COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2379-CR **Cir. Ct. No. 2006CM5863**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRACY A. STOKES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Tracy A. Stokes appeals *pro se* from the order denying his WIS. STAT. § 974.06 motion for postconviction relief. Stokes argues

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version.

that the circuit court erred in concluding that his plea-withdrawal claims were barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), or, in the alternative, that the circuit court erred in denying his motion for sentence modification. For the reasons which follow, we affirm.

BACKGROUND

¶2 Stokes was charged in Milwaukee County Circuit Court Case No. 2006CM5863 with a single count of knowingly violating a domestic abuse injunction. On the day scheduled for trial, the circuit court allowed defense counsel to withdraw because of a breakdown in his relationship with Stokes. Trial was rescheduled, and afterwards, the State filed a second complaint in Milwaukee County Circuit Court Case No. 2007CM5240, charging Stokes with six additional counts of knowingly violating a domestic abuse injunction and three counts of bail jumping.

¶3 After the State filed the second complaint, Stokes agreed to plead guilty to an amended charge of disorderly conduct in the first case, and to two amended charges of disorderly conduct and four municipal citations for disorderly conduct in the second case. The circuit court sentenced Stokes to ninety days in the House of Corrections in the first case, consecutive to any other sentence he was serving, and to ninety days in the House of Corrections for the charges in the second case, concurrent with the sentence in the first.[2]

[2] At the time of sentencing, Stokes was incarcerated and serving a significant sentence following revocation in an unrelated felony case.

¶4 Through counsel, Stokes filed a motion for postconviction relief in both cases, seeking relief on two grounds. First, Stokes alleged that the second complaint should be dismissed because he believed that the State had vindictively filed it in response to Stokes's assertion of his right to counsel in the first case. Second, Stokes sought to withdraw his guilty pleas in both cases on the grounds that his pleas were not knowingly, intelligently, and voluntarily made because when entering his pleas he had the "mistaken understanding that he would receive custody credit for any jail term imposed." Stokes's postconviction counsel later withdrew the plea-withdrawal claim, stating by affidavit that: "I have conferred with my client, and he has instructed me to withdraw the claim in his Post-Conviction Motion regarding withdrawal of his guilty plea." The circuit court went on to deny Stokes's vindictive-prosecution claim.

¶5 Stokes appealed, and we remanded the cases to the circuit court for an evidentiary hearing to determine whether the State's decision to file the second complaint constituted vindictive prosecution. Following an evidentiary hearing, the circuit court dismissed the charges in the second complaint on vindictive prosecution grounds. The order did not affect the judgment in the first case.

¶6 Almost one and one-half years later, Stokes, *pro se*, filed the WIS. STAT. § 974.06 motion for postconviction relief at issue here. Stokes sought to withdraw his plea to the disorderly conduct charge in the first case, alleging that his plea had not been knowingly, intelligently, and voluntarily entered because his trial counsel misinformed him regarding whether he would be receiving custody credit. Stokes further sought to withdraw his plea on the grounds that it was coerced and the product of the dismissed charges in the second complaint. In the alternative, Stokes sought resentencing because he alleged that the sentencing court improperly considered the dismissed charges.

¶7 The circuit court denied Stokes's motion, finding that, in his first postconviction motion, Stokes had raised the claim that he should be permitted to withdraw his plea because he misunderstood the application of any custody credit and had specifically withdrawn it. Therefore, the circuit court found that the issue was waived and procedurally barred under ***Escalona-Naranjo***. The circuit court found Stokes's claim that his plea was coerced by the charges in the second complaint to also be barred by ***Escalona-Naranjo***.

¶8 The circuit court also found, after reviewing the sentencing transcript, that the sentencing court did not rely on the dismissed charges when sentencing Stokes in the first case and that, therefore, the dismissal of those charges did not amount to a new factor warranting resentencing. The circuit court went on to note that even if the sentence had been predicated on the dismissed charges, the subsequent dismissal would not constitute a new factor, as courts are allowed to consider dismissed, unproved, and uncharged conduct at sentencing. This appeal follows.

