COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2898-CR **Cir. Ct. No. 1997CF972838**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PERK EUGENE THOMAS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Perk Eugene Thomas, *pro se*, appeals from an order of the circuit court that denied his motion for a ***Miranda/Goodchild***[1] hearing. The circuit court concluded primarily that the issues raised in the motion were procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree and affirm.

BACKGROUND

¶2 In 1998, angered by her admission that she had sex with two other men and by her calling out another man's name in her sleep, Thomas beat his wife with a baseball bat and stabbed her repeatedly, killing her. When he realized what he had done, he confessed to his sister, who took him to the police station to turn himself in. He also made incriminating statements to the police. Thomas was charged with and pled guilty to first-degree intentional homicide, and he was sentenced to life imprisonment with parole eligibility beginning after forty years.

¶3 With the assistance of his postconviction attorney, Robert Rondini, Thomas filed a postconviction motion to withdraw his guilty plea, alleging ineffective assistance of his trial counsel, Theodore Bryant-Nanz. Specifically, Thomas alleged that Bryant-Nanz had failed to inform him of the possibility of proceeding with an adequate-provocation defense, under which Thomas might be convicted of the lesser-included crime of second-degree intentional homicide. The circuit court held a postconviction hearing, at which Thomas raised an additional issue, claiming Bryant-Nanz was ineffective for failing to file a

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 262, 133 N.W.2d 753 (1965).

Miranda/Goodchild[2] motion to suppress the inculpatory statements Thomas gave to the police. Thomas claimed he had not been read his ***Miranda*** rights before giving any statement, and that he was under the influence of multiple drugs he had taken after the murder in an attempt to commit suicide.

¶4 Thomas and Bryant-Nanz both testified. The circuit court determined that provocation was inapplicable as a defense based on the record and the facts presented at the hearing. Thus, Bryant-Nanz was not ineffective for failing to suggest it as a trial strategy. The circuit court also determined that there was no prejudice from Bryant-Nanz's failure to seek a ***Miranda/Goodchild*** hearing: even if his statements to police should have been suppressed, Thomas's confession to his sister would still have been admissible. Thus, the postconviction motion was denied. Thomas appealed, and this court affirmed. *See* ***State v. Thomas***, No. 1999AP59-CR, unpublished slip op. (WI App May 16, 2000).

¶5 In August 2001, Thomas filed a *pro se* motion for postconviction relief, in which he alleged that one of the detectives, Gilbert Hernandez, had made false reports, particularly with respect to the circumstances of Thomas's waiver of his ***Miranda*** rights. Thomas also complained that he had not been informed of his rights before making any statement. The circuit court denied the motion on the grounds that it was barred by WIS. STAT. § 974.06(4), which requires all grounds for relief to be raised in the original motion or appeal. *See also* ***Escalona***, 185 Wis. 2d at 185. Thomas appealed. This court affirmed, noting that Thomas had

[2] A ***Miranda*** hearing is used to determine whether a defendant properly waived his or her constitutional rights before giving a statement. *See* ***id.***, 384 U.S. at 444; ***State v. Woods***, 117 Wis. 2d 701, 714-15, 345 N.W.2d 457 (1984). A ***Goodchild*** hearing determines the voluntariness of such a statement. *See* ***id.***, 27 Wis. 2d at 264-65.

not asserted any reason for not previously raising some of his issues, nor had he given a reason for re-raising issues already adjudicated. *See* ***State v. Thomas***, No. 2001AP2295, unpublished slip op. and order (WI App Feb. 7, 2003).

¶6 In September 2002, Thomas filed a motion for a new trial on the grounds of newly discovered evidence.[3] The circuit court denied the motion because the prior appeal was still pending and the record was with this court.

¶7 In May 2004, Thomas filed a postconviction motion seeking an evidentiary hearing and the appointment of counsel. The motion itself is not in the record, but the circuit court's order denying the motion indicates that the motion raised the same issues that Thomas had raised in August 2001. The motion was denied as procedurally barred by ***Escalona***.

¶8 In August 2005, Thomas filed another motion[4] for a new trial, attempting to invoke what he called the "plain error" rule of WIS. STAT. § 901.03(4), claiming the rule is an exception to the ***Escalona*** procedural bar. Thomas alleged that the circuit court had erred by accepting his guilty plea without first holding a competency hearing. The circuit court denied the motion under ***Escalona***, explaining that the "plain error" rule Thomas cited relates to admission of evidence, *see generally* WIS. STAT. § 901.03 (entitled "Rulings on evidence"), and noting that at no point previously had Thomas raised any issue

[3] In its appellate brief, the State indicates that it is not counting this motion in its overall tally of Thomas's postconviction motions. We mention it because the circuit court did count it.

[4] Thomas had filed a nearly identical motion in May 2005, which the clerk of the circuit court evidently failed to refer to the court for action. It appears that the circuit court, in ruling on the current motion, counted the May and August 2005 motions as one.

regarding his competency. Thomas appealed. We affirmed. *See* ***State v. Thomas***, No. 2005AP2727, unpublished slip op. (WI App July 10, 2007).

