COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2665 **Cir. Ct. No. 97CF974359**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID E. WILLIAMS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. David E. Williams appeals, *pro se*, from an order denying his WIS. STAT. § 974.06 (1999-2000) motion.[1] Williams claims

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

that: (1) he was denied the effective assistance of counsel; (2) he is entitled to a new trial in the interest of justice; and (3) his due-process rights were violated because the State failed to prove his status as a repeat offender. We affirm.

I.

¶2 Williams was tried for the possession of a controlled substance after police officers searched a house where Williams was babysitting and found a pill bottle containing heroin under the couch on which Williams was lying. Williams was also tried for the delivery of a controlled substance after a police officer identified Williams as the individual who sold two packets of heroin to him during an undercover operation.

¶3 A jury found Williams guilty of one count of possession of heroin with the intent to deliver, within 1000 feet of a school, as a party to a crime and as a second or subsequent offense, *see* WIS. STAT. §§ 961.41(1m)(d)1, 961.14(3)(k), 961.48, 939.05, and 961.49(1) and (2)(a), and one count of delivery of heroin, within 1000 feet of a school, as a second or subsequent offense, *see* WIS. STAT. §§ 961.41(1)(d)1, 961.14(3)(k), 961.48, and 961.49(1) and (2)(a). The trial court imposed and stayed a fifteen-year sentence on the possession charge and imposed a twenty-year sentence on the delivery charge.

¶4 Williams filed a WIS. STAT. § 809.30 motion for a new trial, *pro se*, on January 21, 1999. Williams alleged that his trial counsel was ineffective because counsel failed to investigate "all the facts of the case" and because his counsel failed to interview witnesses. Williams also claimed that his due-process rights were violated because the prosecutor did not file an amended information, which added the second or subsequent offense penalty enhancer, until after

Williams's arraignment, and because the State failed to prove that Williams was a repeat offender.

¶5 The trial court denied the motion. The court concluded that the failure-to-investigate claim was "factually and legally insufficient" and the failure-to-interview-witnesses claim was "generalized and conclusory." The court also determined that Williams was not entitled to a new trial because his due-process argument was not supported by the law.

¶6 Williams appealed *pro se*.[2] We affirmed in an unpublished opinion. *See* ***State v. Williams***, No. 99-0562-CR, unpublished slip op. (Wis. Ct. App. July 11, 2000). We determined that Williams's due-process rights were not violated because the State complied with WIS. STAT. § 961.48(2m)(b)1 when it filed an amended information charging Williams as a repeat offender because the information was filed prior to Williams's trial. ***Id.*** at ¶11-13.

¶7 On November 16, 2000, Williams, again *pro se*, filed a second postconviction motion, this time to modify his sentence. Williams alleged that a new factor existed because his brother had confessed to owning the heroin that the police officers found in the pill bottle under the couch. Williams also claimed that he had evidence that his nephew sold the heroin to the undercover police officer.[3]

[2] Williams appealed *pro se* to prevent his appellate counsel from filing a no-merit report.

[3] Williams filed another postconviction motion on January 23, 2001. The motion essentially contained the same claims as the November 16, 2000, motion. Williams amended this motion on February 15, 2001, adding the criminal complaint from a drug case against his nephew and an affidavit from his nephew in which his nephew claimed that he (the nephew) saw Williams's brother hide the pill bottle under the couch.

¶8 The trial court denied this motion on April 5, 2001. The court concluded that Williams's claims were barred by ***Escalona-Naranjo*** because Williams did not provide a sufficient reason for his failure to raise the claims in the January 21, 1999, motion.[4]

¶9 Williams then filed a § 974.06 motion on May 7, 2001. In this motion, Williams claimed that he was entitled to a new trial in the interest of justice because his trial counsel was ineffective. Williams's arguments were essentially a replication of the claims he presented in his November 16, 2000, motion, only this time, Williams claimed that if his trial counsel would have conducted an adequate investigation, his counsel would have discovered that the heroin was his brother's and that his nephew sold the heroin to the undercover police officer. Williams also claimed that his due-process rights were violated because the State failed to prove his status as a repeat offender.

