COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0919

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICKY L. SWEENEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Oneida County: ROBERT E KINNEY, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Ricky Sweeney appeals an order denying his § 974.06, STATS., postconviction motion to vacate his three convictions for sexual assault or to correct his eighteen-year concurrent sentences. We affirm the order because: (1) Sweeney has not shown sufficient reason for his failure to raise these issues in his initial challenge to the conviction and his earlier appeal; (2) most of

the issues are not jurisdictional or constitutional issues reviewable under § 974.06, STATS.; and (3) none of the issues has any merit.

Sweeney waived his right to present the issues raised in his postconviction motion by his failure to present them in a petition for a writ of habeas corpus and an appeal filed in 1996 (96-0770). His motion does not establish any reason for his failure to raise these issues at that time. Successive motions for relief are not permitted. *See* ***State v. Escalona-Naranjo,*** 185 Wis.2d 168, 181-85, 517 N.W.2d 157, 162-64 (1994).

Sweeney argues that the State has waived its right to call attention to his previous waiver because it did not argue waiver in the trial court. That argument fails for three reasons. First, this court may apply ***Escalona-Naranjo*** regardless of whether the State raises the issue. The waiver rule is one of judicial administration and does not involve the court's power to address the issues. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 444, 287 N.W.2d 140, 146 (1980). The need for finality in litigation and judicial efficiency are matters that this court will enforce regardless of the State's right to argue the issue.

Second, as a matter of judicial efficiency, the rules of waiver are applied more strictly against an appellant. *See* ***State v. Truax***, 151 Wis.2d 354, 359, 444 N.W.2d 432, 435 (Ct. App. 1989).

Third, ***State v. Avery***, 213 Wis.2d 228, 570 N.W.2d 573 (Ct. App. 1997) does not support Sweeney's proposition that the State's failure to argue ***Escalona-Naranjo*** in the trial court precludes its application on appeal. In ***Avery***, the court held that it was "reluctant" to invoke waiver against a defendant when the ***State*** failed to assert ***Escalona-Naranjo*** in the trial court. The issue in ***Avery*** involved newly discovered DNA evidence. The court elected not to enforce the

rule of ***Escalona-Naranjo*** in light of the fact-sensitive questions regarding the discovery of new evidence in an area of evolving scientific techniques. ***Avery*** does not stand for the proposition that this court cannot enforce ***Escalona-Naranjo*** after the State failed to assert it in the trial court, particularly where, as here, the issues are not fact-sensitive and all of the issues could have been raised in the initial postconviction proceedings.

The result would be the same even if this court did not apply the rule of ***Escalona-Naranjo***. Section 974.06, STATS., is available to review only jurisdictional and constitutional issues. Although Sweeney labels several of his issues as jurisdictional attacks, they implicate neither subject matter nor personal jurisdiction. The only constitutional issue is whether his counsel was ineffective for failing to raise the issues Sweeney now attempts to raise. Because those issues have no merit, counsel was not ineffective for failing to raise them and Sweeney was not prejudiced by his counsel's performance.

The issues Sweeney raises lack arguable merit. Sweeney's no contest pleas constitute a waiver of all nonjurisdictional defects and defenses including alleged violations of constitutional rights occurring prior to the plea. *See* ***State v. Aniton***, 183 Wis.2d 125, 129, 515 N.W.2d 302, 303 (Ct. App. 1994). Sweeney attempted suicide on the day the complaint was filed and was committed to a mental hospital. His argument that the trial court lacked jurisdiction because he was not given an initial appearance within a reasonable time is specious. His argument that the trial court failed to consider the sentencing guidelines entitles him to no relief. *See* ***State v. Elam***, 195 Wis.2d 683, 685, 538 N.W.2d 249, 249-50 (1995).

The trial court's ordering treatment as a condition of the sentence does not state a basis for overturning the convictions or the sentence. Corrections authorities may choose to disregard the court's treatment directive, s*ee* ***State v. Lynch***, 105 Wis.2d 164, 168, 312 N.W.2d 871, 874 (Ct. App. 1981), but neither the convictions nor the sentence needs to be modified for this reason. *See* § 973.13, STATS.

Sweeney argues that the trial court violated § § 970.02 and 971.05, STATS., by failing to furnish him with a copy of the complaint and inform him of the possible penalties and by failing to deliver a copy of the information or read it to him. Sweeney was represented by counsel at the initial appearance and arraignment. Counsel confirmed that he and Sweeney had been furnished with a copy of the criminal complaint and waived its reading. The complaint contained the possible penalties. Counsel also confirmed that he was provided with a copy of the information at the arraignment and he waived reading the information. Therefore, the record does not support Sweeney's arguments. Sweeney was informed of the possible penalties before the court accepted his no contest pleas.

The trial court had authority to sentence Sweeney before entry of the judgment of conviction. The authority Sweeney relies on, ***State v. Wheaton***, 114 Wis.2d 346, 338 N.W.2d 322 (Ct. App. 1983) was overruled. *See* ***State v. Pham***, 137 Wis.2d 31, 36-37, 403 N.W.2d 35, 37 (1987).

By the Court.—Order affirmed.

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