COURT OF APPEALS DECISION DATED AND FILED

September 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Nos. 99-2344
99-2400

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

NO. 99-2344

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE A. RUMAGE,

DEFENDANT-APPELLANT.

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NO. 99-2400

STATE OF WISCONSIN EX REL. BRUCE A. RUMAGE,

PETITIONER-APPELLANT,

V.

MICHAEL J. SULLIVAN, SECRETARY, DEPARTMENT OF CORRECTIONS, AND JUDY P. SMITH, WARDEN, OSHKOSH CORRECTIONAL INSTITUTION,

RESPONDENTS-RESPONDENTS.

APPEALS from orders of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Bruce A. Rumage appeals pro se from orders denying his WIS. STAT. § 974.06 (1997-98),[1] motion and his petition for a writ of habeas corpus to prevent his transfer to an out-of-state prison. He raises twelve issues on appeal. We conclude that his claims for relief from his 1992 conviction of two counts of second-degree sexual assault are barred. His principal claim challenging his prison transfer has been rejected in ***Evers v. Sullivan***, 2000 WI App 144, No. 00-0127. We affirm the orders appealed from.

¶2 After his conviction, a timely postconviction motion was filed on Rumage's behalf by his attorney, Nila Robinson. The motion was denied and no appeal was taken under WIS. STAT. RULE 809.30. In May 1996, with the assistance of new counsel, Attorney Michael Backes, Rumage filed a motion for postconviction relief under WIS. STAT. § 974.06. Among the several claims raised was that Attorney Robinson was ineffective in failing to preserve and litigate

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

postconviction claims.[2] A supplement to the motion was filed in October 1996. The motion was denied and Rumage appealed. The order denying the § 974.06 motion was summarily affirmed. *See* ***State v. Rumage***, No. 97-0463, unpublished slip op. (Wis. Ct. App. Feb. 25, 1998).

¶3 In November 1998, Rumage filed a second motion under WIS. STAT. § 974.06. He proceeded pro se on this motion. The trial court ruled that Rumage's claims were barred by the requirement that all grounds for relief under § 974.06 must be raised in one motion, unless there is a showing of a sufficient reason why the claims could not have been raised in a prior motion.

¶4 WISCONSIN STAT. § 974.06 does not "create an unlimited right to file successive motions for relief." ***State ex rel. Dismuke v. Kolb***, 149 Wis. 2d 270, 273, 441 N.W.2d 253 (Ct. App. 1989). "[A] prisoner's failure to assert a particular ground for relief in an initial postconviction motion bars the prisoner's assertion of the ground in a later motion, in the absence of justification for the omission." ***Id.*** at 274. Where 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. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

¶5 In his motion, Rumage did not offer any reason why the claims could not have been raised in his prior WIS. STAT. § 974.06 motion. On appeal, Rumage argues that "his prior appellate counsel … at the very least rendered deficient performance by not identifying and raising this issue … in his October

[2] The motion also questioned whether the two sexual assault charges were duplicitous or deprived Rumage of his right to a unanimous jury verdict, whether trial counsel was deficient for not raising duplicity, and whether the admission of other crimes evidence was error.

1996 postconviction motion."[3] This argument was not developed in the trial court. While Rumage is correct that there is no existing precedent requiring proof of actual ineffective assistance of counsel—that is deficient performance and prejudice—to sustain the burden of proving a sufficient reason, we cannot accept the bald assertion that counsel was ineffective. Any time counsel's conduct is alleged to be deficient, counsel should be provided the opportunity to explain that conduct. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998).

¶6 Moreover, the record demonstrates that Attorney Backes declined to litigate the claims Rumage attempted to raise by a pro se supplement to the first WIS. STAT. § 974.06 motion.[4] Attorney Backes believed the issues lacked merit. Counsel has an ethical duty to not argue frivolous issues. *See* SCR 20:3.1(a). Good appellate advocacy frequently necessitates winnowing out weaker arguments on appeal and focusing on one central issue or, at most, on a few key issues. *See* ***Jones v. Barnes***, 463 U.S. 745, 751-52 (1983). Postconviction counsel is not ineffective for not raising issues, even if nonfrivolous, if counsel exercises his or her professional judgment in refusing to press those issues. *See* ***id.***

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[3] The State reads Rumage's claim to be that Attorney Robinson was ineffective for not raising these claims in the postconviction motion filed under WIS. STAT. RULE 809.30. Rumage references his RULE 809.30 motion and his reply brief discusses Attorney Robinson's failure to get a written order and take a direct appeal. Rumage's first WIS. STAT. § 974.06 motion should have presented claims that Attorney Robinson was deficient. We do not address Attorney Robinson's conduct. The reference in the appellant's brief to counsel's October 1996 postconviction motion focuses on the conduct of Rumage's second postconviction attorney, Attorney Michael Backes.