¶10 Williams filed a notice of appeal on April 24, 2001, but the appeal was dismissed because Williams failed to pay the filing fee. Thus, the trial court dismissed the May 7, 2001, motion because the record had been sent to the court of appeals.

¶11 Williams filed another § 974.06 motion on June 21, 2001, asking the trial court to reinstate his May 7, 2001, motion. Williams supplemented this motion with a claim that his current ineffective-assistance-of-counsel claim should not be barred under ***Escalona-Naranjo*** because his *pro se* status was a sufficient reason for his failure to raise the claim in his original postconviction motion.

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[4] ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¶12 The trial court again denied Williams's motion on ***Escalona-Naranjo*** grounds. The court concluded that Williams's *pro se* status did not excuse Williams's failure to raise his claims in the original motion and on appeal. The trial court also concluded that Williams waived further review of the issues because Williams permitted his second appeal to be dismissed when he failed to pay the filing fee.

I.

¶13 First, Williams claims that his trial counsel was ineffective because his counsel "conducted no investigation whatsoever." Williams alleges that an investigation would have revealed four witnesses who would have testified that Williams's brother and his nephew committed the crimes. This claim, however, is procedurally barred.

¶14 A claim for relief that could have been raised in a prior postconviction motion or on direct appeal, but was not, is procedurally barred absent a sufficient reason for failing to previously raise it. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 163–164 (1994); WIS. STAT. § 974.06(4).[5] Here, Williams raised nine alleged errors by his trial counsel in the

[5] WISCONSIN STAT. § 974.06(4) provides:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

January 21, 1999, motion and six alleged errors in the July 11, 2000, appeal. Williams did not, however, raise the current ineffective-assistance-of-counsel claim at any time during these proceedings. Williams attempts to justify this omission by arguing that his *pro se* status is a "sufficient reason" for his failure to raise the current claim in his initial postconviction motion. We disagree.

¶15 Section 974.06(4) and ***Escalona-Naranjo*** make no exception for unrepresented defendants. Indeed, to do so would be contrary to ***Escalona-Naranjo***'s policy of "finality … in litigation"—under Williams's reasoning, *pro se* litigants would have the unfettered discretion to file as many motions as they wished. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185, 517 N.W.2d at 163. *See also* ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 343, 576 N.W.2d 84, 86 (Ct. App. 1998) ("there is no requirement in our system of jurisprudence that a defendant be permitted to file successive appeals from the same action").

¶16 Moreover, *pro se* litigants are generally held to similar standards as attorneys. *See* ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16, 20 (1992); ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 520–521, 335 N.W.2d 384, 388 (1983) (*pro se* petitions are to be construed liberally). Accordingly, Williams, like all litigants before this court, is subject to the requirements of ***Escalona-Naranjo*** and WIS. STAT. § 974.06(4). Here, other than his *pro se* status, Williams does not provide any reason for his failure to raise the current ineffective-assistance-of-counsel claim in his original motion or appeal. Thus, the claim is barred.

¶17 Second, Williams claims that he is entitled to a new trial in the interest of justice, "even though [his] ineffective assistance of counsel claim was inadequately raised on direct appeal," because Williams's brother confessed to a crime that Williams was convicted for. Williams did not raise this issue in his

January 21, 1999, motion. Thus, Williams is merely restating his ineffective-assistance-of-counsel argument as an interest-of-justice claim to avoid the ***Escalona-Naranjo*** bar. We decided this claim above. Accordingly, we will not address it here. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991) (an appellant may not relitigate issues previously decided no matter how artfully he or she rephrases them).

¶18 Finally, Williams claims that his due-process rights were violated because the State offered no evidence to prove his repeat-offender status. Again, this claim is barred.

¶19 Williams raised this claim in the January 21, 1999, postconviction motion. Williams abandoned it, however, when he failed to raise it in his July 11, 2000, appeal. Thus, Willaims cannot raise this claim now because it is barred under ***Escalona-Naranjo***. Moreover, Williams's contention that he did not raise this claim in the July 11, 2000, appeal because he later received a certified copy of the complaint that was missing the documentation necessary to prove his prior offense is belied by the record. Accordingly, Williams's due-process claim is also barred under ***Escalona-Naranjo***.

By the Court.—Order affirmed.

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