COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2467 **Cir. Ct. No. 1989CF890531**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAVONN MACON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Lavonn Macon, *pro se*, appeals from an order that partially denied his WIS. STAT. § 974.06 (2011-12) motion for postconviction

relief.[1] We conclude that Macon's postconviction motion did not provide a sufficient reason for waiting thirteen years after discovering new information to bring his § 974.06 motion and, therefore, we affirm.

BACKGROUND

¶2 Macon pled guilty to numerous robbery and burglary charges in 1992. His postconviction counsel filed a no-merit report and we affirmed his conviction later that same year. *See* ***State v. Macon***, No. 1992AP2157-CRNM (WI App Nov. 10, 1992).

¶3 Macon subsequently filed a WIS. STAT. § 974.06 motion alleging ineffective assistance of postconviction counsel. We affirmed the denial of that motion. ***State v. Macon***, No. 1994AP1820 (WI App June 1, 1995).

¶4 In 2000, Macon filed a *pro se* petition for a writ of *habeas corpus* in this court. Macon's petition included a copy of a September 19, 1990 letter from the State confirming a plea agreement. In our order denying the petition, we noted that Macon was arguing that "his appellate counsel was ineffective for failing to argue that his trial counsel was ineffective for failing to object to the State's alleged breach of the plea agreement at the sentencing hearing." *See* ***State v. Macon***, No. 2000AP2475-W at 1 (WI App Sept. 20, 2000). Our order explained that the allegations Macon was making related to his counsel's performance as

[1] Macon does not appeal from the order that granted the part of his motion that related to another criminal case. We will not discuss that portion of the postconviction motion or the trial court's decision on that case.

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

postconviction counsel, rather than as *appellate* counsel, because appellate counsel cannot be ineffective for failing to raise a waived issue—such as an issue that was not preserved with a postconviction motion—in the trial court. *See* ***id.*** at 1-2 (citing ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 679, 556 N.W.2d 136 (Ct. App. 1996). Therefore, we concluded, Macon should raise his claim in the trial court, because that is where the "allegedly deficient conduct occurred." *See* ***Macon***, No. 2000AP2475-W at 2.

¶5 Macon subsequently filed another petition for *habeas corpus* in this court, which we again denied. As relevant to this appeal, we said that Macon's allegation that his trial counsel performed ineffectively "for failing to inform Macon of the current plea agreement" was "not supported in Macon's petition." *See* ***State v. Macon***, No. 2000AP3210-W at 2 (WI App Dec. 18, 2000). We also referenced our prior order and reiterated that "when the allegedly deficient conduct occurred during postconviction proceedings before the trial court, a ***Knight*** petition is not the proper vehicle for seeking relief."[2] *See* ***Macon***, No. 2000AP3210-W at 2 n.1.

¶6 Eleven years later, Macon—with the assistance of counsel from the University of Wisconsin Law School's Legal Assistance to Institutionalized Persons Project—filed a motion to correct illegal sentences, pursuant to WIS. STAT. § 973.13. The trial court granted the motion and reduced two of Macon's sentences.

[2] *See* ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

¶7 Nearly two years later, Macon filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. He alleged that his trial counsel provided ineffective assistance by not informing him of "two prior exponentially favorable plea bargain agreements." Macon attached a copy of the September 19, 1990 letter concerning plea negotiations. Macon's motion did not mention any of his previous postjudgment litigation and did not explain why his motion was being brought over twenty years after he pled guilty.[3]

¶8 The trial court denied the portion of Macon's motion that is relevant to this appeal, on two grounds. First, the trial court found that the motion was procedurally barred under ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574, and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because Macon did not raise the issue in his response to the no-merit report or in the WIS. STAT. § 974.06 motion he filed in 1993. The trial court continued: "Even assuming that the defendant was unaware of the September 19, 1990 plea offer letter until after his motion in 1993 was decided, he was clearly aware of it in 2000 when he filed his ***Knight*** petitions in the Court of Appeals." The trial court further held that Macon's § 974.06 motion was procedurally barred because he did not raise the issue when he filed his motion to correct illegal sentences in 2011.

¶9 Macon filed a motion for reconsideration in which he explained that the reason he did not previously raise this issue during the no-merit proceedings or in his 1993 motion was that he did not become aware of the plea negotiation

[3] Macon's motion did reference two 2012 court cases, but he did not argue that his claim could not have been brought earlier (and, in fact, he raised his claim concerning the 1990 letter twice in 2000, when he filed his petitions for *habeas corpus* with this court).

documents until he started working with the Legal Assistance to Institutionalized Persons Project in 2000. He did not, however, explain why he waited over thirteen years after he found the 1990 document and filed his ***Knight*** petitions to file a WIS. STAT. § 974.06 motion in the trial court. Finally, Macon asserted that the court of appeals "committed clear error in 2000, when it erroneously determined that Macon had previously waived issues that he had absolutely no previous knowledge of." (Bolding, italics, and one set of quotation marks omitted.)

