COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2488 **Cir. Ct. No. 2007CF1194**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMIE D. BOWENS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jamie D. Bowens, *pro se*, appeals from an order of the circuit court that denied his motion "for further review" of a denied motion

that sought reconsideration of an order denying Bowens' WIS. STAT. § 974.06[1] motion. The circuit court determined that the motion was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirm.

¶2 Bowens was convicted of first-degree intentional homicide and possession of a firearm by a felon. At trial, the State called four eyewitnesses who identified Bowens as the shooter. The State also called two witnesses from Alabama, who testified that Bowens confessed to killing a man in Milwaukee. The State further offered cell phone records that corroborated witnesses' testimony, and physical evidence in the form of shell casings that linked Bowens to the murder.

¶3 Bowens was convicted of both charges. For the homicide conviction, the circuit court sentenced him to life imprisonment without eligibility for extended supervision. The circuit court also imposed a concurrent ten years' imprisonment for the possession. Bowens filed a postconviction motion alleging that his trial counsel was ineffective for calling witness Jennifer Garcia to testify. The circuit court rejected this argument, denying the postconviction motion for relief after an evidentiary hearing. On appeal, we affirmed Bowens' convictions. *See generally* ***State v. Bowens***, No. 2009AP1135-CR, unpublished slip op. (WI App May 25, 2010).

¶4 In January 2012, Bowens, by Attorney Wendy Patrickus, filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06 (2011-12). The motion alleged that trial counsel was ineffective in three more ways than originally

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

claimed in postconviction proceedings. The motion further claimed that postconviction counsel had been ineffective for not raising these additional instances of trial counsel's ineffectiveness. The circuit court ordered briefing, but ultimately denied the motion without a hearing in April 2012, essentially rejecting the new ineffective-assistance claims on their merits and without invoking the ***Escalona*** bar.

¶5 Bowens, still represented, moved for reconsideration in July 2012 because of "a newly discovered issue." He claimed that "together with the initial issues raised … the defendant has further found additional issues … that when taken in their totality form the basis for ineffective assistance of counsel…. As such, said issue merits the court[']s further review and reconsideration of said motion as a whole." Bowens claimed that trial counsel had failed to adequately "inform the defendant of the totality of the evidence against him during plea negotiations" and failed to provide Bowens with a copy of the discovery materials. Because he did not receive a copy of the discovery, he "was completely dependent on [trial counsel] to inform him of the state's case against him, probably the most important factor in determining whether or not to accept a plea."

¶6 The circuit court denied the motion, explaining that a motion for reconsideration is not a mechanism for raising newly discovered issues. Further, the circuit court explained, WIS. STAT. § 974.06 requires all grounds for relief to be raised in the original motion or appeal, so ***Escalona*** barred these "new" issues because they could have been raised in the original § 974.06 motion in January.

¶7 In October 2012, Bowens, still by counsel, moved "for further review" of the order denying the motion for reconsideration. He claimed that the circuit court "did not take into consideration at that time, (primarily because it was

not available), newly developed law which would now support Mr. Bowens' additional factor as a basis to establish 'sufficient reason' for such a reconsideration request." Bowens pointed to the "emergence of two cases in particular"—***Lafler v. Cooper***, 132 S. Ct. 1376 (2012), and ***Missouri v. Frye***, 132 S. Ct. 1399 (2012)—that he claims "go to the very heart" of his one key factor in the reconsideration motion. "That one factor is Bowens' unknowing denial of a plea offer made to his trial counsel, who neglected to consult with Mr. Bowens in any meaningful way on what the plea offer meant and how it would impact Bowens in light of the evidence the State had against him."

¶8 The circuit court denied the motion, explaining that attorneys have always had a duty, under this state's rules of professional conduct, "to be communicative with [the] client," so any challenge to an attorney's failure to do so could have been raised in the January motion. Further, even if ***Lafler*** and ***Frye*** did create new law, Bowens' case was final by the time those cases were released in March 2012, so any "new" duty was inapplicable to Bowens' trial attorney. Consequently, the circuit court concluded that the motion for further relief was also barred by ***Escalona***.

¶9 Bowens, *pro se*, appealed from all three orders on November 8, 2012. By order dated March 13, 2013, we explained that we only had jurisdiction to review the October order denying the motion for further review: the notice of appeal was not timely as to the April or July orders. *See* WIS. STAT. § 974.06(6); WIS. STAT. RULE 809.82(2)(b). We instructed Bowens not to brief any claims made in the first two motions that might have been disposed of in the April or July

orders.[2] Thus, in this appeal, we review only the October 2012 order denying the motion for further review.

