COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP726 **Cir. Ct. No. 2003CV5807**

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

STATE OF WISCONSIN EX REL. LARRY J. BROWN,

PETITIONER-APPELLANT,

V.

GARY R. MCCAUGHTRY, WARDEN,
AND WAUPUN CORRECTIONAL INSTITUTION,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

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

¶1 PER CURIAM. Larry Brown appeals *pro se* from a circuit court order dismissing his petition for a writ of habeas corpus. The circuit court dismissed Brown's petition for a number of reasons, including: (1) he was not

entitled to prosecute a habeas corpus writ; and (2) an earlier petition that raised one of the same issues had been denied and he was therefore barred from re-litigating that issue. To the extent that Brown raised new issues in his petition, the circuit court reasoned that Brown was procedurally barred from raising those issues. We agree with the circuit court that Brown was not entitled to prosecute a petition for habeas corpus relief, and we also agree that Brown was procedurally barred from relitigating an earlier petition and from raising new postconviction issues. We therefore affirm the circuit court's order dismissing Brown's petition.

¶2 In 1983, Brown was charged with fifteen felonies. He agreed to plead guilty to four counts of first-degree sexual assault and to two counts of armed robbery, in exchange for which the State dismissed the remaining charges. Brown received an eighty-year prison sentence. He filed a postconviction motion in the circuit court, which was denied. This court affirmed the judgment of conviction and postconviction order on May 15, 1985.

¶3 Since that time, Brown has filed no fewer than 11 requests for relief in the circuit court, and he has filed no fewer than 12 appeals and habeas corpus petitions in this court. All requests for relief in the circuit court have been denied, and, when Brown appealed, this court affirmed the circuit court's dispositions. Brown's original requests for relief commenced in this court have been denied. All requests for supreme court review have been denied.

¶4 This appeal arises from a petition for a writ of habeas corpus Brown filed in the circuit court. In the petition, Brown argued that his armed robbery convictions are void because the allegations to which he pled "charge no offense known to law." Specifically, he quoted from the criminal complaint and argued that the allegations did not allege that he used force or threatened to use force in

committing the robberies.[1] He argued that, as a result of that alleged deficiency, the circuit court had been without subject matter jurisdiction on those counts and that his convictions were void as a matter of law.

¶5 The circuit court denied Brown's petition, reasoning first that Brown had raised the same jurisdictional claim in an earlier writ petition, that the petition had been denied, and that Brown was therefore barred from re-litigating the issue. The circuit court also held that Brown was not entitled to bring a petition for a writ of habeas corpus because he was imprisoned by virtue of a final judgment or order. WIS. STAT. § 782.02 (2003-04).[2] Finally, the circuit court reasoned that Brown's petition was barred by the logic of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), which prohibits successive postconviction motions and appeals unless the defendant states an adequate reason for failing to raise the claim in prior postconviction proceedings. Brown appeals, contending that his earlier petition that raised the same issue was not decided on the merits and therefore does not prevent re-litigation of the issue. He also contends that because he is contesting the circuit court's subject matter jurisdiction, the issue is not subject to the procedural bar of ***Escalona-Naranjo***. We conclude that Brown's arguments are without merit.

¶6 First, were this court to assume that Brown's contention regarding the invalidity of two of the charges against him were meritorious, Brown still would not be entitled to bring the claim by habeas corpus petition. As the State

[1] The armed robbery counts stated that Brown took property from the victims "by use or threat of use of a dangerous weapon, namely a knife."

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

correctly points out, Brown is imprisoned pursuant to a final judgment of conviction, and he was therefore not entitled to seek relief in this instance by a habeas corpus petition. *See* WIS. STAT. § 782.02 (no person shall be entitled to prosecute a habeas corpus writ if committed or detained by virtue of the final judgment or order of any competent tribunal of civil or criminal jurisdiction). Brown appears to be contending that because the two charges against him were void from the start, he does not fit the § 782.02 criteria. Brown is still imprisoned on four counts that he does not challenge. Regardless, Brown could have and should have sought relief by WIS. STAT. § 974.06 motion. Pursuant to § 974.06(8), a circuit court may not entertain a habeas corpus petition when it appears that the petitioner has not sought relief by § 974.06 motion in the sentencing court.

¶7 Second, it is clear that Brown raised in his earlier petition the same contention that the counts challenged here were void because they did not allege armed robbery. Although Brown is correct when he argues that the circuit court did not address his contention on the merits, the circuit court nonetheless explained to Brown the reasons it could not reach the merits and provided Brown guidance as to how to bring the issues before a court for review. Brown did not follow those instructions, but instead filed the petition now on appeal.

¶8 Third, Brown's petition is barred by ***Escalona-Naranjo***, in part because he offers no reason for his failure to follow the circuit court's instructions on how to pursue relief in the circuit court. In ***Escalona-Naranjo***, the supreme court considered whether a defendant attempting to raise a constitutional issue in a WIS. STAT. § 974.06 postconviction motion can be prohibited from doing so if the claim could have been raised in a previously filed postconviction motion or on direct appeal. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 173. The court held that all

grounds for postconviction relief must be presented in the original postconviction motion and that "[s]uccessive motions and appeals, which all could have been brought at the same time," are barred unless the defendant is able to state a sufficient reason for his or her failure to raise the claims in the original postconviction or appellate proceedings. *See* ***id.*** at 185.

¶9 Since ***Escalona-Naranjo*** was decided, the logic of that case has been extended to appeals by writ of certiorari from probation and parole revocation hearings. *See* ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 576 N.W.2d 84 (Ct. App. 1998). In that case, we held that:

> Because ***Escalona-Naranjo*** determined 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, it logically follows that to permit a revoked parolee or probationer the same opportunity to contest a revocation comports with due process. An aggrieved defendant should raise all claims of which he or she is aware in the original writ of certiorari proceeding; those claims can then be reviewed by the circuit court and, if desired, by the appellate court. Successive, and often reformulated, claims clog the court system and waste judicial resources.

Id. at 343. Here, as noted, Brown has filed numerous requests for relief. Brown articulated no reason for his failure to pursue this claim in those numerous prior requests, and we can see no basis to avoid application of the ***Escalona-Naranjo*** bar.

¶10 Finally, Brown's substantive contention – that the armed robbery charges stated no offense known to law and that the circuit court was therefore without jurisdiction – is without merit. As the State notes, Brown was charged with fifteen felonies. Even assuming that the armed robbery charges to which he pled were inadequate – and they do not appear inadequate on their face – the

circuit court acquired subject matter jurisdiction because it is undisputed that the other charges in the complaint were legally adequate. *See* ***Mack v. State***, 93 Wis. 2d 287, 295, 286 N.W.2d 563 (1980).

By the Court.—Order affirmed.

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