COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1302 **Cir. Ct. No. 2004CF5152**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEONARD L. PARKER,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Leonard L. Parker appeals from an order summarily denying his postconviction motion. We conclude that Parker has not alleged a "sufficient reason" pursuant to ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994), for failing to pursue on direct appeal his prior

waiver of ***Batson*** challenges to some of the prosecutor's peremptory strikes. *See* ***Batson v. Kentucky***, 476 U.S. 79, 86 (1986). Therefore, we affirm.

¶2 A jury found Parker guilty of first-degree reckless homicide with the use of a dangerous weapon, and two counts of armed robbery with the use of force.[1] The trial court imposed an aggregate sentence of thirty-seven years, comprised of thirty- and seven-year aggregate respective periods of initial confinement and extended supervision. On direct appeal, Parker's sole challenge was to the admissibility of his statements to police. *See* ***State v. Parker***, No. 2006AP345-CR, unpublished slip op. ¶1 (WI App Oct. 25, 2007). We affirmed. *See* ***id.***

¶3 On March 23, 2009, Parker moved *pro se* for postconviction relief pursuant to WIS. STAT. § 974.06 (2007-08).[2] In that motion, Parker alleged for the first time that the prosecutor violated ***Batson*** by exercising the State's peremptory strikes to remove nonwhite prospective jurors from his eventual jury panel, and that his trial counsel was correlatively ineffective for failing to raise ***Batson*** objections. The trial court denied the motion, ruling that Parker's allegations were conclusory and therefore not sufficient to entitle him to an evidentiary hearing, and that his ineffective assistance claim was also procedurally barred by ***Escalona***.

¶4 Preliminarily, Parker waived his ***Batson*** challenge because a timely objection to the use of a peremptory strike must be raised "before the jury is

[1] One of the armed robberies was an attempt; the other was the completed crime.

[2] All references to the Wisconsin Statutes are to the 2007-08 version.

sworn." ***State v. Jones***, 218 Wis. 2d 599, 602, 581 N.W.2d 561 (Ct. App. 1998). ***Jones*** explained the reason for that rule is because:

> this procedure will promote the efficient and economic administration of justice. It will allow the trial court to promptly address the issue and make any necessary decisions without great disruption to the process of impaneling a jury. When no objection is made until after the jury is sworn, the possibility for an immediate remedy for unconstitutional action has been lost. Second, the early objection assists the defendant, opposing counsel and the trial court by making an objection while the parties' and the trial court's recollections of the voir dire questioning are still fresh. This will help the trial courts and parties achieve the fairest and most appropriate result. Third, our holding creates a "bright-line" test that is easy to follow.
>
> Finally, our decision is in accord with the majority of courts that have addressed this issue.

Id.

¶5 To avoid ***Escalona***'s procedural bar, Parker must allege a sufficient reason for failing to have previously raised all grounds for postconviction relief on direct appeal or in his original postconviction motion. *See* ***Escalona***, 185 Wis. 2d at 185-86. Whether ***Escalona***'s procedural bar applies to a postconviction claim is a question of law entitled to independent review. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶6 Parker devotes over four pages of his postconviction motion to the "sufficient reason" requirement of ***Escalona*** and the related case law, but he does not allege anything more than a passing reference to trial counsel's ineffectiveness

as his "reason" for failing to previously raise his ***Batson*** challenge.[3] Parker's reference does not constitute a sufficient reason, as he does not explain in more than conclusory allegations why trial counsel was ineffective for failing to raise a ***Batson*** objection. Moreover, if Parker is challenging trial counsel's effectiveness, Parker has not explained why postconviction counsel was not obliged to raise the ***Batson*** issue pursuant to WIS. STAT. RULE 809.30(2)(h), to afford the trial court the opportunity to order an evidentiary hearing to allow the prosecutor and trial counsel the opportunity to explain respectively their peremptory strikes and failures to object to those strikes. *See* ***Jones***, 218 Wis. 2d at 602; ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Following ***Escalona***, we conclude that Parker's reason for failing to previously raise this issue is insufficient to overcome ***Escalona***'s procedural bar.[4]

[3] Although Parker challenged trial counsel's effectiveness for waiving his ***Batson*** objection, in his postconviction motion, Parker personally absolved postconviction/appellate counsel for failing to raise trial counsel's ineffectiveness, explaining that "it is somewhat understandable, why Post-Conviction/Appellate counsel … was reluctant to litigate such a Jury Array/Selection-Batson Issue Claim." Although he did not elaborate in his motion, on appeal he claims that it was understandable for postconviction/appellate counsel not to raise the issue because the law was "not clearly established, until 2008, with the "Snyder" decision holding," referencing ***Snyder v. Louisiana***, 552 U.S. 472, 485 (2008). However, the law was sufficiently established in ***Batson*** in 1986, as relied upon in 1998 in ***State v. Jones***, 218 Wis. 2d 599, 602, 581 N.W.2d 561 (Ct. App. 1998).

[4] Parker alternatively contends that an ineffective assistance claim need not be pursued on direct appeal, urging us to follow ***Massaro v. United States***, 538 U.S. 500 (2003), in which the court held that "an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under [28 U.S.C.] § 2255, whether or not the petitioner could have raised the claim on direct appeal." ***Id.*** at 504. However, "Wisconsin has declined to adopt the approach taken by the Supreme Court in ***Massaro*** … and continues to require defendants to raise ineffective assistance of counsel on direct appeal if possible … reaffirming ***Escalona*** rather than adopting ***Massaro***." ***Northern v. Boatwright***, 594 F.3d 555, 559 n.3 (7th Cir. 2010).

By the Court.—Order affirmed.

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