¶10 WISCONSIN STAT. § 974.06 allows a defendant to attack his conviction after the time for direct appeal has expired. *See* ***Escalona***, 185 Wis. 2d at 176. All grounds for relief, however, must be raised in the defendant's original, supplemental, or amended motion or appeal. *See* ***State v. Allen***, 2010 WI 89, ¶25, 328 Wis. 2d 1, 786 N.W.2d 124; ***Escalona***, 185 Wis. 2d at 181. Claims that could have been raised on direct appeal or by prior motion are barred from being raised in a subsequent postconviction motion absent a sufficient reason for not raising the claims earlier. *See* ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. Whether the ***Escalona*** procedural bar applies is a question of law we review *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶11 Bowens first contends that ***Escalona*** is inapplicable to his motion for further review because it requires all grounds for relief to be raised in the "original, supplemental or amended motion," *see* ***id.***, 185 Wis. 2d at 185, and if the circuit court were correct in its application of that case, then "only the original motion could have been mentioned [in ***Escalona***;] it is obvious that this procedural bar was meant to be applied in successive appeals not successive motions in the same appeal."

[2] We therefore do not address Bowens' first claim, that new issues can be raised in a reconsideration motion. The circuit court so held in its July order which, our order explained, we lack jurisdiction to review.

¶12 Bowens' contention, of course, misses the mark, in that his interpretation completely undermines ***Escalona***'s concern for finality. But even if the October motion for further review should not be barred by virtue of the January WIS. STAT. § 974.06 motion or the July reconsideration motion, Bowens still had a prior postconviction motion and direct appeal and, thus, the fundamental premise of ***Escalona*** remains applicable: absent a sufficient reason for not raising the issue in the *original* appeal or postconviction motion, the current claim that counsel ineffectively counseled Bowens about his plea should be barred.

¶13 The motion for further review claims that the circuit court had failed to consider the "emergence of two cases"—***Frye***, which held "that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused," ***id.***, 132 S. Ct. at 1408, and ***Lafler***, which explained how to apply the ordinary test for ineffective assistance when the claim is that trial counsel's ineffectiveness caused a defendant to reject a plea and the defendant is later convicted at trial, *see* ***id.***, 132 S. Ct. at 1384.

¶14 The recency of ***Frye*** and ***Lafler***, however, is not a sufficient reason for failing to raise this ineffective-assistance issue in the earlier motion or appeal. As the circuit court explained, neither case created new law for Wisconsin. We agree with the circuit court's observation that attorneys have long had an obligation to properly communicate information to their clients under Wisconsin's rules of professional conduct, and ***Frye*** even notes that "codified standards of professional practice … can be important guides." *See* ***id.***, 132 S. Ct. at 1408. Moreover, both ***Frye*** and ***Lafler*** have a considerably rich case law history on which they rely, including ***Hill v. Lockhart***, 474 U.S. 52 (1985). Therefore, the

emergence of the ***Frye*** and ***Lafler*** decisions is not a sufficient reason for Bowens' failure to raise trial counsel's ineffective communication earlier.

¶15 Bowens, in his reply, contends that he was "subjectively ignorant" of this issue earlier and, thus, claims that ***Escalona*** should not apply. He relies on a portion of ***Escalona*** in which the supreme court wrote that WIS. STAT. § 974.06 "was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later. Rather, the defendant should raise the constitutional issues *of which he ... is aware* as part of the original postconviction proceedings." *See* ***Escalona***, 185 Wis. 2d at 185-86 (emphasis added). However, we do not perceive the supreme court to be endorsing lack of personal knowledge of applicable legal principles as a sufficient reason to explain a defendant's failure to timely raise an issue in postconviction proceedings: it is a well-established maxim that ignorance of the law does not provide a defense. *See* ***Putnam v. Time Warner Cable of SE Wis. Ltd. P'ship***, 2002 WI 108, ¶13 n.4, 255 Wis. 2d 447, 649 N.W.2d 626.

¶16 Further, regardless of ***Escalona***'s applicability, Bowens' motion for further review ultimately fails to establish ineffective assistance of any counsel. To secure an evidentiary hearing, the motion had to allege sufficient material facts which, if true, entitle Bowens to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. A defendant claiming ineffective assistance of counsel must show that counsel's performance was both deficient and prejudicial. *See* ***id.***, ¶26. "In the context of pleas, a defendant must show the outcome of the plea process would have been different with competent advice." ***Lafler***, 132 S. Ct. at 1384. Specifically, in circumstances like those Bowens contends happened to him:

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

See ***id.*** at 1385. The motion for further review makes no such allegations.[3]

¶17 Accordingly, the motion before us fails to sufficiently allege at least prejudice from trial counsel's performance, so the ineffective-assistance claim would fail. This means that postconviction counsel would not have had a basis for challenging trial counsel's performance in that regard. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance."); *see also* ***State v. Starks***, 2013 WI 69, ¶56, 349 Wis. 2d 274, 833 N.W.2d 146 (in claiming ineffective appellate counsel for failure to raise certain issues, defendant must establish how unraised issues are "clearly stronger" than those actually raised). Therefore, whether because of a procedural bar or on the merits, the circuit court properly denied Bowens' motion for relief.

By the Court.—Order affirmed.

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

[3] Bowens' motion for further review also fails to make any allegations under ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).