COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1788-CR
97-2903

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

OLTON LEE DUMAS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Rock County: JAMES E. WELKER and EDWIN C. DAHLBERG, Judges. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. Olton Dumas appeals orders denying his motions for postconviction relief in two cases.[1] The issue on appeal is whether the circuit court in each case properly determined that Dumas's postconviction motions were

[1] These two appeals were consolidated by our order dated February 11, 1998.

barred. Because we conclude that Dumas did not establish a sufficient reason for his failure to raise the issues in his previous motions or appeals, we affirm.

BACKGROUND

These two cases have quite a long and complicated procedural history. We will discuss only those events relevant to the two appeals.

No. 97-2903:

Dumas was charged in September 1991 with two crimes: resisting an officer and battery to an officer. He was charged as a repeat offender in both counts. In October 1991, pursuant to a plea agreement, Dumas pled guilty to the charge of battery to an officer as a repeater. At sentencing, the circuit court withheld sentence and imposed a three-year term of probation to be served concurrently with the parole Dumas was serving. This sentence was later modified, with Dumas's agreement, to include one year in jail as a condition of probation.

In November 1994, the Department of Corrections began probation revocation proceedings against Dumas. Just before these proceedings were begun, Dumas sought habeas corpus relief in the circuit court on the grounds, among others, that his sentence improperly ordered his term of probation to run concurrently with his term of parole.[2] The circuit court agreed and ordered Dumas to be resentenced.

[2] This was one of at least three petitions for habeas corpus filed by Dumas in the circuit court.

At the resentencing hearing, the prosecutor said that the State viewed the original plea agreement as invalid and suggested that Dumas seek to withdraw his plea. The prosecutor then asked the court to sentence Dumas to eight years in prison. Dumas said that he was not seeking plea withdrawal but that he wanted to be resentenced. The circuit court agreed and sentenced Dumas to a one-year term of probation, sentence withheld.

In June 1995, the Department of Corrections revoked Dumas's probation. In July 1995, before Dumas returned to the court for post-revocation sentencing, he filed a motion for plea withdrawal on the ground that the State had breached the agreement by arguing for an eight-year sentence at his resentencing hearing. Dumas was initially represented in the post-revocation court proceedings by Attorney James Dumke.[3] Dumke had also been the prosecutor who negotiated Dumas's plea agreement in 1991. Before the plea withdrawal motion was decided, Attorney Roger Merry was appointed to represent Dumas. On July 17, 1995, Dumas filed, pro se, a notice of appeal from the judgment of conviction. While the first plea withdrawal motion was pending, Dumas filed two additional pro se motions for plea withdrawal in the circuit court. By order dated November 1, 1995, this court remanded the record to the circuit court to allow it to decide the motions.

In December 1995, the circuit court held a hearing on the plea withdrawal motions and denied them. Subsequently, Dumas returned to the circuit court to be sentenced on the probation revocation. The court sentenced him to

[3] Dumke also was Dumas's trial counsel in the case underlying No. 97-1788-CR.

four years in prison to run concurrently with any existing sentence. Dumas completed serving his sentence in this case in December 1997.

In September 1997, before his sentence was completed, Dumas filed another pro se postconviction motion for plea withdrawal in the circuit court. By order dated September 18, 1997, the circuit court denied the motion on the grounds that it was Dumas's second postconviction motion for plea withdrawal. It is from this order that Dumas now brings appeal No. 97-2903.

No. 97-1788-CR:

This appeal arises from a different judgment of conviction entered in September 1995, after a jury trial. Dumas was found guilty of three misdemeanor counts as an habitual offender.[4] Dumas was represented at trial by Attorney Dumke. Dumas was sentenced to three years in prison to be served consecutively on each charge. Dumas, by his appellate counsel, Attorney Glen Cushing, appealed the conviction to this court. We affirmed and the supreme court denied his petition for review.

