COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2007

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2696 **Cir. Ct. No. 1995CF954254**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES DILLARD, JR.,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. James Dillard, Jr., appeals from the order denying his motion for postconviction relief. He argues that the circuit court erred when it found, without holding an evidentiary hearing, that he had not established a claim

for ineffective assistance of trial counsel and that his Sixth Amendment right to a jury trial had not been violated. We agree with the circuit court, and affirm.

¶2 In 1995, Dillard was charged with four counts of first-degree sexual assault of a child. He eventually entered ***Alford***[1] pleas to two counts of first-degree sexual assault of a child. The court sentenced him to two consecutive thirty-year sentences. In 1996, Dillard filed a motion for postconviction relief in which he alleged that at the time he entered the pleas, he believed that he was pleading to two counts of second-degree sexual assault of a child. He also stated that his trial counsel had told him that he would receive a thirty-year sentence in total. The circuit court denied the motion finding that the record belied his assertions, and that he had not established that a manifest injustice had occurred.

¶3 In October 2005, Dillard filed a motion for postconviction relief under WIS. STAT. § 974.06 (2003-04).[2] Dillard argued that his trial counsel was ineffective for failing to investigate his case properly, and because he coerced Dillard into accepting the plea bargain. Dillard also argued that his sentence violated ***United States v. Booker***, 543 U.S. 220 (2005), and ***Blakely v. Washington***, 542 U.S. 296 (2004). The circuit court denied the motion without a hearing finding that Dillard's claims of ineffective assistance of counsel were barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and that he had not established a ***Booker*** violation.

[1] ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 In this appeal, Dillard first argues that he received ineffective assistance of trial counsel because his counsel did not conduct an adequate pre-trial investigation, and gave him "sub-standard" advice during the plea negotiations. We agree with the trial court that this claim is barred by ***Escalona***. Claims of error that could have been raised in the direct appeal or in a previous motion under WIS. STAT. § 974.06, cannot be raised in a subsequent § 974.06 motion unless the appellant offers a sufficient reason for failing to do so earlier. ***State v. Lo***, 2003 WI 107, ¶15, 264 Wis. 2d 1, 665 N.W.2d 756. This is because "[w]e need finality in our litigation…. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation." ***Escalona***, 185 Wis. 2d at 185.

¶5 Dillard's claim of ineffectiveness is based, in part, on two alleged facts. He claims that he told his trial attorney that his ex-girlfriend would testify that he had never acted inappropriately with her children, and that his trial attorney told him that he would not cross-examine children. Even if true, both of these involve events that occurred before Dillard entered his plea, and consequently were known to him when he entered his plea, and when he brought his first motion for postconviction relief. Dillard has not offered a sufficient reason for not raising this claim earlier, and hence it is barred by ***Escalona***.

¶6 The second basis for Dillard's claim of ineffective assistance of counsel is that his trial attorney misled him about the terms of the plea bargain. He raised this issue in his first motion for postconviction relief, and the circuit court denied that motion. Consequently, this issue is barred under the doctrine of issue preclusion. *See* ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). Further, because the circuit court properly determined that these

claims were barred, the court was not required to hold a hearing on the motion. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996).

¶7 Relying on ***Booker*** and ***Blakely***, Dillard also argues that the circuit court sentenced him based on factors not found by the jury. Specifically, he argues that the court considered the severity of the offense and the impact on the victim to increase his sentence, facts that were not found by the jury. This court rejected the same argument in ***State v. Montroy***, 2005 WI App 230, ¶23, 287 Wis. 2d 430, 706 N.W.2d 145, *overruled on other grounds by* ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 179. We agree with the circuit court that this argument also has no merit.

¶8 Finally, the briefs submitted by the appellant's attorney do not comply with the Rules of Appellate Procedure in several critical respects. First, the Statement of the Case and Facts in the appellant's brief-in-chief does not contain citations to the record. This is a violation of WIS. STAT. RULE 809.19(1)(d), which requires the party to set out facts "relevant to the issues presented for review, with appropriate references to the record." "An appellate court is improperly burdened where briefs fail to consistently and accurately cite to the record." ***Weiland v. Paulin***, 2002 WI App 311, ¶11, 259 Wis. 2d 139, 655 N.W.2d 204 (citation omitted), *rev'd on other grounds*, 2003 WI 27, 260 Wis. 2d 277, 659 N.W.2d 875. Further, the appendix to this brief contains a document that is not part of the record in violation of WIS. STAT. RULE 809.19(2). The brief itself contains typographical and collating errors.

¶9 More egregiously, however, the appellant's attorney has cited to unpublished opinions that are not cited in support of issue preclusion, claim preclusion, or law of the case. This violates WIS. STAT. RULE 809.23(3). Failure

to comply with the rules is grounds for this court to impose sanctions, including the imposition of a penalty or cost on counsel. WIS. STAT. RULE 809.83(2). Consequently, we will sanction the appellant's attorney by imposing a penalty of $50 for each inappropriate citation for a total of $250.[3] The appellant's attorney shall pay this fine to the Clerk of Court within thirty days of the date of this opinion. If counsel fails to timely pay this sanction, an additional penalty may be assessed for each day the payment is late.

¶10 For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

[3] The appellant's attorney cited to unpublished opinions on pages 12, 16, 23, and 25 of the brief-in-chief, and page 5 of the reply brief.