue the claim of sentence modification before this court in either his brief-in-chief or in his "Statement on Reply Brief." We deem the claim abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

redress." Postconviction counsel, however, has the obligation to select the issues that, in counsel's professional opinion, should be advanced to attack the judgment of conviction. *See* ***Jones v. Barnes***, 463 U.S. 745, 751-52 (1983). Therefore, Warren's bare assertion that postconviction counsel did not pursue every potential issue is not a sufficient reason for a subsequent postconviction motion.

¶8 The State hypothesizes that Warren's statements about postconviction counsel's omissions are intended to allege postconviction counsel's ineffectiveness. Ineffective assistance of postconviction counsel may, in some circumstances, constitute a basis for failing to raise claims in an original postconviction motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). A defendant claiming ineffective assistance of counsel, however, must show that the attorney's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Here, Warren has done no more than state that his postconviction counsel chose not to raise some possible claims for relief. This assertion does not begin to address the two-prong showing necessary to satisfy ***Strickland***. We conclude that Warren inadequately briefed the issue of postconviction counsel's ineffectiveness, and we do not address the matter further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶9 Warren also asserts that his successful challenge to the DNA surcharge does not bar his current litigation because he did not file that challenge pursuant to WIS. STAT. § 974.06. Because Warren's direct appellate proceedings bar his current claims, we decline to consider whether any other postconviction challenge also acts as a procedural bar. *See* ***State v. Zien***, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 761 N.W.2d 15 (cases should be decided on narrowest possible ground).

¶10 Finally, Warren asserts that we cannot apply a procedural bar here because: (1) the circuit court allegedly improperly analyzed the mechanics of applying the bar; and (2) the circuit court and the State both addressed the merits of his claims. Warren is wrong. The rule is long settled that we affirm correct decisions of the circuit court and need not rely on its particular rationale. *See* ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973).

By the Court.—Order affirmed.

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