COURT OF APPEALS DECISION DATED AND FILED

July 11, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2004AP2823

Cir. Ct. No. 1996CF961748

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VERNON H. WALKER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Vernon H. Walker appeals from a postconviction order summarily denying his motion for a new trial.[1] The issues are whether postconviction/appellate counsel's failure to timely order and forward to Walker the transcript of a hearing granting the State's motion for an adjournment of his jury trial constitutes a sufficient reason to avoid the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), and whether our previous decisions bar the other issues Walker now raises. We conclude that this failure is a sufficient reason to consider one aspect of the adjournment issue that we had not expressly considered, but that our previous decisions bar the remainder of Walker's claims.[2] We affirm.

¶2 A jury found Walker guilty of masked armed robbery as a repeater. The trial court imposed a thirty-five-year sentence to run concurrent to a previously imposed sentence. Walker filed two responses to his counsel's no-merit report. The potential issues we identified in that appeal were the propriety of: (1) the alleged delay between Walker's arrest and his first court appearance; (2) the on-site ("show-up") identification procedure; (3) *the alleged denial of due*

[1] Walker is frequently referred to in the record as Verlin. He refers to himself in his *pro se* appellate briefs as Verlin. Our caption, however, identifies him as Vernon. Absent a motion to amend the caption, we will refer to him as Vernon and assume that Verlin and Vernon are one and the same.

[2] Walker contends that he is entitled to discretionary reversal pursuant to WIS. STAT. § 752.35 (2003-04). He argues that the real controversy has not been fully tried because his purported alibi witness did not testify. In this opinion, we implicitly decide that issue adversely to Walker. Walker also complains that the trial court erroneously refused to strike a certain prospective juror for cause, compelling him to exercise a peremptory strike. To the extent that we did not consider that issue pursuant to our ***Anders*** review, Walker's allegations are wholly inadequate to demonstrate trial court error or the ineffective assistance of trial counsel because that prospective juror was not a member of the jury that convicted Walker, nor does Walker identify whom he would have preferred to strike instead and why. *See* ***Anders v. California***, 386 U.S. 738 (1967).

process for adjourning Walker's trial at the State's request on June 17, 1996 ("adjournment hearing"); (4) the denial of Walker's mistrial motion; (5) the viability of resentencing; and (6) various incidences of trial counsel's alleged ineffectiveness.[3] We concluded that there was no arguable merit in pursuing these issues or any others. *See* ***State v. Walker***, No. 98-0502-CR-NM, unpublished slip op. (Wis. Ct. App. July 9, 1998) ("***Walker I***"); *see also* ***Anders v. California***, 386 U.S. 738 (1967).

¶3 Over three years after ***Walker I***, Walker filed a postconviction motion pursuant to WIS. STAT. § 974.06 (2001-02), claiming that the trial court erred in: (1) failing to recuse itself (the circuit court commissioner) from presiding over the preliminary hearing without disclosing its prior probable cause finding in issuing a related search warrant; (2) *adjourning Walker's speedy trial*; (3) *condoning prosecutorial misconduct for the alleged false statement that there was no pending speedy trial demand in urging an adjournment of the trial*; and (4) failing to conduct an adequate *voir dire*. Walker also raised three instances of alleged ineffective assistance of counsel in failing: (1) to advance a meaningful argument for suppression; (2) *to protect his right to a speedy trial*; and (3) to conduct an adequate *voir dire*. We summarily affirmed the trial court's summary denial for failing to overcome ***Escalona***'s procedural bar regarding his failure to raise these issues in his two no-merit responses on direct appeal. *See* ***State v. Walker***, No. 01-3255, unpublished slip op. at 4 (WI App Oct. 17, 2002) ("***Walker II***").

[3] The potential issues regarding the adjournment issue legitimately before us are italicized in paragraphs two and three of this opinion.

