COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP854 **Cir. Ct. No. 2002CF271**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO MAYS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed and cause remanded with instructions.*

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

¶1 PER CURIAM. Antonio Mays appeals from an order denying his motion for postconviction relief pursuant to WIS. STAT. § 974.06 (2005-06).[1]

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

Mays argues that: (1) the trial court abused its discretion when it denied his pretrial motion to suppress evidence gathered in a warrantless search; (2) the trial court violated his Fifth Amendment rights when it failed to charge him by grand jury indictment; and (3) his postconviction counsel was ineffective for failing to contest the fact that the judgment of conviction states he was convicted as a habitual criminal when he had never been so charged in this case. We affirm the trial court's order on issues one and two as barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). As to issue three, upon our review of the record, we determine that the reference in the judgment of conviction to WIS. STAT. § 939.62, habitual criminality, is a clerical error; therefore, we remand to the trial court to either correct or direct the court clerk to correct the judgment of conviction to accurately reflect that Mays was not convicted of or sentenced under § 939.62.

BACKGROUND

¶2 This appeal arises from Mays's conviction in June 2003 for armed robbery, use of force as a party to a crime, in violation of WIS. STAT. §§ 943.32(2) and 939.05 (2001-02). On December 24, 2001, two men entered a private residence, shot and killed a dog, ordered the occupants to lie on the floor, and took cash and presents. Mays and Lamarcus Jones were alleged to have committed those crimes.

¶3 Mays and Jones were initially tried together in August 2002. However, after several outbursts by Mays during the first two days of trial, the trial court accepted defense counsel's request for a mistrial and ordered Mays to undergo a mental health evaluation. Mays was subsequently declared competent to stand trial, and the State resumed its prosecution of Mays individually.

¶4 The trial court tried Mays on the original information,[2] which outlined two charges, and an additional information filed by the State based upon an automatic weapon obtained in a search of 3609 West Hampton Avenue, Mays's girlfriend's residence.[3] During the first trial, Mays's defense counsel moved the trial court to suppress the evidence obtained in this search. The trial court denied the motion, holding that Mays lacked standing to challenge the validity of the search. Mays represented himself at the second trial and renewed the motion to

[2] The original information listed the following counts:

> COUNT 01: ROBBERY-ARMED, USE OF FORCE, PARTY TO A CRIME
>
> On December 24, 2001, at 7825 W Fond Du Lac Av, City of Milwaukee, as party to a crime, with intent to steal, by the use or threat of use of a dangerous weapon did take property from the person of Alawn Allan, the owner, by using force against the person of the owner with intent thereby to overcome the said owner's physical resistance or physical power of resistance to the taking or carrying away of said property, contrary to Wisconsin Statute[] Section[s] 943.32(1)(a) & (2) and 939.05.
>
> COUNT 02: CRUELTY TO ANIMALS, WHILE ARMED
>
> On December 24, 2001, at 7825 W. Fond Du Lac Av, City of Milwaukee, while using a dangerous weapon, did intentionally treat an animal in a cruel manner resulting in the death of the animal, contrary to Wisconsin Statute[] Sections 951.02 and 951.18(1) and 939.63.

[3] After this search, the State filed an additional information, which added the following count:

> COUNT THREE
>
> CHARGE: POSSESSION OF FULL AUTOMATIC WEAPON
>
> On December 24, 2001, at 7825 W. Fond du Lac, City of Milwaukee, did intentionally and without consent knowingly possess a full automatic firearm contrary to Wisconsin Statute[] Section 941.26(1)(a).

suppress. The second trial court affirmed the previous court's denial of the motion.

