COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1402 **Cir. Ct. No. 92CF920660**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM H. THORNTON, JR.,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 WEDEMEYER, P.J. William H. Thornton, Jr. appeals from orders denying his WIS. STAT. § 974.06 motion, seeking dismissal of his penalty enhancer convictions based on ***State v. Peete***, 185 Wis. 2d 4, 517 N.W.2d 149 (1994) (holding state must prove nexus between underlying crime and weapon possession penalty enhancer) and ***State v. Howard***, 211 Wis. 2d 269, 564 N.W.2d

753 (1997) (holding that ***Peete*** should be applied retroactively). Thornton claims the trial court erred in ruling that his § 974.06 motion was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Because Thornton's postconviction motion, filed subsequent to the Wisconsin Supreme Court's decisions in ***Peete*** and ***Howard***, failed to raise this issue, Thornton's claim is barred by ***Escalona-Naranjo***.

I. BACKGROUND

¶2 During the summer of 1992, a jury found Thornton guilty of first-degree recklessly endangering safety, possession of cocaine with intent to deliver, and possession of marijuana, all while armed with a dangerous weapon.[1] Thornton's conviction was affirmed on direct appeal on June 14, 1994. The direct appeal did not raise any issue relative to the weapon possession penalty enhancer.

¶3 The Wisconsin Supreme Court decided the ***Peete*** decision in June 1994. In December 1995, Thornton's counsel filed a WIS. STAT. § 974.06 postconviction motion on his behalf. The motion did not raise any issue relative to the weapon possession penalty enhancer. The motion was denied, and the order denying the motion was later affirmed on appeal.

¶4 In June 1997, the Wisconsin Supreme Court decided the ***Howard*** case. On April 2, 1998, acting *pro se*, Thornton filed another WIS. STAT. § 974.06 motion. The motion did not raise any issues related to the weapon possession penalty enhancer. The order disposing of his motion denied his ineffective

[1] The jury also found Thornton guilty of failing to pay the controlled substance tax. This conviction, however, was vacated after the Wisconsin Supreme Court's decision in ***State v. Hall***, 207 Wis. 2d 54, 557 N.W.2d 778 (1997).

assistance claim, and vacated the conviction for failure to pay a controlled substance tax. This court summarily affirmed the trial court's order in May 2000.

¶5 On August 27, 1998, Thornton filed another *pro se* WIS. STAT. § 974.06 motion, and challenged the "while armed with a dangerous weapon" penalty enhancer for the first time, based on the ***Peete*** and ***Howard*** decisions. However, because of proceedings in the appellate court, the trial court lacked jurisdiction to decide the motion.

¶6 On March 2, 2001, Thornton filed another WIS. STAT. § 974.06 motion, which asserted that his convictions related to the weapon possession penalty enhancer should be vacated based on ***Peete*** and ***Howard***. The trial court acknowledged that Thornton could not have raised this issue during his direct appeal in 1993, because the cases had not been decided yet. Nevertheless, the trial court ruled that Thornton could have raised the ***Peete/Howard*** issue in his April 1998 § 974.06 motion. As a result, the trial court ruled that Thornton's failure to do so barred his claim under ***Escalona-Naranjo***. An order to that effect was entered. Thornton filed a motion for reconsideration, which was also denied by order. Thornton appeals from those orders.

II. DISCUSSION

¶7 The issue in this case is whether or not Thornton's ***Peete/Howard*** claim is precluded by ***Escalona-Naranjo***. We agree with the trial court that it is precluded.

¶8 In ***Escalona-Naranjo***, our supreme court ruled that a prisoner may not file successive postconviction motions if the issues raised could have been raised in the original motion or appeal. ***Id.***, 185 Wis. 2d at 185. The reason for

this is because "[w]e need finality in our litigation." ***Id.*** If a defendant's claim for relief could have been, but was not, raised in a prior postconviction motion or on direct appeal, the claim is procedurally barred absent a sufficient reason for failing to previously raise it. ***Id.***

¶9 Here, it is undisputed that Thornton filed a postconviction motion subsequent to ***Peete/Howard***. Thornton filed a postconviction motion in April of 1998, long after the Wisconsin Supreme Court decided the ***Peete*** and ***Howard*** cases. The only reason Thornton offers for his failure to raise this issue in that postconviction motion is because he was ignorant of the law and not very good at researching. Ignorance is not a sufficient excuse. ***Douglas County Child Support Enforcement Unit v. Fisher***, 185 Wis. 2d 662, 670, 517 N.W.2d 700 (Ct. App. 1994). Moreover, *pro se* litigants are held to the same rules that apply to attorneys on appeal. ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992).

