COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1157 **Cir. Ct. No. 2006CF000901**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN J. LELINSKI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 PER CURIAM. Steven J. Lelinski appeals from a circuit court order denying his second WIS. STAT. § 974.06 (2015-16) postconviction motion without a hearing.[1] The postconviction court concluded that Lelinski's claim was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirm.

I. BACKGROUND

¶2 This appeal constitutes Lelinski's third attempt to challenge his convictions for second-degree sexual assault with use or threat of force, attempted second-degree sexual assault with use or threat of force, lewd and lascivious behavior, and fourth-degree sexual assault.

¶3 In his direct appeal of the judgments of conviction and order denying his postconviction motion, Lelinski argued:

> (1) there was insufficient evidence to support the conviction on second-degree sexual assault; (2) the trial court erroneously exercised its discretion in allowing in "other acts" evidence; (3) the trial court erroneously exercised its discretion in denying his motion for severance and granting the State's motion for joinder; (4) the trial court erred in summarily denying his claim of ineffective assistance of counsel without conducting a ***Machner*** hearing;[2] and (5) the sentence imposed was unduly harsh.

State v. Lelinski, No. 2008AP2379-CR, unpublished slip op. ¶1 (WI App June 2, 2009) (footnote in original). We affirmed. *See* ***id.*** The Wisconsin Supreme Court denied Lelinski's petition for review.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

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

¶4 On February 21, 2013, Lelinski, *pro se*, filed his first WIS. STAT. § 974.06 motion. He argued that the prosecutor failed to disclose information that could have been used to impeach the credibility of one of the victims. The postconviction court denied the motion without a hearing. Lelinski appealed, and we affirmed. ***State v. Lelinski***, No. 2013AP1331, unpublished slip op. ¶1 (WI App Feb. 25, 2014). The Wisconsin Supreme Court denied Lelinski's petition for review.

¶5 In his second WIS. STAT. § 974.06 motion, Lelinski argued that his postconviction counsel was ineffective for failing to challenge trial counsel's ineffectiveness. Specifically, Lelinski asserted that postconviction counsel should have argued that trial counsel was ineffective for not competently advising Lelinski as to the consequences of refusing a plea bargain offer made by the State prior to charges being issued. Lelinski claimed that he brought the issue to postconviction counsel's attention and the postconconviction counsel assured him he would research and investigate it. Ultimately, postconviction counsel informed Lelinski he would not raise the issue because he did not believe it had sufficient merit. Lelinski argued that, after reviewing postconviction counsel's notes, he became aware that postconviction counsel's conclusion in this regard was "based on mistakes of fact surrounding the plea offer; a failure to obtain information necessary to properly evaluate the merits of the claim; and a misunderstanding as to whether Lelinski would have accepted the plea."

¶6 The postconviction court rejected the motion without a hearing based on ***Escalona***. This appeal follows.

II. ANALYSIS

¶7 At issue is whether the circuit court erroneously exercised its discretion when it denied Lelinski's postconviction motion without a hearing. Our supreme court has summarized the applicable legal standards:

> Whether a motion alleges sufficient facts that, if true, would entitle a defendant to relief is a question of law that this court reviews *de novo*. The circuit court must hold an evidentiary hearing if the defendant's motion raises such facts. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

State v. Burton, 2013 WI 61, ¶38, 349 Wis. 2d 1, 832 N.W.2d 611 (italics added; citations and internal quotation marks omitted).

¶8 WISCONSIN STAT. § 974.06 permits collateral review of the imposition of a sentence based on errors of jurisdictional or constitutional dimension. ***State v. Johnson***, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981). However, it "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." ***Escalona***, 185 Wis. 2d at 185. Thus, a defendant who has had a direct appeal or another postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a "sufficient reason" for failing to raise it earlier. *See* ***id.*** (italics omitted). A claim of ineffective assistance from postconviction counsel may present a "sufficient reason" to overcome the ***Escalona*** procedural bar. *See, e.g.*, ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). A defendant can overcome the presumption of effective assistance only if he can "show that 'a particular nonfrivolous issue was clearly

stronger than issues that counsel did present.'" ***State v. Romero-Georgana***, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668 (applying "'clearly stronger'" standard to evaluation of § 974.06 motions "when postconviction counsel is accused of ineffective assistance on account of his failure to raise certain material issues before the circuit court") (citations, italics, and one set of quotation marks omitted). Whether a procedural bar applies is a question of law. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶9 Applying those standards here, we conclude that Lelinski's WIS. STAT. § 974.06 motion is procedurally barred, and, on that basis, we affirm the order.

