

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2729

Cir. Ct. No. 2002CF3153

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SALVADOR PELESTOR-JIMENEZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. Salvador Pelestor-Jimenez appeals pro se from a circuit court order denying his WIS. STAT. § 974.06 (2005-06),¹ postconviction

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

motion. In 2003, a jury found Pelestor-Jimenez guilty of false imprisonment by use of a dangerous weapon as a party to a crime and attempted first-degree intentional homicide. In his motion, Pelestor-Jimenez argued that his trial counsel was ineffective for failing to investigate his case adequately and failing to call his alibi witness. The circuit court denied the motion, reasoning that the motion was “wholly conclusory” and barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (postconviction claims that could have been raised in prior postconviction or appellate proceedings are barred absent a sufficient reason for failing to raise the claims in the earlier proceedings).

¶2 We agree with the circuit court that Pelestor-Jimenez’s motion was conclusory. We therefore affirm the circuit court’s order on that basis. We do not agree, however, that the motion was procedurally barred. Further, we are convinced by the history of this case that Pelestor-Jimenez may not have had an opportunity for a meaningful appeal due, in large part, to his apparent inability to communicate in English and his mistaken belief that his family would be able to retain an attorney to represent him. We conclude that a remand to the circuit court is required for a fact-finding hearing on the question of whether there is a basis to reinstate Pelestor-Jimenez’s WIS. STAT. RULE 809.30 direct appeal rights. Such a hearing is necessary for this court to determine if good cause exists to reinstate those rights. At this hearing, Pelestor-Jimenez should be represented by Spanish-speaking counsel who has had an opportunity to review the file and discuss this matter with him.

¶3 The procedural history of this matter is undisputed. Pelestor-Jimenez was represented by retained counsel at trial. After sentencing on August 11, 2003, trial counsel appropriately filed a timely notice of intent to pursue postconviction relief. The clerk of circuit court forwarded a copy of that

document to the public defender, and the public defender sent Pelestor-Jimenez an indigency-evaluation form.

¶4 On August 26, 2003, the public defender received a letter from Pelestor-Jimenez in which he stated that he did not want counsel appointed to represent him and that he instead wished to have a “paid lawyer” represent him in postconviction and appellate proceedings. The indigency form Pelestor-Jimenez returned was not completed.

¶5 The public defender sent Pelestor-Jimenez a letter acknowledging that he did not wish to have counsel appointed for him. Noting, however, that Pelestor-Jimenez had indicated that he did not speak English well, the public defender sent Pelestor-Jimenez an indigency-evaluation form in Spanish. The public defender asked Pelestor-Jimenez to return the form if he wished to have counsel appointed to represent him. The public defender also asked Pelestor-Jimenez to confirm whether he would be retaining counsel.

¶6 Shortly thereafter, the public defender received a response from Pelestor-Jimenez along with an incomplete Spanish indigency-evaluation form. In the letter, Pelestor-Jimenez confirmed that his family would be retaining counsel to represent him in postconviction and appellate proceedings. The public defender then sent to Pelestor-Jimenez a letter confirming its receipt of his letters and “further confirming that the public defender would not be appointing counsel and would be closing the file.”

¶7 Pelestor-Jimenez was unable to retain counsel, however, and no WIS. STAT. RULE 809.30 postconviction motion or direct appeal was ever filed. Nothing in the record indicates that Pelestor-Jimenez returned to the public defender to request appointed counsel. Instead, Pelestor-Jimenez filed a petition

for a writ of habeas corpus in this court, which asserted that the public defender had improperly denied him appointed postconviction and appellate counsel. This court denied the petition because it was clear from the materials provided that Pelestor-Jimenez's own actions and representations had resulted in the public defender not appointing counsel.

¶8 Since the denial of that habeas corpus petition, Pelestor-Jimenez has attempted to obtain from the circuit court transcripts of his trial at public expense, and he has attempted to obtain from this court an extension of the deadline for filing a postconviction motion or a notice of appeal. All of Pelestor-Jimenez's requests have been denied.

¶9 In the pro se motion underlying this appeal, Pelestor-Jimenez alleged that his trial counsel was ineffective for failing to call an alibi witness. He also renewed an earlier request for production of transcripts at public expense. As noted, the deadline for Pelestor-Jimenez to pursue direct postconviction and appellate review under WIS. STAT. RULE 809.30 had expired.

¶10 The circuit court denied the motion, concluding that it was barred by *Escalona-Naranjo*. The circuit court also reasoned that the allegations of the motion were "wholly conclusory" and did not "sufficiently state a claim of ineffective assistance of counsel." *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972) (circuit court may deny a postconviction motion without a hearing if the motion: fails to set forth sufficient facts to raise a question of fact; presents only conclusory allegations; or if the record conclusively demonstrates that the defendant is not entitled to the relief sought).

¶11 On appeal, the State argues that the circuit court's order should be affirmed because the motion's allegations were unsupported and conclusory. *See*

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (circuit court must hold an evidentiary hearing on a postconviction motion only if the motion alleges facts that, if true, would entitle the defendant to relief).² Although we agree with that argument, it is apparent that this appeal represents that rare instance where the consequences of an unfortunate early choice by a defendant, when compounded by language difficulties, have deprived the defendant of meaningful review of the circuit court's decision. The result is a legal paradox, the logic of which dictates that a presumably indigent defendant cannot obtain transcripts at public expense without demonstrating an issue of potential merit, but the defendant cannot demonstrate an issue of potential merit without the transcripts.

¶12 In an apparent attempt to resolve this paradox, Pelestor-Jimenez sought an order from this court after he commenced this appeal, asking the court to extend the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion or a notice of appeal and requiring production of transcripts. This court appropriately denied the requests by order dated December 19, 2006, reasoning that Pelestor-Jimenez had not yet established good cause for such a lengthy extension of the postconviction and appellate deadlines. In regard to production of transcripts, the court noted, among other things, that transcripts, even if produced, could not be used in this appeal because the circuit court had decided the motion that was the subject of the appeal without transcripts. Thus, it was both

² It appears that, to the extent the circuit court held that the motion was procedurally barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), the State has abandoned any defense of that ruling. We agree that *Escalona-Naranjo* does not apply here because Pelestor-Jimenez has not filed a prior postconviction motion challenging the merits of his conviction.

inappropriate and unnecessary to order transcripts and order supplementation of the appellate record.

¶13 With this opinion, the court returns to these questions. Although we affirm the circuit court's order, we nonetheless remand this matter to the circuit court with directions to appoint Spanish-speaking counsel to assist Pelestor-Jimenez and to hold a fact-finding hearing to assist this court in determining whether good cause exists to extend Pelestor-Jimenez's direct postconviction and appellate rights.

By the Court.—Order affirmed and cause remanded with directions.

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

