COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1513 **Cir. Ct. No. 1999CF5988**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE D. PRUDE,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Terrance D. Prude, *pro se*, appeals from an order of the circuit court, which denied without a hearing Prude's latest postconviction motion. We agree with the circuit court that the motion is procedurally barred by

State v. Escalona-Naranjo, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We therefore affirm the order.

¶2 Prude pled guilty to five counts of armed robbery as party to a crime. Prior to sentencing, he moved to withdraw those pleas on the grounds that he had not understood the plea negotiation and its consequences. The circuit court denied the motion and sentenced Prude to eighty years' imprisonment and twenty years' probation. In 2003, Prude filed a *pro se* motion claiming that he had not understood the elements of his offenses or the nature of the charges. The circuit court denied the motion as contradicted by the record and completely frivolous.

¶3 In 2004, with appointed counsel, Prude again moved for plea withdrawal. He claimed his pleas were not knowing, intelligent, and voluntary because his trial attorney lied to him about the sentence he would receive. The circuit court denied the motion. Prude appealed, and we affirmed.[1] *See* ***State v. Prude***, No. 2004AP554-CR, unpublished slip op. (WI App May 9, 2006).

¶4 In 2007, Prude filed a *pro se* motion for plea withdrawal, alleging he did not understand the party-to-a-crime element. The circuit court denied the motion as procedurally barred by ***Escalona***. Prude appealed and we affirmed. *See* ***State v. Prude***, No. 2007AP1077, unpublished slip op. (WI App May 13, 2008). In addition, we cautioned Prude, under ***State v. Casteel***, 2001 WI App 188, ¶¶23-27, 247 Wis. 2d 451, 634 N.W.2d 338, "that we are prepared to impose appropriate sanctions should he persist in filing repetitive motions." *See* ***Prude***, No. 2007AP1077, unpublished slip op. at ¶12.

[1] This was Prude's direct appeal, taken after we reinstated his WIS. STAT. RULE 809.30 postconviction/appeal rights.

¶5 In 2008, Prude sought resentencing on the basis of a new factor. The circuit court denied the motion without a hearing, both on its merits and as procedurally barred by ***Escalona***. We initially determined that Prude was entitled to an evidentiary hearing, and we remanded the matter to the circuit court. *See* ***State v. Prude***, No. 2008AP2552-CR, unpublished slip op. & order (WI App June 8, 2009). Following the hearing on remand, the circuit court again denied the motion, and we affirmed that result. *See* ***State v. Prude***, No. 2008AP2552-CR, unpublished slip op. (WI App Mar. 8, 2011).

¶6 Underlying the current appeal is Prude's latest postconviction motion, filed on May 28, 2013, pursuant to WIS. STAT. § 974.06 (2011-12)[2] and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). Prude alleged: (1) the State breached the plea agreement with respect to its sentencing recommendation; (2) trial counsel was ineffective for not objecting to said breach; and (3) postconviction counsel was ineffective for not challenging trial counsel's performance. Prude also asserted that he did not raise these claims earlier because he was not aware of them until he consulted a paralegal. The circuit court noted that Prude has had multiple motions since his direct appeal, and it concluded the current motion was barred by ***Escalona***.

¶7 A motion brought under WIS. STAT. § 974.06 is typically barred when filed after a direct appeal unless the defendant shows a sufficient reason why he did not or could not raise the issues previously. *See* ***Escalona***, 185 Wis. 2d at 185. Ineffective assistance of postconviction counsel may constitute a sufficient

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

reason. *See* ***Rothering***, 205 Wis. 2d at 677-78. However, while postconviction counsel's ineffectiveness might explain why Prude did not raise his breach-of-plea-agreement argument in proceedings between 2000 and 2004, it cannot explain why Prude did not raise the breach issue in his 2007 *pro se* motion or in conjunction with his 2008 motion for sentence modification. Accordingly, ***Rothering*** does not save the current postconviction motion from the procedural bar of ***Escalona***.

¶8 Prude has also claimed that he did not raise the breach or ineffective-assistance issues previously because he was not aware of them until he consulted a paralegal who spotted the issues. He relies on a portion of ***Escalona*** in which the supreme court wrote that WIS. STAT. § 974.06 "was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later. Rather, the defendant should raise the constitutional issues *of which he … is aware* as part of the original postconviction proceedings." ***Escalona***, 185 Wis. 2d at 185-86 (emphasis added).

¶9 We do not perceive the supreme court's language to be endorsing lack of personal knowledge as a sufficient reason to explain a defendant's failure to timely raise an issue in postconviction proceedings: it is a well-established maxim that ignorance of the law does not provide a defense. *See* ***Putnam v. Time Warner Cable of Se. Wis. Ltd. P'ship***, 2002 WI 108, ¶13 n.4, 255 Wis. 2d 447, 649 N.W.2d 626. Indeed, any issue involving the breach of the plea agreement, if there was in fact such a breach, existed as of the moment it occurred, not the moment at which Prude learned of the law governing plea agreements.

Accordingly, we conclude that Prude's late discovery of a new-to-him legal theory is not sufficient reason to defeat the ***Escalona*** procedural bar.[3]

¶10 The State has additionally requested that we impose sanctions under ***Casteel***, contending that Prude has ignored our warnings regarding repetitive filings. *See* ***Prude***, No. 2007AP1077, unpublished slip op. at ¶12. We decline to impose sanctions at this time, particularly given that Prude partially prevailed in his last appellate case. We do, however, renew our warning to Prude that repetitive motions, particularly those unsupported by adequate allegations, will likely subject him to sanctions. *See* ***Casteel***, 247 Wis. 2d 451, ¶¶23-27.

By the Court.—Order affirmed.

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

[3] In any event, there is no merit to a claim that the State breached the plea agreement. According to the plea colloquy form and the colloquy transcript, Prude agreed that the State would seek "very substantial incarceration." Though Prude also claims the State agreed it would not recommend any specific sentence length, he does not point us to any portion of record that would so demonstrate. The sentencing transcript shows the State in fact recommended "very substantial incarceration," in those exact words. We do not view the State's subsequent recommendation of "very, underline three times, very substantial term of incarceration" to be a "material and substantial breach … that violates the terms of the agreement and defeats a benefit" for Prude. *See* ***State v. Deilke***, 2004 WI 104, ¶14, 274 Wis. 2d 595, 682 N.W.2d 945.

Of course, if there was no merit to a challenge to the State's comments, there was no reason for trial counsel to object and no reason for postconviction counsel to challenge trial counsel's performance. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).