¶4 Two years after ***Walker II***, Walker filed another postconviction motion, alleging trial counsel was ineffective for failing to: (1) immediately object and assert prosecutorial misconduct in misstating the absence of a speedy trial demand to obtain an adjournment; (2) order production of the transcript of the adjournment hearing during which the State successfully moved to adjourn Walker's trial under false pretenses, (misstating that there was no speedy trial demand); (3) forward a copy of that transcript to Walker within fourteen days of his request; (4) pursue suppression of the show-up identification in a particular manner; and (5) strike one of the prospective jurors for cause, and conduct a comprehensive *voir dire* of two others. The trial court summarily denied the motion, explaining why there was good cause to grant the adjournment (negating the prejudice necessary for an ineffective assistance claim), and rejecting consideration of Walker's remaining issues on the basis of ***Escalona***. Walker appealed, also seeking discretionary reversal pursuant to WIS. STAT. § 752.35 (2003-04), contending that the real controversy had not been fully tried.

¶5 To maintain an ineffective assistance claim, the defendant must show that counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). ***Escalona*** requires the defendant to raise all grounds for postconviction relief in his or her original, supplemental or amended postconviction motion, or on direct appeal, unless in a successive postconviction motion, he or she alleges a sufficient reason for failing to previously raise those issues. ***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 In his postconviction motion, Walker alleges that had postconviction/appellate counsel forwarded the transcript of the adjournment hearing to him within two weeks of his request he would have been able to identify these potential issues in ***Walker I***. Instead, Walker received this transcript over eight months after we affirmed the judgment of conviction in ***Walker I***. In ***Walker II***, he raised the adjournment and prosecutorial misconduct issues, which we denied as procedurally barred by ***Escalona***. We do not know whether Walker properly alleged in ***Walker II*** that the reason he failed to identify these potential issues in ***Walker I*** was because he did not have the adjournment transcript, which revealed these precise issues. To afford Walker the benefit of the doubt, we address these issues.

¶7 The prosecutor requested an adjournment because five police officers, whom he intended to call as witnesses, were unavailable. In a further attempt to prevail on his adjournment motion, the prosecutor also claimed "[i]t [was his] understanding" that there was no speedy trial demand. Walker's counsel strenuously objected to the adjournment, although he did not mention the prosecutor's misunderstanding about the absence of a speedy trial demand. The trial court granted the adjournment after noting that Walker was already serving a six-year prison term.

¶8 We are not persuaded that the trial court would have denied the State's adjournment motion (and essentially dismissed the case without the testimony of the five police officers it presumably needed to prove its *prima facie* case) had it known about the speedy trial demand. First, Walker was serving a six-year sentence, which would presumably minimize the significance of a speedy

trial demand. Second, the trial was adjourned again, at the parties' behest.[4] Consequently, any compelling reason for ensuring that Walker had a speedy trial was marginalized by Walker's subsequent stipulation to an adjournment.

¶9 Walker's most significant complaint, however, was that his alleged alibi witness was available for the trial date that was adjourned at the State's request, but was subsequently unavailable (prompting his September, 1996 stipulation to adjourn) when this case was ultimately tried in December of 1996, resulting in Walker's conviction. Walker's alibi witness's subsequent absence was not known at the time of the State's motion to adjourn. What the trial court knew when it granted the adjournment, was that denying the motion would have presumably resulted in dismissing the charges, knowing that five of the State's (presumably key) witnesses were unavailable.

¶10 We analyze the effectiveness of counsel's assistance by "consider[ing] the law and the facts as they existed when trial counsel's conduct occurred." ***State v. Felton***, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983). Without the benefit of hindsight, trial counsel was not ineffective for not including this alleged alibi witness's potential unavailability as an additional basis for opposing the State's adjournment motion.

¶11 Walker alleges the general ineffective assistance of counsel as his reason for failing to raise particular aspects of the suppression and juror issues previously; he does not explain, however, why he did not previously raise those specific issues incident to the related issues he raised in ***Walker I*** and ***II***. Walker's

[4] The September 30, 1996 docket entry is, "[o]n stipulation of counsel, Court adjourn[]s Jury Trial."

general allegation does not overcome ***Escalona***'s procedural bar, particularly in the context of the wealth of issues Walker raised *pro se* in ***Walker I*** and ***II***. *See* ***Tolefree***, 209 Wis. 2d at 424. Insofar as Walker's request for discretionary reversal is concerned, the only context in which it is not procedurally barred by ***Escalona*** is as it relates to the unavailability of Walker's alleged alibi witness, arguably resulting from adjourning the trial at the State's request. For the reasons previously addressed, discretionary reversal is not warranted.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).