DISCUSSION

¶9 On appeal, Stokes generally argues that, by barring his plea-withdrawal claims on ***Escalona-Naranjo*** grounds, the circuit court denied him his right to due process. In the alternative, he argues that the circuit court erred in denying his motion for sentence modification.[3] Stokes is wrong on both accounts. We address each in turn.

[3] To the extent that Stokes may raise other issues on appeal, we conclude that those issues lack discernible merit and need not be addressed.

I. The circuit court's finding that Stokes's plea-withdrawal claims were barred by *Escalona-Naranjo* did not deny Stokes his right to due process.

¶10 In his WIS. STAT. § 974.06 motion, Stokes claimed his guilty plea was not knowing, intelligent, and voluntary for two reasons: (1) his trial counsel misadvised him regarding the "custody credit" he would be receiving; and (2) the plea was coerced as it was based, in part, on the charges in the second case that were later dismissed on vindictive prosecution grounds. The circuit court dismissed both claims based on ***Escalona-Naranjo***, concluding that Stokes did not raise the issues in his prior postconviction motion and did not allege a sufficient reason for failing to do so. Stokes now argues that by applying ***Escalona-Naranjo*** the circuit court denied him due process. Stokes is mistaken.

¶11 ***Escalona-Naranjo*** holds "that due process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error." ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). As such, ***Escalona–Naranjo*** requires that a defendant raise all grounds for postconviction relief in his or her first postconviction motion or in the defendant's direct appeal. *See* ***id.***, 185 Wis. 2d at 185. A defendant may not pursue claims in a subsequent appeal that could have been raised in an earlier postconviction motion or direct appeal unless the defendant provides a "'sufficient reason'" for not raising the claims previously. ***Id.*** at 181-82. Whether a defendant's successive appeal is procedurally barred is a question of law that we review *de novo*. ***State v. Fortier***, 2006 WI App 11, ¶18, 289 Wis. 2d 179, 709 N.W.2d 893.

¶12 Here, while Stokes had an opportunity to raise both of his plea-withdrawal claims in his prior postconviction motion, he did not do so. Nor did he

set forth any reason, much less a sufficient reason, for failing to do so in his WIS. STAT. § 974.06 motion before the circuit court.[4] Consequently, the circuit court properly concluded that Stokes's plea-withdrawal claims were barred by ***Escalona-Naranjo***.

¶13 Stokes now argues, for the first time on appeal, that he did not raise the claims in his prior postconviction motion due to the ineffective assistance of his postconviction counsel.[5] However, Stokes waived his right to assert that reason when he failed to raise it before the circuit court. *See* ***Lange v. LIRC***, 215 Wis. 2d 561, 572, 573 N.W.2d 856 (Ct. App. 1997). "We will not address an issue raised for the first time on appeal." ***Id.***

II. The circuit court did not err in concluding that the sentencing court did not rely on the dismissed charges.

¶14 In the alternative, Stokes moved for sentence modification on the grounds that the dismissal of the charges in the second case was a new factor

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[4] Stokes argues that his WIS. STAT. § 974.06 motion was "not the full development of his position" and that the circuit court should have provided him a hearing to set forth his "sufficient reason" because as a *pro se* litigant he was unaware of the need to address the issue in his initial motion. However, while we recognize the court's obligation to liberally construe a *pro se* litigant's motions, *see* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521-22, 335 N.W.2d 384 (1983), that obligation does not extend to creating an issue or making an argument for a litigant. "We cannot serve as both advocate and judge." ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). *Pro se* litigants are generally held to the same rules that apply to lawyers on appeal, and "must satisfy all procedural requirements." ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). Allowing Stokes to circumvent those rules would be contrary to ***Escalona-Naranjo***'s policy of "finality in … litigation." *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

[5] Stokes's assertion that his postconviction counsel was ineffective appears somewhat disingenuous considering Stokes admits in his appellant's brief that postconviction counsel raised one of Stokes's current claims for plea withdrawal in Stokes's initial postconviction motion but withdrew it at Stokes's request.

under ***Rosado v. State***, 70 Wis. 2d 280, 234 N.W.2d 69 (1975). *See also* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828 (holding that a court "may base a sentence modification upon the defendant's showing of a 'new factor'") (citation omitted). In doing so, he argued that dismissal was a factor highly relevant to the sentencing on the disorderly conduct charge in the first case. The circuit court denied his motion after reviewing the sentencing transcript, concluding that the sentencing court did not rely on the dismissed charges when sentencing Stokes, and that even if it had, consideration of the dismissed charges was not an err. We agree.

