COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP189 **Cir. Ct. No. 1998CF6565**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONNEL FITZGERALD,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Ronnel Fitzgerald, *pro se*, appeals from an order denying his second WIS. STAT. § 974.06 motion. The circuit court denied the motion after it determined that Fitzgerald's claims were procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and that the

"newly discovered evidence" offered was discoverable and should have been raised in Fitzgerald's first § 974.06 motion. The circuit court further concluded that the remainder of Fitzgerald's claims were a rehash of claims previously raised, and as such, they could not be relitigated. We affirm.

BACKGROUND

¶2 As set forth in our prior decision resolving Fitzgerald's *pro se* appeal from the circuit court order denying his first WIS. STAT. § 974.06 motion:

> In December 1998, Fitzgerald and others committed an armed robbery in which the victim was shot and killed. Fitzgerald was charged with felony murder. He pled guilty while represented by Attorney Ann T. Bowe. Prior to sentencing, he moved for and received new counsel, Attorney Richard Poulson.
>
> Poulson moved to withdraw Fitzgerald's plea. Fitzgerald claimed his plea was not knowing or intelligent because Bowe failed to properly investigate available defenses, so he was not adequately advised of possible defenses that he was or might be waiving. Specifically, he contended Bowe had not adequately investigated a coercion defense that Fitzgerald had raised with her.
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> The court held a multi-day hearing at which both Bowe and Fitzgerald testified, and ultimately denied the motion, concluding that counsel had given good advice when she explained that a coercion defense would not be viable. Fitzgerald then moved for reconsideration, presenting a letter from co-defendant Zachary Hayes, which Fitzgerald asserted supported his coercion defense. The court held another hearing at which Hayes testified, but denied reconsideration, concluding Hayes's testimony effectively ratified Bowe's conclusion on the viability of a coercion defense. Fitzgerald was subsequently sentenced to sixty years' imprisonment.
>
> Attorney John Grau was appointed to represent Fitzgerald for postconviction proceedings, and filed an appeal on Fitzgerald's behalf. The sole issue on appeal was whether the circuit court erred in denying the plea withdrawal motion. In February 2002, we summarily affirmed the judgment and orders. [***State v. Fitzgerald***, No.

> 2000AP3510-CR, unpublished op. and order (WI App Feb. 19, 2002). The Wisconsin Supreme Court denied Fitzgerald's petition for review.]
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> In December 2009, Fitzgerald filed the … [first] WIS. STAT. § 974.06 motion. He alleged that Grau was ineffective for not arguing that "trial counsel Ann T. Bowe, and post-conviction counsel Richard Poulson" were ineffective. Specifically, Fitzgerald complains that Bowe and Poulson failed to investigate the coercion defense, and Poulson failed to adequately gather evidence from discovery materials that would support the coercion claim and enhance the reconsideration motion hearing.
>
> The circuit court rejected the motion. Regarding the coercion investigation claim, the court noted that Fitzgerald was simply revisiting an issue previously addressed by the plea withdrawal motion and, therefore, the court would not consider that issue. The court also concluded that evidence Fitzgerald thought should have been uncovered in the discovery materials was based on hearsay and would not have led to a different result on the plea withdrawal motion. Accordingly, the court ruled there had been no prejudice and denied the motion.

State v. Fitzgerald, No. 2010AP420, unpublished slip op. ¶¶2–7 (WI App Mar. 1, 2011) (footnotes omitted), *review denied*, 2011 WI 100, 337 Wis. 2d 50, 806 N.W.2d 638. Fitzgerald appealed, and in March 2011, we affirmed. ***Id.***, ¶1.

¶3 In November 2012, Fitzgerald, *pro se*, filed the WIS. STAT. § 974.06 motion underlying this appeal. The motion was based on his discovery of the 1999 sentencing transcript of Hayes. According to Fitzgerald, this transcript established that the circuit court erred when it said it had told Hayes when Fitzgerald was incarcerated. Fitzgerald asserted that the circuit court's mistaken belief in this regard led it to conclude that Hayes was not credible:

> The trial court based its ruling on it[]s belief that it told Hayes that the defendant was in custody. This belief obviously created this mindset that Hayes was lying about knowing that Fitzgerald was in custody. Now we know that the [circuit] court was wrong about telling Hayes the defendant was in custody.

