COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1646 **Cir. Ct. Nos. 1995CF951901**
2006CV3909

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

STATE OF WISCONSIN EX REL. ANTONIO V. CALVERT,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN,

RESPONDENT-RESPONDENT.

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

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

¶1 PER CURIAM. Antonio V. Calvert appeals from an order denying his petition for a writ of habeas corpus alleging the ineffective assistance of appellate counsel. The issue is whether the alleged ineffective assistance of counsel is a sufficient reason to overcome the procedural bars of ***State v.***

Escalona-Naranjo, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) and ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). We conclude that it is not because Calvert does not further allege why he did not promptly raise these issues following our decision on direct appeal because he knew about two of the four issues prior to his 1995 jury trial, and one we had already decided adversely to him. Therefore, we affirm.

¶2 A jury found Calvert guilty of first-degree intentional homicide while armed. The trial court imposed a life sentence, plus five years for the weapons enhancer, and declared that Calvert would be eligible for parole in thirty-five years. Calvert's postconviction counsel moved for a new trial on the basis of newly discovered evidence, namely the testimony of two witnesses. Following an evidentiary hearing, the trial court denied the motion, ruling that it was unlikely that the witnesses' testimony would constitute newly discovered evidence, and that even if it did, it was not reasonably likely to produce a different result at trial. On appeal we affirmed, holding that the proffered evidence was not newly discovered pursuant to ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). *See* ***State v. Calvert***, No. 96-3115-CR, unpublished slip op. at 4 (Wis. Ct. App. Apr. 20, 1998) (also citing at 2, ***State v. Brunton***, 203 Wis. 2d 195, 207-08, 552 N.W.2d 452 (Ct. App. 1996)).

¶3 In 2006, Calvert petitions for a writ of habeas corpus alleging the ineffective assistance of appellate counsel pursuant to ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). Calvert alleges that his appellate counsel was ineffective for failing to raise certain instances of trial counsel's alleged ineffectiveness and for failing to challenge other trial court rulings that trial counsel had litigated, albeit unsuccessfully. Calvert does not directly allege why he failed to raise these issues previously, but indirectly alludes to alternative

reasons for his belated petition: he implies that appellate counsel's ineffectiveness on direct appeal was to blame, while alternatively alleging that "[a]ll the claims raised herein are based on facts outside the appeals records, they are newly discovered," yet maintaining that the failure to previously raise them was appellate counsel's fault.

¶4 Calvert's substantive challenges are to the trial court's denial of his suppression and adjournment motions, and to two categories of claimed newly discovered evidence involving the alleged failure to investigate witnesses who he claims would have exonerated him at trial, or at least have provided the jury with reasonable doubt to support an acquittal. The more specific and seemingly significant of Calvert's newly discovered evidence claims has been litigated and appealed, although unsuccessfully, and another has never been raised previously.[1] The trial court construed the motion as challenging the effectiveness of postconviction counsel pursuant to WIS. STAT. § 974.06 (2005-06), and summarily denied it because Calvert had not shown prejudice in light of the trial court's previous denials of his suppression and adjournment motions, and because it refused to revisit the newly discovered/failure to investigate issue regarding the proffered witnesses, which had already been denied by the trial court, and affirmed by this court.[2]

[1] Calvert raised several other issues that the trial court also denied. He does not pursue those issues on appeal.

[2] The trial court again considered the adjournment issue incident to the newly discovered evidence issue because the testimony of some additional witnesses at the postconviction evidentiary hearing negated the principal reason for the adjournment.

¶5 A postconviction movant must raise all grounds for postconviction relief on direct appeal (or in his or her original, supplemental or amended postconviction motion) unless, in a subsequent postconviction motion, he or she alleges a sufficient reason for failing to previously raise those issues. *See* ***Escalona***, 185 Wis. 2d at 185-86. The claimed ineffectiveness of counsel may constitute a sufficient reason to overcome ***Escalona***'s procedural bar. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) ("*It may be in some circumstances* that ineffective postconviction counsel constitutes a sufficient reason as to why an issue which could have been raised on direct appeal was not.") (Emphasis added); ***State v. Robinson***, 177 Wis. 2d 46, 52-53, 501 N.W.2d 831 (Ct. App. 1993). Whether ***Escalona***'s procedural bar applies to a postconviction claim is a question of law entitled to independent review. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶6 In his habeas corpus petition, Calvert alleges that appellate counsel was ineffective for failing to pursue the trial court's denial of his suppression and adjournment motions. He does not however, file an affidavit confirming that he told appellate counsel to pursue those issues on direct appeal and noting appellate counsel's reasons for ignoring his alleged requests. Calvert also does not allege why he did not promptly pursue these issues on his own, particularly when he must have been aware of these claims, or at least their underlying facts, no later than at the conclusion of his jury trial. Calvert also alleges that appellate counsel was ineffective for failing to pursue the newly discovered evidence issues. Postconviction/appellate counsel pursued the more specific and consequential newly discovered evidence claim, albeit unsuccessfully. The trial court rejected that claim after hearing the testimony of the two defense witnesses. We affirmed

that denial. *See* ***Calvert***, No. 96-3115-CR, unpublished slip op. at 3-4. We will not revisit the rejection of that issue. *See* ***Witkowski***, 163 Wis. 2d at 990.

¶7 At the end of his habeas corpus petition, Calvert also alleges that "[a]ll the claims raised herein are based on facts outside the appeals records, they are newly discovered, this court had never heard them because appellate counsel failed to bring them before the court; these claims of substantive lines [sic] for relief are on record, counsel should not have missed it [sic]." Calvert does not allege however, why a lengthy delay was warranted, or why "counsel … missed it." Moreover, if, as Calvert alleges, "[a]ll the claims raised herein are based on facts outside the appeals records," we cannot consider them. *See* ***Howard v. Duersten***, 81 Wis. 2d 301, 307, 260 N.W.2d 274 (1977). Consequently, Calvert's reasons are insufficient to overcome ***Escalona***'s procedural bar.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).