¶15 The State accurately summarizes Stokes's arguments on appeal thusly:

> (1) that [the circuit court] improperly merely speculated whether the charges in [the second case] affected the sentence on the charge in [the first case];
>
> (2) that because [Stokes] no longer admits the conduct in [the second case], the information presented at sentencing to the effect that he was admitting [that conduct] was inaccurate;
>
> (3) that because admitted charges are given more weight tha[n] other conduct, his pleas in [the second case] necessarily affected the sentence in [the first case]; [and]
>
> (4) [t]hat as a matter of law, charges dismissed on the grounds of prosecutorial vindictiveness should be precluded from consideration by a sentencing court, in order to punish the [S]tate for its misconduct.

For the following reasons, we conclude that the circuit court did not err in denying Stokes resentencing.

¶16 To begin, Stokes did not raise issues (2) through (4) with the circuit court in his WIS. STAT. § 974.06 motion. In his motion, he merely argued that

dismissal of the charges in the second complaint was a new factor warranting a new sentencing hearing. He did not assert before the circuit court: that he now denies the conduct underlying the dismissed charges, although he previously pled guilty to the charges; that the information given to the circuit court during sentencing was inaccurate; or that, as a matter of law, resentencing was necessary to punish the State. We decline to consider those arguments because they were raised for the first time on appeal. *See* ***Lange***, 215 Wis. 2d at 572.

¶17 As such, we only address Stokes's argument that the circuit court erroneously exercised its discretion when it "speculated" that the sentencing court did not rely on the dismissed charges when sentencing Stokes. The determination of whether a new factor justifies sentence modification is committed to the circuit court's discretion. ***Harbor***, 333 Wis. 2d 53, ¶33. "We will sustain a discretionary determination if it is the product of a rational mental process and is 'demonstrably … made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law.'" ***State v. Verstoppen***, 185 Wis. 2d 728, 741, 519 N.W.2d 653 (Ct. App. 1994) (citation omitted; ellipses in ***Verstoppen***).

¶18 After reviewing the sentencing transcript, the circuit court concluded that the sentencing court did not rely on the dismissed charges when sentencing Stokes. The circuit court stated:

> Although the [sentencing] court sentenced the defendant in these cases at the same time, they involved separate offenses. Nothing in the sentencing record suggests that the court based its decision to impose a consecutive sentence in [the first case] on the defendant's conduct [in the second case]. The court intended for the defendant to serve consecutive incarceration as punishment for his conduct in each of the criminal offenses, even though he was already serving a substantial prison term. That is why the court ordered the sentence on each of the misdemeanor counts to run consecutive to any other sentence, albeit concurrent with each other. The fact that the charges in

> [the second case] were subsequently dismissed is not relevant to the court's intent to impose consecutive incarceration for the offense committed in [the first case].

(Footnote omitted; record cites omitted.) The circuit court's decision was not mere speculation; rather, its reasoning was based upon the law and the facts set forth in the sentencing transcript. As such, we affirm the circuit court's discretionary decision denying Stokes's motion for resentencing.[6] *See* ***id.***

By the Court.—Order affirmed.

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

[6] The circuit court also correctly noted that even if the charges in the second case had been dismissed prior to sentencing in the first case, the circuit court would have been permitted to consider the dismissed charges for sentencing purposes. *See* ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341 ("A sentencing court may consider uncharged and unproven offenses and facts related to offenses for which the defendant has been acquitted.") (footnotes omitted).