¶4 Additionally, Fitzgerald argued that Poulson gave him constitutionally deficient representation at the pre-sentence motion for reconsideration of Fitzgerald's motion to withdraw his guilty plea by failing to contest what Fitzgerald contends was an "erroneous application of law." Fitzgerald asserted that Poulson should have postponed Fitzgerald's sentencing hearing and investigated the transcripts. Upon doing so, Poulson could have corrected the court's ruling, which, according to Fitzgerald, would have led to a different result.

¶5 The circuit court denied Fitzgerald's motion and the motion for reconsideration that followed.[1]

ANALYSIS

¶6 WISCONSIN STAT. § 974.06 "does not ... create an unlimited right to file successive motions for relief." ***State ex rel. Dismuke v. Kolb***, 149 Wis. 2d 270, 273, 441 N.W.2d 253, 254 (Ct. App. 1989). In ***Escalona-Naranjo***, 185 Wis. 2d at 177, 517 N.W.2d at 160, our supreme court explained that § 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion, thereby cutting off successive frivolous motions. If a defendant's grounds for relief have been finally

[1] The Honorable Elsa C. Lamelas accepted Fitzgerald's plea, presided over the motion hearings, and rejected the withdrawal motion and subsequent reconsideration motion. She also imposed sentence.

The Honorable Rebecca F. Dallet issued the orders denying Fitzgerald's first *pro se* WIS. STAT. § 974.06 motion and his subsequent reconsideration motion.

The Honorable David L. Borowski issued the order that underlies this appeal and the order denying Fitzgerald's subsequent reconsideration motion.

adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a § 974.06 motion unless the circuit court ascertains that a sufficient reason exists for the failure to allege or adequately raise the issue earlier. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181–182, 517 N.W.2d at 162. The procedural bar exists because of the need for finality in litigation. ***Id.***, 185 Wis. 2d at 185, 517 N.W.2d at 163. Whether claims in a § 974.06 motion are barred is a question of law we review *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175, 176 (Ct. App. 1997).

¶7 The reason offered by Fitzgerald for not previously raising the claims before us is this:

> Fitzgerald … believed his 2 attorneys [i.e., Poulson and Grau] had given him sound advi[c]e [that nothing was wrong with the circuit court's ruling on his motion for plea withdrawal], therefore, he never doubted what they had told him until he was left to fend for himself on his first [WIS. STAT.] § 974.06 motion. When he found out what constitutes an abuse of discretion on that appeal he exhausted his argu[]ment for that § 974.06 motion, then began to seek Hayes'[s] sentencing transcripts.

¶8 Unfortunately for Fitzgerald, ignorance of the law is not a sufficient excuse for him to challenge his judgment of conviction yet again. If it were, the procedural bar of ***Escalona-Naranjo*** and WIS. STAT. § 974.06(4) would be eviscerated, as many collateral challenges are raised by *pro se* litigants. Fitzgerald was sentenced in July 2000. He filed his first *pro se* WIS. STAT. § 974.06 motion eight and one-half years later, in December 2009. He did not request Hayes's 1999 sentencing transcript until March 2012. The reason he offers for failing to raise the claims before us is woefully insufficient and does not overcome ***Escalona-Naranjo***'s procedural bar.

¶9 To the extent Fitzgerald's motion rehashes issues that were already addressed in prior appeals—such as his alleged defense of coercion or his claims of constitutionally deficient representation—we agree with the circuit court that his challenges are barred. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (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."); *see also* ***State v. Walberg***, 109 Wis. 2d 96, 103, 325 N.W.2d 687, 691 (1982) (WISCONSIN STAT. § 974.06 postconviction motion cannot be used to raise issues disposed of by a previous appeal.).

By the Court.—Order affirmed.

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