COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP674 **Cir. Ct. No. 1996CF52**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DA VANG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Da Vang, pro se, appeals an order denying his WIS. STAT. § 974.06[1] motion for postconviction relief. Vang seeks a new trial,

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

asserting his postconviction counsel was ineffective by failing to challenge the denial of Vang's statutory right to be present at trial. We conclude Vang's argument is procedurally barred and, therefore, affirm the order.

BACKGROUND

¶2 Vang was charged with two counts of first-degree intentional homicide, based on allegations Vang shot and killed his wife and her friend. Shortly before trial, Vang informed the circuit court that he would not participate in the trial. After several hearings to ensure Vang was fully aware of his right to participate in the trial with the assistance of his attorney and his right to be present during all court proceedings, Vang repeatedly expressed his desire not to participate in the trial in any way. Consistent with WIS. STAT. § 971.04(3),[2] the court required Vang's presence at the beginning of the trial—specifically, until the jury was selected and sworn in. Vang thereafter deliberately eschewed participation in the trial until it was almost over. When Vang changed his mind about participating, the circuit court granted a two-day continuance to enable Vang's attorney to prepare for the remainder of the trial.

[2] WISCONSIN STAT. § 971.04(3) provides, in relevant part:

> If the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of the court, the trial or return of verdict of the jury in the case shall not thereby be postponed or delayed, but the trial or submission of said case to the jury for verdict and the return of verdict thereon, if required, shall proceed in all respects as though the defendant were present in court at all times.

¶3 Vang was ultimately convicted upon a jury's verdict of two counts of first-degree intentional homicide. Relevant to this appeal, Vang was present at his sentencing. Although Vang filed a notice of appeal, he voluntarily dismissed the appeal, No. 1998AP1000-CR, before briefing. A new appellate attorney subsequently filed a no-merit notice of appeal. That appeal, No. 1998AP3152-CRNM, was voluntarily dismissed when Vang chose to discharge his appellate attorney and proceed pro se.

¶4 Vang subsequently filed a WIS. STAT. § 974.06 postconviction motion alleging government misconduct deprived him of both his Sixth Amendment right to counsel and his due process right to a fair trial. Vang also moved for a ***Machner***[3] hearing, claiming his trial attorney provided ineffective assistance for a variety of reasons. The circuit court appointed an attorney to represent Vang on his postconviction claims, and counsel filed a supplemental motion that superseded Vang's pro se motion for postconviction relief, but raised the same issues. The motion was denied and, on appeal, this court affirmed. *See* ***State v. Vang***, No. 2000AP667, unpublished slip op. (WI App Apr. 10, 2001).

¶5 In 2004, Vang filed another pro se motion for postconviction relief under WIS. STAT. § 974.06, claiming his postconviction counsel provided ineffective assistance by failing to challenge the ineffectiveness of his trial counsel. The circuit court denied that motion and, on appeal, we affirmed. *See* ***State v. Vang***, No. 2004AP1385, unpublished slip op. (WI App Feb. 1, 2005). In 2015, Vang filed what he described as a "Petition for Writ of Habeas Corpus" pursuant to ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d

[3] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

136 (Ct. App. 1996). Citing ***State v. Koopmans***, 210 Wis. 2d 670, 563 N.W.2d 528 (1997), in which the court held that a defendant may not waive his or her statutory right to be present at sentencing, Vang asserted postconviction counsel was ineffective by failing to challenge Vang's statutory right to be present at trial. The circuit court construed the filing as a WIS. STAT. § 974.06 postconviction motion and, correctly recognizing ***Koopmans*** was distinguishable on its facts, denied the motion on its merits. This appeal follows.

DISCUSSION

¶6 Although the circuit court denied Vang's motion on its merits, we need not address the merits because Vang's arguments are procedurally barred under both WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). *See* ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992) (we may affirm for reasons other than those stated by trial court). In ***Escalona-Naranjo***, our supreme court held that "a motion under [WIS. STAT. §] 974.06 could not be used to review issues which were *or could have been* litigated on direct appeal." ***Escalona-Naranjo***, 185 Wis. 2d at 172 (emphasis added). The statute, however, does not preclude a defendant from raising "an issue of constitutional dimension which for sufficient reason was not asserted or was inadequately raised in his [or her] original, supplemental or amended postconviction motions." ***Id.*** at 184.

¶7 Vang contends that the ineffectiveness of his postconviction counsel constitutes a sufficient reason for circumventing ***Escalona-Naranjo***'s procedural bar. This court has acknowledged that "ineffective postconviction counsel could be a sufficient reason for permitting an additional motion for postconviction relief under § 974.06, STATS., thereby making the remedy under § 974.06 an adequate

and effective remedy for the alleged errors." *See* ***Rothering***, 205 Wis. 2d at 683. However, § 974.06 was "designed to compel a prisoner to raise all questions available to him [or her] in one motion." ***State v. Lo***, 2003 WI 107, ¶18, 264 Wis. 2d 1, 665 N.W.2d 756 (quoting WIS. STAT. ANN. § 974.06 cmt. (West Supp. 1998)).

¶8 Here, Vang does not offer a sufficient reason for failing to have raised the present issue in his 2004 pro se WIS. STAT. § 974.06 motion. The facts forming the basis for his current motion existed when he filed his earlier motions. Vang nevertheless asserts he could not have raised this argument earlier because he was not aware of ***Koopmans*** until recently. Although we grant pro se criminal defendants considerable latitude, every person is presumed to know the law and cannot claim ignorance as a defense. *See* ***State v. Jensen***, 2004 WI App 89, ¶30, 272 Wis. 2d 707, 681 N.W.2d 230 ("Ignorance of the law is no defense.").

¶9 Vang's claimed ignorance of the law does not constitute a sufficient reason to raise a new issue in what is Vang's third postconviction motion. To allow Vang to use his pro se status to raise a claim that he should have raised during his earlier motions would be contrary to ***Escalona-Naranjo***'s policy of "finality ... in litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. Vang is therefore procedurally barred from raising the issue now.

¶10 Vang alternatively contends the circuit court erred by construing his petition as a postconviction motion under WIS. STAT. § 974.06. We disagree. Courts are not bound by a pro se defendant's choice of labels, *see* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983), and Vang fails to show that

the circuit court erred by construing the filing as a § 974.06 motion. Moreover, this court has held that in a postconviction setting,

> a petition for writ of habeas corpus will not be granted where (1) the petitioner asserts a claim that he or she could have raised during a prior appeal, but failed to do so, and offers no valid reason to excuse such failure or (2) the petitioner asserts a claim that was previously litigated in a prior appeal or motion after verdict.

State v. Pozo, 2002 WI App 279, ¶9, 258 Wis. 2d 796, 654 N.W.2d 12. Vang offered no reason why pursuit of this issue in earlier proceedings would have been inadequate. Thus, even if Vang's submission had not been construed as a WIS. STAT. § 974.06 motion, his request for relief was properly denied.

By the Court.—Order affirmed.

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