COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP433

Cir. Ct. Nos. 1990CF2712A
1990CF902665

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ONTARIO DEON FONDREN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Ontario Deon Fondren appeals from orders summarily denying his postconviction motions for resentencing and reconsideration. The issue is whether the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) applies to Fondren's

resentencing motion alleging a new factor. We conclude that Fondren's resentencing motion is procedurally barred by ***Escalona*** because the issues raised (or factors alleged) existed immediately after sentencing and could have been raised on direct appeal (or in Fondren's subsequent postconviction motion). Therefore, we affirm.

¶2 A jury found Fondren guilty of two counts of armed robbery, first-degree reckless injury, and attempted first-degree intentional homicide.[1] The trial court imposed the maximum consecutive sentences for these crimes: a ten-year sentence for the reckless injury, and consecutive twenty-year sentences for each of the other three crimes, resulting in a seventy-year aggregate sentence. Fondren moved for resentencing predicated on the trial court's failure to consider the sentencing guidelines. The trial court granted the motion, considered the sentencing guidelines, and resentenced Fondren to a seventy-year aggregate sentence, the same sentence that was originally imposed. Fondren moved for sentence modification, which the trial court denied. On direct appeal, Fondren challenged the judgments and the postconviction order, contending that the trial court erroneously exercised its sentencing discretion in three different areas: failing to explain why it imposed the maximum aggregate sentence, imposing an allegedly excessive sentence, and imposing a sentence that was disparate to those of his co-defendants. This court rejected all three sentencing challenges on their merits, and affirmed the judgments and postconviction order. *See* ***State v. Fondren***, Nos. 95-3260-CR and 95-3261-CR, unpublished slip op. (Wis. Ct. App. Sept. 4, 1996) ("***Fondren I***").

[1] Fondren was found guilty as a party to the crime of one of the armed robberies and the attempted homicide.

¶3 Fondren then sought resentencing pursuant to WIS. STAT. § 974.06 (1997-98), contending that his constitutional rights were violated when the trial court corrected an error in calculating sentence credit outside of Fondren's presence, and that his counsel was correlatively ineffective. The trial court summarily denied this motion as procedurally barred by ***Escalona***. On appeal, this court rejected all of Fondren's claims on their merits, and also explained why the trial court's recalculation of sentence credit (by correcting its mistakenly having granted dual credit on consecutive sentences) was correct and consequently nonprejudicial, obviating the ineffective assistance claim. *See* ***State v. Fondren***, No. 97-1439, unpublished slip op. at 2-3 (Wis. Ct. App. Aug. 28, 1998) ("***Fondren II***").

¶4 In his most recent postconviction motion for resentencing, again filed pursuant to WIS. STAT. § 974.06 (2005-06), Fondren claims that he was denied due process of law and is entitled to sentence modification for being resentenced on inaccurate information, namely that the resentencing court relied heavily on the assessment of the trial court that originally imposed sentence (without considering the sentencing guidelines). Fondren alleges that he failed to raise these issues previously because of the ineffective assistance of postconviction counsel. The trial court summarily denied the motion as procedurally barred by ***Escalona***, and explained that Fondren could have raised these specific claims in ***Fondren II*** because he was aware of them at that time, and had raised other ineffective assistance claims.

¶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 Fondren's challenges all relate to some aspect of the resentencing, where the trial court imposed the identical seventy-year aggregate sentence it had originally imposed, albeit this time after considering the sentencing guidelines. Fondren's reasons (ineffective assistance of postconviction counsel, his claimed ignorance of the law, and compelled reliance on a "jailhouse lawyer") are not sufficient to excuse his repeated failures to previously challenge sentences on grounds that existed at the time they were reimposed.

¶7 Fondren claims that ***Escalona*** does not procedurally bar sentence modification motions predicated on a new factor. *See* ***State v. Grindemann***, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507. ***Grindemann*** does not apply because Fondren's alleged new factor is not "new"; his criticisms were in existence from the time he was resentenced and could have been raised shortly after resentencing, namely in ***Fondren I*** or ***II***. We consequently conclude that

Fondren's current postconviction motion for resentencing is procedurally barred by ***Escalona***.[2]

¶8 Fondren sought reconsideration, alleging that he was unable to assert his reasons for failing to have previously raised these issues because he was attempting to comply with the page limit for postconviction motions. *See* Milwaukee County Cir. Ct. R. 427 (establishes twenty pages as the maximum length for a postconviction motion pursuant to WIS. STAT. § 974.06). In his reconsideration motion, he also alleges his reasons as his *pro se* status, his ignorance of the law, and his compelled reliance on a "jailhouse lawyer." The trial court denied his reconsideration motion because "it sets forth nothing which would alter the court's original decision."

¶9 The trial court decided ***Fondren II*** on the basis of ***Escalona***, explaining that "Fondren has offered no justification for failing to raise these issues in his prior motion or appeal. The court concludes these issues could have been raised and therefore declines to address them at this time." Consequently, Fondren was aware of ***Escalona***'s procedural bar. Moreover, the potential applicability of that procedural bar should have alerted Fondren to the necessity to explain why he did not raise these issues previously, particularly when he devoted pages of his current postconviction motion to renewing issues that we already decided in ***Fondren II***, such as his sentencing challenges.

[2] Fondren's criticisms relate to the resentencing hearing; he essentially criticizes the trial court for imposing the same sentence on resentencing as it did originally. His criticisms and the factors on which they are predicated existed after resentencing, and should have been apparent to him when he appealed from that resentencing order (in ***Fondren I***, and certainly by the time he filed ***Fondren II***). Some of Fondren's current claims are also barred as previously litigated in ***Fondren I*** and ***II***. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (we will not revisit previously rejected issues).

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).