COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1836 **Cir. Ct. No. 1995CF955367**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROY J. JONES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RUSSELL W. STAMPER, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Roy J. Jones appeals from the order denying his motion for postconviction relief. He argues that the trial court erred when it concluded that most of his claims were barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and that the remaining claims were

merely conclusory. Because we conclude that the circuit court did not err, we affirm.

¶2 Jones was convicted after a jury trial of one count of first-degree sexual assault of a child, two counts of first-degree sexual assault of a child while armed, two counts of kidnapping while armed, and two counts of first-degree sexual assault. The court sentenced him to a total of 143 years in prison. Jones then brought a motion for postconviction relief, which was denied by the circuit court. Jones appealed from the judgment and order and this court affirmed. *See* ***State v. Jones***, No. 98-0685-CR, unpublished slip op. (Wis. Ct. App. June 29, 1999). The Wisconsin Supreme Court denied his petition for review.

¶3 In December 2002, Jones filed a motion for postconviction relief under WIS. STAT. § 974.06 (2003-04).[1] The circuit court denied the motion, finding that the claims were barred by ***Escalona***. In June 2004, Jones again filed a motion under § 974.06, alleging that: (1) he was denied his right to an attorney during a line-up; (2) the State offered perjured testimony at his trial when a detective said he had an arrest warrant for Jones; (3) Jones's trial attorney did not investigate whether there was a violation-of-probation/parole warrant for Jones or an arrest warrant; (4) Jones's trial attorney did not call a DNA expert; (5) his due process rights were violated when the State did not disclose prior to trial the names of several witnesses who testified, and that his trial counsel was ineffective for not objecting to this testimony; (6) the criminal complaint should have been dismissed because it was not file stamped, and his trial counsel was ineffective for not

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

objecting to the complaint and asserting that the court lacked jurisdiction over him; and (7) his appellate counsel was ineffective for not bringing claims of ineffective assistance of trial counsel. The circuit court denied the motion, finding that the claims were barred by ***Escalona***, with the exception of the claims alleging ineffective assistance of counsel. The court found that those claims were conclusory in nature and did not address them. Jones then filed a motion for reconsideration, which the circuit court also denied.

¶4 In his brief to this court, Jones asserts that: (1) he was denied his constitutional right to an attorney at the pre-arrest line-up; (2) he is entitled to a new trial based on newly discovered evidence; (3) the State violated due process by offering the false testimony of the detective; (4) the court did not have jurisdiction to impose the sentence; (5) the State violated due process when it did not timely disclose the names of two witnesses who testified at the trial and that the trial court erroneously exercised its discretion when it allowed them to testify; (6) the court did not have jurisdiction because the criminal complaint was "void;" and (7) appellate counsel was ineffective for not discovering the new evidence and for not arguing ineffective assistance of trial counsel.

¶5 In ***Escalona***, 185 Wis. 2d at 185, the supreme court stated:

> We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

An appellant is barred from raising claims of error that could have been raised in the direct appeal or in a previous motion under WIS. STAT. § 974.06, 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.

¶6 We conclude, as did the circuit court, that all of the claims except for the allegations of ineffective assistance of appellate counsel are barred by ***Escalona***. Jones has already exercised his right to a direct appeal and previously filed a motion for postconviction relief under WIS. STAT. § 974.06, and he has not offered a sufficient reason for why he did not raise these issues in those proceedings. Consequently, he is barred from bringing these claims now.

¶7 Ineffective assistance of appellate counsel may be a sufficient reason for failing to have previously raised the issues. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678-80, 556 N.W.2d 136 (Ct. App. 1996). The circuit court found that Jones made only conclusory statements in support of his claims of ineffective assistance of appellate counsel, and the State argues that he has done so again in his brief to this court. We agree that his statements are conclusory. Further, the proper procedure for raising ineffective assistance of appellate counsel is to bring a writ of *habeas corpus* to this court under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). Assuming, however, that he is alleging that appellate counsel was ineffective for failing to raise at the trial court the issues he raises in his brief, we will address the merits of the arguments now.

¶8 The basis for Jones's ineffective assistance of appellate counsel claims is that appellate counsel failed to allege ineffective assistance of trial counsel. In order to establish that appellate counsel was ineffective, Jones must first establish that trial counsel was ineffective. In order to establish an ineffective assistance of trial counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient

performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant is not entitled to reversal for ineffective assistance of trial counsel unless the defendant "can establish both that 'counsel's error were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable,' and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***State v. Flynn***, 190 Wis. 2d 31, 47, 527 N.W.2d 343 (Ct. App. 1994) (citation omitted). Counsel is not ineffective for failing to make meritless arguments. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). We will consider the arguments Jones raises in turn.

¶9 Jones first argues that he was denied his right to counsel during a line-up procedure. The line-up, however, occurred before he was charged with a crime. A defendant is not entitled to counsel at a line-up held before he is charged. ***State v. Taylor***, 60 Wis. 2d 506, 524, 210 N.W.2d 873 (1973). Therefore, trial counsel was not ineffective for failing to challenge the line-up.

¶10 Jones also argues that he is entitled to a new trial based on newly discovered evidence. The requirements for granting a new trial for newly discovered evidence are: (1) the evidence must have come to the moving party's knowledge after a trial; (2) the moving party must have not been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial. ***Sheehan v. State***, 65 Wis. 2d 757, 768, 223 N.W.2d 600 (1974). If the newly discovered evidence fails to meet any one of these tests, the defendant is not entitled to a new trial. ***Id.***

¶11 The evidence that Jones says is newly discovered is that the officer who arrested him did not have a warrant to do so. As the State argues, however, this fact is not material because the officer had probable cause to arrest him. *See* WIS. STAT. § 968.07(1)(d). Jones has not established that this evidence was material, nor that it is reasonably probable that a different result would have been reached at trial. Since the evidence was not material, Jones is not entitled to a new trial based on newly discovered evidence.

¶12 The next issue Jones raises is that the State knowingly allowed false testimony in court. He asserts that the State allowed the officer who arrested him to testify that he had an arrest warrant when he did not. Jones's allegations do not establish that the State acted intentionally, or withheld any evidence from him. The evidence at most establishes a mistake. Further, Jones has not demonstrated how this testimony, even if false, affected the outcome of the trial. As we discussed previously, even if the officer did not have a warrant, the arrest was valid under the probable cause standard. Jones has not established that trial counsel was ineffective for failing to raise this issue.

¶13 The next issue Jones raises is that the State did not include the names of two witnesses who testified on its witness list. We agree with the State that Jones has not explained how this prejudiced him, and consequently, he has not established that trial counsel was ineffective.

¶14 Next Jones claims that the court lacked jurisdiction over him because the complaint was not properly file stamped. As the State points out, however, the complaint does have a file stamp on the back of the last page. The issue is completely without merit, and trial counsel was not ineffective for not challenging the complaint.

¶15 Since Jones has not established any grounds for finding that he received ineffective assistance of trial counsel, he did not receive ineffective assistance of postconviction counsel when counsel did not raise these issues. Consequently, 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.