COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP451 **Cir. Ct. No. 2003CV10619**

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

STATE OF WISCONSIN EX REL. ANDRE WINGO,

PETITIONER-APPELLANT,

V.

RANDALL R. HEPP, WARDEN,

RESPONDENT-RESPONDENT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Andre Wingo appeals from the circuit court's denial of his petition for a writ of habeas corpus, in which Wingo argued that his trial counsel had been ineffective for failing "to object to and preserve for appellate review [Wingo's] rights to be free of Double Jeopardy." More

specifically, Wingo argued that trial counsel should have objected to the charges against him because they were multiplicitous. The circuit court concluded that Wingo's petition was barred because he was not entitled to pursue habeas corpus relief. It also concluded that the petition was barred because Wingo had filed the same or similar claims in prior postconviction filings, and they had been denied. Although we agree with the circuit court's decision to deny and dismiss Wingo's petition for the reasons it set forth, we also conclude that the petition was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994) (defendant barred from raising in WIS. STAT. § 974.06 motion claims that could have been raised in prior postconviction and appellate proceedings); *cf*. ***State ex rel. Schmidt v. Cooke***, 180 Wis. 2d 187, 189-90, 509 N.W.2d 96 (Ct. App. 1993) (defendant may file only one habeas corpus petition alleging ineffective assistance of counsel unless defendant can provide adequate explanation why all issues relating to counsel's representation were not raised in the first petition). We therefore affirm the circuit court's order, although for different reasons than those articulated by the circuit court.

¶2 Wingo was convicted of third-degree sexual assault and substantial battery in 1997. He was appointed appellate counsel who filed a no-merit report on his behalf. *See* WIS. STAT. RULE 809.32 (1995-96).[1] This court affirmed Wingo's conviction.

¶3 In November 2001, Wingo filed a WIS. STAT. § 974.06 (1999-2000) postconviction motion, which was denied. In that motion, Wingo argued, in part,

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

that his two sentences violated his right to be free from double jeopardy because of his belief that he had committed only one crime.[2] Wingo filed a second § 974.06 (1999-2000) motion in February 2002, which was denied shortly thereafter. In August 2002, Wingo filed his third § 974.06 (1999-2000) motion. This time, when the motion was denied, Wingo appealed. This court affirmed the circuit court's order, reasoning that Wingo's motion was procedurally barred by ***Escalona-Naranjo*** because Wingo had not demonstrated why he could not have raised the issues in his earlier postconviction motions.

¶4 Wingo then filed the petition that is the subject of this appeal. In his petition, he claimed that the charges against him were unconstitutionally multiplicitous and that his trial attorney was ineffective for failing to preserve that claim for appeal. The circuit court denied the petition without a hearing, noting that Wingo had sought the same relief in prior requests, which had been denied. The circuit court reasoned that Wingo was barred from pursuing the petition under "the doctrine of issue preclusion and/or collateral estoppel." On appeal, Wingo argues, without reference to published authority, that his petition was not barred and that his trial counsel was ineffective for failing to challenge the charges against him on double-jeopardy grounds. We disagree.

¶5 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

[2] Much of the procedural documentation upon which we rely is not included in the appellate record, but in the appendix to the respondent's brief. The court will take judicial notice of the documents because they are court records. *See* WIS. STAT. § 902.01 (2003-04).

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.

¶6 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 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.

¶7 The same logic applies to Wingo's reformulation of the same or similar claims into either WIS. STAT. § 974.06 motions or petitions for habeas corpus writs. It is clear that if Wingo had filed a § 974.06 motion raising the same issues he raised in his petition – certainly the preferable, if not mandatory, option

under WIS. STAT. § 974.06(8)[3] – ***Escalona-Naranjo*** would operate to bar its consideration on the merits. We can see no viable basis for declining to apply ***Escalona-Naranjo*** simply because Wingo has styled his filing as a habeas corpus petition. Failing to apply ***Escalona-Naranjo*** in this situation would undercut the rationale and logic of that case, as well as this court's reasoning in ***State ex rel. Dismuke v. Kolb***, 149 Wis. 2d 270, 271, 441 N.W.2d 253 (Ct. App. 1989) (failure to assert a particular ground for relief in initial § 974.06 motion bars assertion of that ground in a later motion in absence of sufficient reason for failure to raise that ground in earlier motion), and ***Cooke***, 180 Wis. 2d at 189-90 (successive habeas corpus petitions alleging ineffective assistance of appellate counsel not permitted unless defendant provides adequate explanation for failure to raise the issue in earlier petition).

¶8 The court turns finally to the State's request that Wingo be restricted from future filings "as a sanction for his repetitive and frivolous motions and petitions." The court has reviewed the procedural history of this matter and concludes that a sanction is not appropriate in this instance. Should Wingo attempt to litigate the same issues in the future, however, the court will consider sanctioning Wingo in the manner advocated by the State.

[3] WISCONSIN STAT. § 974.06(8) provides that a "petition for a writ of habeas corpus or an action seeking that remedy in behalf of a person who is authorized to apply for relief by motion under this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced the person, or that the court has denied the person relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his or her detention."

By the Court.—Order affirmed.

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