¶10 The trial court denied the motion for reconsideration "for the same reasons the court previously cited in its September 4, 2013 decision." This appeal follows.

DISCUSSION

¶11 On appeal, Macon again argues that his postconviction motion was not procedurally barred because he did not become aware of the September 1990 plea offer letter until 2000. He also repeats his allegation that this court erroneously held that he had waived his claims by not raising them in response to the no-merit report, which was during a time "when Macon clearly had no knowledge of the existence of the factual information now supporting his claims."

¶12 In response, the State argues that Macon's claim is barred by ***Escalona-Naranjo*** for two reasons: (1) Macon could have raised this claim when he brought his 2011 motion to correct his sentences; and (2) "accepting as true Macon's assertion that he discovered the factual basis of his claim in 2000, Macon offers no good reason why he waited *thirteen years* to raise his claims in the trial court." We conclude that the State's second argument is dispositive and, therefore, we decline to address the parties' debate over whether Macon's motion

is procedurally barred by his 2011 motion. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

¶13 A defendant must "provide a sufficient reason for raising an issue for the first time in a [WIS. STAT.] § 974.06 motion when that issue 'could have been raised on direct appeal or in a sec. 974.02 motion.'" ***State v. Pinno***, 2014 WI 74, ¶64 n.22, 356 Wis. 2d 106, 850 N.W.2d 207 (quoting ***Escalona-Naranjo***, 185 Wis. 2d at 185 and citing § 974.06(4)) (emphasis omitted). Moreover, the sufficiency of the reason may be affected by delay, as our supreme court explained in ***State v. Allen***, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124:

> Delay can … wreak havoc…. Waiting three and a half years before seeking a sentence reduction is one thing; waiting three and a half years before seeking a new trial is quite another. The existence of an arguably meritorious issue does not provide a sufficient reason for waiting many years to raise an issue that could have been raised earlier. Here, the delay was seven years.

Id., ¶73 (discussing the sufficiency of the reason for raising an issue for the first time in a § 974.06 motion).

¶14 Macon's WIS. STAT. § 974.06 motion did not offer any explanation for the delay in raising the issue of the 1990 plea negotiations; indeed, the motion did not even acknowledge that prior postconviction motions and petitions had been filed and denied. Macon provided some explanation in his motion for reconsideration, stating that he "had absolutely no knowledge of the allegations now supporting the claims" when he filed his § 974.06 motion in 1993. However, Macon did not address the trial court's observation that even if Macon did not become aware of the plea offer letter until 2000, he still had not explained why he waited thirteen years to file his latest § 974.06 motion. The thirteen-year delay

was not reasonable; Macon's motion is procedurally barred. *See* ***Allen***, 328 Wis. 2d 1, ¶73; *see also* ***State v. Romero-Georgana***, 2014 WI 83, ¶55, __ Wis. 2d __, 849 N.W.2d 668 (When defendant filed his third § 974.06 postconviction motion, "he was required to justify the delay in making his claim.").

¶15 Finally, we briefly address Macon's assertion that in our September 20, 2000 order denying his petition for *habeas corpus*, this court "erroneously determined that Macon had *waived* the factual issues now supporting his [WIS. STAT. § 974.06] motion merely on the grounds that he had failed to raise the issues during his previous no-merit proceedings[,] and in his prior [§ 974.06] … motion." Macon misreads our order.[4]

¶16 Our order explained that appellate counsel could not have performed deficiently because "[a]ppellate counsel's failure to raise a waived issue is not deficient." ***Macon***, No. 2000AP2475-W at 2. We continued:

> As in ***Rothering***, what Macon really complains of is the failure of postconviction counsel to bring a postconviction motion before the trial court to withdraw his plea and rais[e] the issue of ineffective trial counsel. Since this allegedly deficient conduct occurred before the trial court, we conclude a ***Knight*** petition is not the proper vehicle for seeking relief. This claim should be raised in the trial court.

Macon, No. 2000AP2475-W at 2 (citation and footnote omitted). This language does not support Macon's assertion that we found that his issue concerning the 1990 letter was waived. On the contrary, we indicated that Macon should file a motion in the trial court alleging ineffective assistance of postconviction counsel.

[4] We also note that Macon did not appeal the order or seek clarification from this court as to its meaning.

Macon's postconviction motion is procedurally barred because he did not provide a sufficient reason for waiting thirteen years to file it. Therefore, we affirm the trial court's order.

By the Court.—Order affirmed.

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