[4] Rumage attempted to raise other issues by filing a pro se supplement to the WIS. STAT. § 974.06 motion on November 6, 1996. The trial court did not address the pro se issues because Rumage elected to be represented by counsel. *See* ***State v. Debra A.E.***, 188 Wis. 2d 111, 138, 523 N.W.2d 727 (1994). Only two issues identified in this appeal were referenced in Rumage's pro se supplement.

at 751. On the record, counsel explained that he had focused his representation on the striking and controlling issues and that Rumage was satisfied that counsel's argument "is effective." There is no basis to conclude that postconviction counsel was ineffective in not raising the claims Rumage raised in his second § 974.06 motion.[5] Thus, Rumage has not given a sufficient reason for his failure to bring these claims to the trial court's attention at the time of the first § 974.06 motion. The claims are procedurally barred by § 974.06(4); ***Dismuke***, 149 Wis. 2d at 273; and ***Escalona-Naranjo***, 185 Wis. 2d at 185.[6]

¶7 Rumage's attempt to stop his transfer to an out-of-state prison came before the trial court when a petition for a supervisory writ filed in the Wisconsin Supreme Court was certified to the trial court for disposition. *See* ***Rumage v. Sullivan***, No. 98-2494-W, unpublished order (Wis. Aug. 27, 1998). To pursue the claim Rumage also filed a "petition for a preliminary injunction."[7]

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[5] We note that in submitting his pro se supplement to the motion, Rumage referred to ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and his intent to raise all the issues for appeal "at this time" to avoid waiver. Despite this caveat on the face of the motion, Rumage elected to waive the issues by proceeding only on the issues raised by counsel's motion. While Attorney Backes suggested at the hearing that Rumage could raise the issues in his pro se supplement in a future motion under WIS. STAT. § 974.06, Rumage's reliance on that representation was not brought forth as a sufficient reason for failure to raise the claims in the first § 974.06 motion. Additionally, Attorney Backes's suggestion was not a misrepresentation provided Rumage could later present a sufficient reason for not raising his claims in the first motion. Rumage was aware of the holding in ***Escalona-Naranjo*** and cannot now claim ignorance of the requirement of advancing a sufficient reason. *See* ***Douglas County Child Support Enforcement Unit v. Fisher***, 185 Wis. 2d 662, 670, 517 N.W.2d 700 (Ct. App. 1994) (the maxim "ignorance of the law is no excuse" is applicable where necessary to the due administration of justice).

[6] Rumage's reliance on ***Loop v. State***, 65 Wis. 2d 499, 222 N.W.2d 694 (1974), is misplaced. As ***Escalona-Naranjo***, 185 Wis. 2d at 183-84, explains, the procedural bar applies after any postconviction motion, regardless of whether a direct appeal is taken. This was Rumage's third postconviction motion.

[7] Rumage's request to stop his transfer was heard with his WIS. STAT. § 974.06 motion.

The trial court denied the requested injunctive relief, concluding that it lacked authority to prohibit the Wisconsin Department of Corrections (DOC) from transferring Rumage and that Rumage failed to exhaust his administrative remedies before commencing a court action to prevent his transfer.

¶8 Rumage contends that while the DOC has authority under WIS. STAT. § 301.21(1m)(a) and (2m)(a)[8] to enter into contracts with other entities for the transfer and confinement of Wisconsin prisoners, there is no authorization for the DOC to actually transfer prisoners to those facilities. Rumage contends that because prisoners are sentenced to the Wisconsin state prisons and not committed to the custody of the DOC, prisoners cannot be transferred under § 301.21(1m) and (2m). This line of reasoning was addressed in ***Evers*** and rejected. ***Evers*** holds that prison inmates are committed to the custody of the DOC and that the DOC is authorized to transfer inmates to facilities in other states pursuant to contracts made with those facilities. *See* ***Evers***, 2000 WI App 144 at ¶¶14, 16. Rumage's argument is controlled by ***Evers***.[9]

¶9 Rumage's final claim is that the statute authorizing the DOC to make contracts for the transfer of inmates, WIS. STAT. § 301.21, violates the constitutional prohibitions against ex post facto laws. *See* U.S. CONST. art. I, §§ 9

[8] WISCONSIN STAT. § 301.21(1m)(a) provides in part: "The department may enter into one or more contracts with another state or a political subdivision of another state for the transfer and confinement in that state of prisoners who have been committed to the custody of the department." Section 301.21(2m)(a) provides in part: "The department may enter into one or more contracts with a private person for the transfer and confinement in another state of prisoners who have been committed to the custody of the department."

[9] Having reached the merits of Rumage's argument, we need not address his threshold claims that under WIS. STAT. § 973.15(3), the trial court has authority to prevent the prisoner's transfer to a facility not designated by the trial court, that he exhausted all available administrative remedies, and that a petition for a writ of habeas corpus was the proper remedy.

and 10; WIS. CONST. art. I, § 12. An ex post facto law is one which "punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed." ***State v. Thiel***, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994) (citations omitted). Rumage suggests that because he was sentenced prior to the adoption of § 301.21(1m) and (2m), and the trial court was not aware of the law at sentencing, his transfer pursuant to the statute enhances his sentence and punishment.[10]

¶10 We reject Rumage's contention. The DOC's ability to transfer inmates to out-of-state institutions does not enhance his sentence or impose a condition not contemplated by the trial court. We note that at the time Rumage was sentenced, prison inmates were subject to transfer to Minnesota institutions. *See* WIS. STAT. § 301.21(1) (1991-92). To challenge the transfer-contract law as an ex post facto law, Rumage must prove that the legislature had a punitive intent in enacting the law. *See* ***Thiel***, 188 Wis. 2d at 706. The purpose of the transfer-contract law is not to punish but to aide the administration of housing prisoners and ease overcrowding in Wisconsin prisons. We conclude that WIS. STAT. § 301.21 is not an ex post facto law.

By the Court.—Orders affirmed.

[10] Rumage was sentenced on May 28, 1992. The contract authorizations found in WIS. STAT. § 301.21(1m) and (2m) were enacted after he was sentenced.

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