In May 1997, Dumas filed with this court pro se, a petition for a writ of habeas corpus. In this petition, he alleged among other things, that he had received ineffective assistance of trial, postconviction and appellate counsel. By order dated May 19, 1997, we dismissed Dumas's petition and directed him to

[4] The habitual offender portion of the charge was based on the 1991 conviction for battery to an officer. The circuit court properly applied the habitual offender enhancer even though the 1991 conviction was on appeal at that time. Section 939.62(2), STATS. states in relevant part: "The actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced ... which convictions remain of record and unreversed." Since Dumas's 1991 conviction was unreversed at the time he was convicted in 1995, the circuit court properly applied the habitual offender enhancer.

seek relief on his claims of ineffective assistance of counsel in the circuit court. ***State ex rel. Dumas v. Vander Ark***, No. 97-1403-W, unpublished order (Ct. App. May 19, 1997).

In September 1997, Dumas returned to the circuit court and moved for sentence modification. He alleged that the repeater portion of the charge was invalid because a date was incorrect and because he did not stipulate to the habitual offender portion of the charge. He also alleged ineffective assistance of trial (Dumke) and postconviction (Merry) counsel. The circuit court denied the motion finding that Dumas was precluded from raising these issues because he had not raised the issues in his previous appeal. He now appeals from the denial of this motion.

On appeal, he again challenges the use of the habitual offender portion of the charge for the same reasons he challenged it below. He also asserts that he received ineffective assistance of appellate counsel because Cushing did not challenge the habitual offender portion of the charge which was based on his 1991 conviction. He appears to be asserting that Cushing should have challenged the habitual offender enhancer based on the ineffectiveness of Attorneys Dumke and Merry. Specifically, he alleges that Dumke's roles as both the prosecutor who negotiated the plea in the 1991 conviction and as his defense counsel, and briefly as postconviction counsel in the 1995 conviction, created a conflict of interest which entitled him to withdraw his plea.[5]

[5] He also makes some allegations about Merry's actions as postconviction counsel.

ANALYSIS

The issue in both cases is whether the circuit court properly denied Dumas's motions because he had not raised the various issues in his previous postconviction motions or on appeal, and he had not offered a sufficient reason for his failure to do so. A defendant must raise all grounds for relief in his original, supplemental, or amended motion for postconviction relief. ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 181, 517 N.W.2d 157, 162 (1994). If a defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a new postconviction motion, unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. ***Id.*** at 181-82, 517 N.W.2d at 162.

We agree with the State that Dumas has not offered a sufficient reason in either case for his failure to raise these issues in his prior postconviction motions and appeal. Therefore, the circuit court properly denied both motions.

In No. 97-1788-CR, Dumas also raises the issue of whether he received effective assistance of appellate counsel. He bases his claim on his appellate counsel's failure to raise on appeal to this court the issue of ineffective assistance of trial and postconviction counsel. When Dumas brought a writ of habeas corpus before this court in May 1997 raising the same claims, we directed him to bring the claims first to the circuit court.

When Dumas returned to the circuit court, he asserted that he had received ineffective assistance of trial and postconviction counsel. The circuit court denied the motion because Dumas could have raised the issue in his direct appeal. In his motion before the circuit court, Dumas did not offer any reason as to why he had not raised the issue in his direct appeal.

In his brief in appeal No. 97-1788-CR, Dumas asserts that he received ineffective assistance of appellate counsel because Cushing did not raise the issue of his trial and postconviction counsel's ineffectiveness. In other words, he is asserting that it was Cushing's fault that the issue was not raised in his direct appeal. He did not, however, offer this reason to the circuit court when he brought his postconviction motion. It was Dumas's burden to explain to the circuit court why he had failed to raise the issues in his previous appeal. *See* ***Escalona-Naranjo***, 185 Wis.2d at 181-82, 517 N.W.2d at 162. He did not. Based on the information before it, the circuit court properly denied Dumas's motion for postconviction relief. This appeal is from the denial of that order. Therefore, we affirm.

By the Court.—Orders affirmed.

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