¶9 In June 2008, Thomas filed a motion seeking to withdraw his plea and to have a competency exam. The motion was denied as procedurally barred. Thomas appealed, but later voluntarily dismissed the appeal.

¶10 Thomas filed the motion underlying the current appeal in October 2014. This is Thomas's sixth substantive *pro se* motion and the seventh overall. The motion sought both sentence modification based on a new factor and a ***Miranda/Goodchild*** hearing. Thomas claimed that he had made incriminating statements without ***Miranda*** warnings, that he had not actually waived his rights as Detective Hernandez claimed, and that the statements were not voluntary; that if he had received a ***Miranda/Goodchild*** hearing, the results of the proceedings would have been different; and that this was a crime of passion, and if he had been allowed "to present a temporary insanity plea to a jury, he may have received a 'lesser included sentence.'"

¶11 The circuit court denied the motion. It noted that nowhere in the motion was a new factor alleged.[5] Thus, sentence modification was not appropriate. The rest of the motion was again rejected as procedurally barred by ***Escalona***. Thomas appeals.

[5] Thomas does not address his new-factor claim at any point on appeal. It is therefore deemed abandoned. *See* ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

DISCUSSION

¶12 WISCONSIN STAT. § 974.06 (2013-14)[6] permits some claims for relief to be brought after the time for appeal or other postconviction remedy has expired. *See* WIS. STAT. § 974.06(1). However, "[a]ll grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion" or appeal. *See* WIS. STAT. § 974.06(4); *see also* ***State v. Lo***, 2003 WI 107, ¶42, 264 Wis. 2d 1, 665 N.W.2d 756. If a 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 [§]974.06 motion" unless there is a sufficient reason given for the failure to previously raise the issue. ***Escalona***, 185 Wis. 2d at 181-82. Whether Thomas's current motion was procedurally barred is a question of law that we review *de novo*. *See* ***State v. Tillman***, 2005 WI App 71, ¶14, 281 Wis. 2d 157, 696 N.W.2d 574.

¶13 Thomas claims in his appellate brief that he has "sufficient reason" for not raising his issues earlier: Rondini refused to raise them.[7] Specifically, he complains that Rondini should have argued that Bryant-Nanz was ineffective for not mentioning the possibility of pursuing the lesser-included offense of second-

[6] All subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[7] The State asserts that the issues Thomas wants to raise are not properly before this court because he claims ineffective assistance of appellate counsel, which is supposed to be pursued by writ of *habeas corpus*. *See* ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992). However, ineffective-assistance claims against trial counsel must be preserved by postconviction motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). Thus, Thomas is also basically challenging postconviction counsel's performance, which can be raised in the circuit court and may constitute a sufficient reason under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). *See* ***Rothering***, 205 Wis. 2d at 682.

degree intentional homicide, and that Bryant-Nanz deceived Thomas into pleading guilty by telling him the victim's family would not be in court if he entered a plea.

¶14 The lesser-included-offense issue was raised and finally adjudicated in the original postconviction motion and appeal. It cannot form the basis of a new WIS. STAT. § 974.06 motion. *See* ***Escalona***, 185 Wis. 2d 181-82; *see also* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

¶15 Further, assuming without deciding that Rondini was somehow ineffective for not claiming Bryant-Nanz deceived Thomas into entering his plea, Rondini's ineffectiveness would at best be a sufficient reason for explaining why the issue was not raised in the postconviction motion Rondini filed, which would have provided justification for Thomas to raise the ineffective-assistance claim against Bryant-Nanz in his August 2001 motion. However, this issue was not raised in August 2001, and ineffective assistance from Rondini does not explain Thomas's failure to raise the claim against Bryant-Nanz in his August 2001, September 2002, May 2004, August 2005, or June 2008 motions.[8] Thus, this issue is also barred by ***Escalona***.

¶16 In the appellate brief, Thomas does not provide sufficient reasons that relate to his demand for a ***Miranda/Goodchild*** hearing. However, like the lesser-included-offense issue, the ***Miranda/Goodchild*** issue was previously raised

[8] Of course, Thomas would also have to show that this ineffective-assistance claim not raised by Rondini was "clearly stronger" than the issues that Rondini did pursue. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668.

and litigated. It cannot now form the basis for a new postconviction motion.[9] *See* ***Escalona***, 185 Wis. 2d at 181-82; ***Witkowski***, 163 Wis. 2d at 990.

By the Court.—Order affirmed.

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

[9] To the extent that Thomas claims ***Escalona*** is an unconstitutional limitation on access to the courts, we note that access to the courts need only be meaningful, adequate, and effective. *See* ***Piper v. Popp***, 167 Wis. 2d 633, 651, 482 N.W.2d 353 (1992); ***Johnson v. Barczak***, 338 F.3d 771, 772 (7th Cir. 2003). The right of access is neither absolute nor unconditional. *See* ***Village of Tigerton v. Minniecheske***, 211 Wis. 2d 777, 785, 565 N.W.2d 586 (Ct. App. 1997). In any event, even if we agreed with Thomas—which we do not—***Escalona*** is a decision of the supreme court, and we cannot overturn it.