¶10 Lelinski argues he did not raise the issue of postconviction counsel's ineffectiveness in his original WIS. STAT. § 974.06 motion because he only first became aware of factual grounds in July of 2015 after retaining new counsel who had obtained and reviewed Lelinski's original postconviction counsel's notes for the first time. The notes, Lelinski argues, reveal that postconviction counsel decided not to pursue any issues concerning the plea bargain offer based on assumptions of fact that were incorrect.

¶11 Lelinski concedes that he had knowledge of the facts relating to his trial counsel since 2006 but submits that he did not have sufficient facts to bring an ineffective assistance of postconviction counsel claim. According to Lelinski, he did not secure a copy of postconviction counsel's notes prior to the filing of his first WIS. STAT. § 974.06 motion because "he had no particular reason to believe [the notes] would help him." Instead, he "assumed his postconviction counsel had properly investigated and evaluated the issue" of trial counsel's ineffectiveness relating to the plea bargain offer.

¶12 These are not sufficient reasons for Lelinski's failure to raise this claim in his first WIS. STAT. § 974.06 motion. Lelinski was aware of the underlying ineffective assistance relating to the plea bargain offer even without postconviction counsel's notes and could have alleged that this claim was "clearly stronger" than those claims that were raised in Lelinski's direct appeal. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶46 (one set of quotation marks omitted). Second, Lelinski's reason for not requesting postconviction counsel's file earlier—i.e., that he assumed postconviction counsel had properly investigated and evaluated the issue—is insufficient to avoid the procedural bar.

¶13 As aptly summed up by the postconviction court in its decision:

> The problem here is that the defendant previously had an opportunity to raise all issues in his February 21, 2013 motion filed under [WIS. STAT. §] 974.06…. That he did not wait until he had appellate counsel's notes in hand does not constitute a sufficient reason for failing to raise the current issue…. The defendant's attempts to bypass the longstanding rule of ***Escalona*** by arguing that sufficient reason exists as to why his current claim was not raised in his *pro se* [§] 974.06 motion is rejected.
>
> Here, there is *no question* Lelinski knew the full contours of this issue back in 2008. He himself knew all of the facts that he claims counsel did not understand. Consequently, there is absolutely no reason he could not have raised the issue without the benefit of counsel's notes in his February 21, 2013 motion by simply stating, "I told postconviction counsel about this offer that lapsed before I was charged with all of these counts and that trial counsel didn't sufficiently explain things to me, yet postconviction counsel didn't raise this issue!" Counsel's notes may explain counsel's particular understanding about the issue or why he didn't raise it on direct appeal, but the appearance of his notes in July of 2015 doesn't explain why the defendant himself couldn't have raised the issue in his prior motion…. [A]ll the notes do is confirm that Lelinski spoke to [postconviction counsel] about this particular issue. And since Lelinski clearly knew about the issue in 2008, it could have been raised in his 2013 [WIS. STAT. § 974.06] motion. Unlike "newly discovered evidence,"

> this evidence isn't new at all because the defendant himself knew all of the pertinent facts. The only discovery here is the purported "real" reason why postconviction counsel didn't raise the issue previously, but again that certainly did not preclude the defendant from raising it.
>
> For these reasons, the court finds that the heavy procedural bar of ***Escalona*** must descend with a crash.

(Footnote omitted.) We agree. *See* WIS. CT. APP. IOP VI(5)(a) (Nov. 30, 2009) ("When the trial court's decision was based upon a written opinion ... of its grounds for decision that adequately express the panel's view of the law, the panel may incorporate the trial court's opinion or statement of grounds, or make reference thereto, and affirm on the basis of that opinion."). Therefore, we affirm the postconviction court's order.

By the Court.—Order affirmed.

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