¶10 To allow Thornton an exception based on these facts and his claimed ignorance would be to eviscerate the rule. The policy behind ***Escalona-Naranjo*** strongly suggests that defendants should take seriously the "single opportunity to raise claims of error." ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). This policy necessarily includes the principle that a defendant should exercise caution to ensure that any potentially meritorious issues are discovered before filing the postconviction motion. This rule is absolutely essential to the efficient due administration of justice. Accordingly, we conclude that when Thornton filed his postconviction motion in April 1998, he

should have raised the ***Peete/Howard*** issue therein. His failure to do so precludes his right to do so in subsequent postconviction motions.[2]

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

[2] Thornton raises two additional issues: (1) his postconviction counsel provided ineffective assistance for failure to raise the ***Peete/Howard*** issue; and (2) his transfer to an out-of-state prison was illegal. We reject both issues for the same reasons discussed in the body of this opinion. Thornton could have raised both issues in his April 1998 postconviction motion. Failure to do so without any justification for the failure precludes his right to raise the issues here. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

¶11 SCHUDSON, J. (*dissenting*). On August 27, 1998, Thornton filed a *pro se* § 974.06 motion presenting his ***Peete*/*Howard*** challenge for the first time. Thornton could not have raised the ***Peete*/*Howard*** claim before June 26, 1997, when the supreme court decided ***Howard*** but, theoretically at least, he could have done so in April 1998 when he filed his earlier § 974.06 motion. Does ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), require dismissal of his ***Peete*/*Howard*** challenge? Of course not.

¶12 In his affidavit supporting his August 27 motion, Thornton explained why he had failed to raise the ***Peete*/*Howard*** issue four months earlier. Simply stated, he had been effectively denied appellate counsel and, left to his own devices, he had not become aware of the legal developments allowing for the ***Peete*/*Howard*** challenge. As soon as he became aware of them, however, Thornton presented his ***Peete*/*Howard*** motion.

¶13 As verified by the July 23, 1997 letter from First Assistant State Public Defender William Tyroler ("I am denying your request for counsel on counts other than the tax stamp."), and the September 30, 1997 letter from his assigned attorney, William Coleman ("… I am authorized to represent you only on the tax stamp matter, and on nothing else."), Thornton was left without appellate representation on any potential ***Peete*/*Howard*** issue. Additionally, in his affidavit, Thornton stated:

> Upon my awareness of the ***Peete*** and ***Howard*** rulings, I attempted to raise the ***Peete*** error claim during[] my [a]ppeal from the second § 974.06 … [m]otion(s). However, the [c]ourt notified me that I was

> [j]urisdictionally precluded from maintaining [b]oth an appeal and [p]ost-conviction [m]otions simultaneously….
>
> ….
>
> … [T]he [d]efendant … could not have foreseen the subsequent decisions in ***Peete*** and ***Howard*** and [their] [e]ffect on the present case. It is unknown why previous [c]ounsel[] who[] are learned and skilled in the science of law did not raise the ***Peete*** error claim.

¶14 As Thornton points out, the circuit court did not address his explanation for his failure to present the ***Peete/Howard*** challenge four months earlier. The court stated only: "Neither [WIS. STAT. § 974.06] nor ***Escalona***[***-Naranjo***] permit [sic] a defendant to file additional postconviction motions whenever he may discover other issues that apply to his case. Such a system would wholly emasculate ***Escalona***[***-Naranjo***] and render it meaningless." Sadly, the majority echoes the circuit court's unexamined ***Escalona-Naranjo*** analysis.

¶15 ***Escalona-Naranjo*** never was intended to close the courtroom door to an inmate under circumstances such as these. ***Escalona-Naranjo*** properly prevents strategic delay and never-ending litigation. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185-86. Here, obviously, Thornton's delay was not strategic—he would have had no conceivable reason not to promptly pursue the ***Peete/Howard*** issue. And here, the inconsequential delay would not lead to prolonged litigation.

¶16 Thornton was without appellate counsel with respect to any potential ***Peete/Howard*** issue. Proceeding *pro se* approximately nine months after ***Howard*** was decided, he filed a § 974.06 motion but did not raise the ***Peete/Howard*** issue. But approximately four and one-half months later, he not only filed a ***Peete/Howard*** motion but also, in his affidavit supporting that motion, he acknowledged his obligation to explain why he had failed to raise the issue earlier. Thornton's affidavit traced the circumstances and stated that as soon as he became

aware of the ***Peete*/*Howard*** issue, he pursued it. *The State does not dispute that Thornton raised the* ***Peete*/*Howard*** *issue as soon as he became aware of it. See* ***Escalona-Naranjo***, 185 Wis. 2d at 185-86 ("[T]he defendant should raise the constitutional issues *of which he or she is aware* as part of the original postconviction proceedings.") (emphasis added).

¶17 Thus, according to the undisputed record, Thornton, *pro se*, did the best he could and, unless ***Escalona-Naranjo*** is to become a close-the-courtroom-door game of "gotcha," his best was quite good enough to gain his day in court. Accordingly, I respectfully dissent.