COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP73 **Cir. Ct. No. 1992CF920500**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDDIE CHARLES ROGERS,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Eddie Charles Rogers appeals *pro se* from an order summarily denying his motion for postconviction relief pursuant to WIS. STAT.

§ 974.06 (2005-06).[1] The issue is whether Rogers's reason for failing to raise this precise ineffective assistance of postconviction counsel claim is sufficient to overcome the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We conclude that it is not because his current claim is an indirect challenge to the effectiveness of trial counsel, which could have been litigated directly pursuant to WIS. STAT. RULE 809.30(2)(h) (1993-94), or indirectly pursuant to his habeas corpus petition pursuant to ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992); Rogers has not alleged a sufficient reason why this court should analyze trial counsel's effectiveness through the alleged ineffectiveness of postconviction counsel, when his substantive claim could have been litigated on direct appeal, or in the context of his habeas petition. Therefore, we affirm.

¶2 A jury found Rogers guilty of first-degree intentional homicide while armed with a dangerous weapon, and an attempt of that same offense. The trial court imposed a twenty-five-year sentence for the attempt, to run concurrent to the life sentence imposed for the homicide. The trial court set Rogers's parole eligibility date in 2032. Rogers sought postconviction relief pursuant to WIS. STAT. RULE 809.30(2)(h) (1993-94), and sentence modification, both of which the trial court denied. This court affirmed the judgments of conviction, and the two postconviction orders on direct appeal. *See* ***State v. Rogers***, No. 1993AP950-CR, unpublished slip op. at 2 (Wis. Ct. App. Apr. 19, 1994) ("***Rogers I***").

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 Approximately ten years later, Rogers filed a *pro se* petition for a writ of habeas corpus to challenge the effectiveness of appellate counsel for failing to challenge trial counsel's effectiveness in three respects on direct appeal. *See* ***Knight***, 168 Wis. 2d at 522. This court denied the petition ex parte because it did not consider an unexplained ten-year delay to be "speedy and prompt" as required for a habeas petition. *See* ***State ex rel. Rogers v. McCaughtry***, No. 2004AP268-W, unpublished slip op. at 3-4 (WI App Feb. 16, 2004) ("***Rogers II***") (quoting ***State ex rel. Beaudry v. Panosian***, 35 Wis. 2d 418, 426, 151 N.W.2d 48 (1967)).

¶4 Rogers now challenges postconviction counsel's effectiveness, pursuant to WIS. STAT. § 974.06, for failing to challenge trial counsel's effectiveness for raising a claim of self-defense at trial, rather than a provocation defense. Rogers's reason for failing to previously raise this issue was that he believed that he could not challenge trial counsel's effectiveness on direct appeal. Rogers claims that his current postconviction motion ("***Rogers III***") was his first opportunity to challenge postconviction counsel's effectiveness (which was simply an indirect attack on trial counsel's effectiveness). We disagree.

¶5 A postconviction movant must raise all grounds for postconviction relief on direct appeal (or in his or her original, supplemental or amended postconviction motion) unless, in a subsequent postconviction motion, he or she alleges a sufficient reason for failing to previously raise those issues. *See* ***Escalona***, 185 Wis. 2d at 185-86. The claimed ineffectiveness of postconviction counsel may constitute a sufficient reason to overcome ***Escalona***'s procedural bar. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) ("*It may be in some circumstances* that ineffective postconviction counsel constitutes a sufficient reason as to why an issue which could have been raised on direct appeal was not.") (emphasis added). 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 Rogers claims that trial counsel's strategic decision to claim self-defense rather than provocation was unreasonable, principally because his second shot negated any claimed self-defense. Rogers is not claiming that new or different evidence warrants the provocation defense or renders self-defense unreasonable.

¶7 Rogers's reason for failing to litigate this issue previously was his mistaken belief that he was required to first pursue a direct appeal before pursuing an ineffective assistance claim. Trial counsel's effectiveness may be challenged indirectly incident to that of postconviction or appellate counsel; however, the effectiveness actually being challenged here remains that of trial counsel and could have been raised previously.

¶8 Rogers could have pursued that claim by postconviction motion pursuant to WIS. STAT. RULE 809.30(2)(h) (1993-94), before pursuing a direct appeal. He also did not allege that particular ineffective assistance claim in his habeas petition against appellate counsel despite raising other similar indirect ineffective assistance claims. *See* ***Rogers II***, 2004AP268-W, unpublished slip op. at 1-2. Rogers's mistaken belief that he had to pursue a direct appeal (and implicitly a habeas petition) before filing a postconviction motion alleging postconviction counsel's ineffectiveness pursuant to WIS. STAT. § 974.06, is not sufficient or reasonable, and does not overcome ***Escalona***'s procedural bar. *See* ***Escalona***, 185 Wis. 2d at 185-86.

By the Court.—Order affirmed.

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