COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP684 **Cir. Ct. No. 2001CF734**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANCIS MCCLENDON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Francis McClendon appeals from an order denying his WIS. STAT. § 974.06 (2003-04)[1] postconviction motion. His motion

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

was based upon two assertions: that the prosecutor's sentencing remarks violated the parties' plea agreement and that his trial counsel was ineffective for failing to object to the prosecutor's remarks. Because McClendon's motion is barred by the rubrics of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), we affirm.

BACKGROUND

¶2 On July 23, 2001, McClendon pled no contest to a charge of substantial battery. He was sentenced to five years of confinement and five years of extended supervision. Although he filed a notice of intent to pursue postconviction relief, he did not pursue a motion or a direct appeal under WIS. STAT. §§ 809.30 and 974.02. In 2004, he filed a *pro se* plea withdrawal motion alleging that: (1) his no contest plea was based upon inaccurate advice from his trial counsel; (2) the remarks of the prosecutor at sentencing had breached the parties' plea agreement that the State make no sentencing recommendation; and (3) his trial counsel was ineffective for failing to object to the alleged breach. On October 29, 2004, the trial court denied the motion. The court was not persuaded that trial counsel had erroneously advised McClendon to accept a plea agreement. It observed that the defendant received a substantial concession considering the defendant's extensive criminal record. It further noted that the defendant had acknowledged his understanding that the court was not bound by the terms of the plea agreement and was free to impose the maximum sentence. Thus, the court reasoned that the imposition of the maximum sentence did not implicate trial counsel's performance in negotiating the plea. Finally, the court also concluded that the prosecutor's sentencing remarks had not violated the promise to make no sentencing recommendation; therefore, trial counsel was not ineffective for failing to object.

¶3 McClendon next moved for reconsideration of the denial of his motion. This motion was also rejected. No appeal was filed from the denial of either motion.

¶4 On February 8, 2005, McClendon filed a second postconviction motion, which he denominated as filed pursuant to WIS. STAT. § 974.06. This motion essentially tracked the same claims as his first postconviction motion, which the court construed had also been filed under § 974.06.[2] It consisted of two claims: the prosecutor's remarks at sentencing violated the plea agreement and his trial counsel was ineffective for failing to object to the prosecutor's remarks. Again, the trial court rejected the motion, but this time reasoning that the second motion simply reasserted the same basis as the first motion and was therefore barred by the dictates of ***Escalona-Naranjo***. McClendon now appeals.

ANALYSIS

¶5 In ***State v. Evans***, 2004 WI 84, ¶33, 273 Wis. 2d 192, 682 N.W.2d 784, our supreme court further explicated the implications of ***Escalana-Naranjo***, declaring:

> … under Wis. Stat. § 974.06(4), issues that were raised or could have been raised during the direct appeal or in a previous § 974.06 motion may not be brought in a subsequent § 974.06 motion absent a showing of a "sufficient reason." *Escalona-Naranjo*, 185 Wis. 2d at 181-84[]. This rule is designed to ensure finality in prisoner litigation and to "compel[] 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

[2] McClendon does not challenge the trial court's interpretation.

> legislation." *Id.* at 185[]. The circuit court's order on a § 974.06 motion may be appealed to the court of appeals. Wis. Stat. § 974.06(7).

¶6 The trial court's characterization of McClendon's first postconviction motion as a WIS. STAT. § 974.06 motion was correct. As pointed out by the State, it was filed "long after the time for a remedy under § (Rule) 809.30 and § 974.02 had expired. Thus, it was cognizable only as a motion under § 974.06." The challenges raised by McClendon in his second motion were the very same challenges presented in the first motion. In the former motion, McClendon had the opportunity to properly offer bases for his motion. In his second motion, he failed to proffer any reason why he should be permitted to present his challenges again. The trial court was correct in observing that if McClendon was dissatisfied with the court's earlier ruling, he had a ready remedy by appealing to this court. He failed to do so. His appeal fails.

By the Court.—Order affirmed.

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