COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1720 **Cir. Ct. No. 1996CF965092**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM LEE BROWN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

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

¶1 PER CURIAM. William Lee Brown appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04) motion.[1] Brown contends the trial

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

court erred in ruling that his claims were procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Because Brown's claims were either raised in his direct appeal or could have been raised in his direct appeal, we conclude that the trial court did not err in ruling that Brown is procedurally barred from re-raising the claims in this appeal. Accordingly, we affirm.

BACKGROUND

¶2 In March 1997, following a bench trial, Brown was convicted of first-degree intentional homicide, theft from a person, and operation of a vehicle without the owner's consent. On April 11, 1997, he was ordered to serve a life sentence on the homicide count with concurrent sentences on the other offenses.

¶3 After sentencing, Brown, with new counsel, filed a motion seeking a new trial or sentence modification. He asserted in that motion that his waiver of a jury trial was invalid due, in part, to the ineffective assistance of his trial counsel. He also claimed that there was insufficient evidence to support the verdict and that the sentence imposed was excessive. The trial court denied the motion in November 1997.

¶4 Brown then appealed to this court and we affirmed the judgment of conviction and postconviction order in a decision dated August 17, 1999. On April 21, 2005, Brown filed a *pro se* postconviction motion under WIS. STAT. § 974.06, which is the subject of this appeal. He asserted three claims: (1) that he did not voluntarily waive his right to a jury trial; (2) that his trial counsel was ineffective; and (3) that his sentence was excessive. The trial court denied the motion, ruling that the claims were procedurally barred by ***Escalona-Naranjo***. Brown now appeals from that order.

DISCUSSION

¶5 Brown contends that the trial court should not have denied his motion based on ***Escalona-Naranjo***, that his constitutional and jurisdictional issues should supersede the procedural bar, and that he should not be penalized because counsel failed to raise issues in his first appeal. We reject Brown's contentions.

¶6 Other than the additional factual assertions in this appeal, Brown's claims are the same as those made in his original postconviction motion and direct appeal. Accordingly, he is procedurally barred from asserting them again. ***Escalona-Naranjo***, 185 Wis. 2d at 181. Even if we construed the claims to be different from those raised in the direct appeal, Brown is prohibited from filing repeated postconviction motions on grounds that could have been raised in his direct appeal. ***Id.*** Defendants are not permitted to pursue an endless succession of postconviction remedies:

> 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.

Escalona-Naranjo, 185 Wis. 2d at 185. Thus, claims which could have been, but were not, raised in a prior postconviction motion or on direct appeal, are procedurally barred unless a sufficient reason for failing to raise the issue is presented. ***Id.*** Here, Brown proffers two reasons why the procedural bar should not apply to him: he received ineffective assistance of counsel and constitutional claims should not be procedurally barred. We reject both in turn.

¶7 First, he claims that ineffective assistance provides a sufficient reason to avoid the procedural bar. Although Brown is correct that ineffective

assistance can provide a sufficient reason, such does not apply given the facts in this case. Here, postconviction counsel was different than trial counsel and did raise a claim in the direct appeal that trial counsel provided ineffective assistance. Accordingly, ineffective assistance of *trial* counsel *was* raised previously and therefore cannot be raised again. Brown's claim that the ineffective assistance of his postconviction counsel provides a sufficient reason to avoid the procedural bar also fails because Brown did not raise this issue in his postconviction motion to the trial court. Appellants cannot raise issues for the first time in the court of appeals because the trial court must be given an opportunity to review the issue. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). In addition, Brown does not contend that postconviction counsel was actually ineffective, but rather that postconviction counsel was unaware of certain facts which, under the circumstances here, fall far short of deficient performance.

¶8 Second, Brown claims that the ***Escalona-Naranjo*** procedural bar should not apply to constitutional claims. Our supreme court held in ***Escalona-Naranjo*** that the bar applies to claims of constitutional error, ***id.*** at 180-81, and this court is bound to apply supreme court precedent.

¶9 In sum, because the claims raised by Brown were either previously raised, or could have been previously raised, and because Brown failed to provide us with a sufficient reason to avoid application of the procedural bar, we affirm the trial court's order.

By the Court.—Order affirmed.

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