¶5 At the close of the second trial, the jury found Mays guilty of Count One, armed robbery, use of force as a party to a crime, and acquitted Mays on Counts Two and Three. At sentencing, Mays was again represented by counsel, and the trial court heard from the State, Mays's counsel, and Mays himself. The State made a sentencing recommendation of twenty-five years (fifteen years' initial confinement and ten years' extended supervision) and specifically stated on the record that "[t]here are no statutory aggravating factors or penalty enhancers to be taken into account…. There also was not a statutory charged enhancer, nor is there one that had been uncharged or read in." The trial court, in its sentencing remarks, specifically noted that the Class B felony of which Mays had been convicted carried a maximum sentence of not more than sixty years. The trial court then sentenced Mays to twenty years, comprised of ten years' initial confinement and ten years' extended supervision.

¶6 Mays, through postconviction counsel, filed a motion for postconviction relief alleging that the order of a mistrial in the first case and the subsequent retrial was a violation of his constitutional guarantee against double jeopardy. The motion also alleged that his defense counsel in the first trial provided ineffective assistance. The trial court denied the postconviction motion, and we affirmed the judgment and order on the merits. *See* ***State v. Mays***, No. 04-1888-CR, unpublished slip op. (WI App Aug. 30, 2005).

¶7 On December 13, 2005, Mays, *pro se*, filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06. In that motion, Mays requested the trial court vacate the judgment of conviction on four grounds: (1) the

evidence was insufficient to support the conviction for armed robbery; (2) the conviction violated his guarantee against double jeopardy; (3) the request for a mistrial was the result of ineffective defense counsel; and (4) the trial court improperly convicted and sentenced him as a habitual criminal. The trial court denied the motion as barred by ***Escalona-Naranjo***. Mays did not appeal.

¶8 On March 15, 2006, Mays filed the two motions giving rise to this appeal. In the first motion (Motion I), Mays claimed he was denied his Fifth Amendment right to a grand jury indictment and that the trial court abused its discretion when it found that Mays lacked standing to contest the warrantless search of his girlfriend's residence. Mays did not, however, offer an explanation as to why he had not raised these issues in his earlier appeal and motion. The second motion (Motion II) requested a hearing and alleged that postconviction counsel had been ineffective for failing to raise the issue of improper conviction as a habitual criminal during Mays's initial appeal. Mays's judgment of conviction references habitual criminality, WIS. STAT. § 939.62, as part of his conviction.

¶9 In considering these motions, the trial court applied the claim of ineffective assistance of postconviction counsel raised in Motion II to the issues Mays raised in Motion I. The trial court noted that a claim of ineffective assistance of postconviction counsel can be a sufficient reason to overcome the ***Escalona-Naranjo*** bar. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). The trial court denied the motions, however, finding that because neither of the claims raised in Motion I had merit, postconviction counsel was not ineffective for failing to raise them. In its order, the trial court did not address Mays's claim of an improper conviction of habitual criminality. Mays appeals from this order.

DISCUSSION

*I. Issues raised in Motion I are barred by **Escalona-Naranjo***

¶10 WISCONSIN STAT. § 974.06 allows a defendant to attack his or her conviction after the time for appeal has lapsed.[4] ***Escalona-Naranjo***, 185 Wis. 2d at 176-77. However, the statute "compel[s] a prisoner to consolidate all grounds for relief, including constitutional grounds, in his or her original, supplemental or amended motion."[5] ***Id.*** at 183. A defendant is therefore barred from raising grounds for relief subsequent to an appeal or other postconviction motion unless there is a "sufficient reason" for why the claims were not raised initially. ***Id.*** at 185; *see also* ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756.

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[4] WISCONSIN STAT. § 974.06(1) states:

> After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

[5] WISCONSIN STAT. § 974.06(4) states:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

¶11 Mays contends that his constitutional rights were violated when the State charged him with an infamous crime (armed robbery) by information and not indictment by grand jury, as required by the Fifth Amendment of the United States Constitution. Mays also claims that the trial court abused its discretion when it denied his motion to suppress evidence obtained in the warrantless search of his girlfriend's residence because he had a reasonable expectation of privacy at that location.

¶12 The State argues that while the trial court was correct in denying Mays's postconviction motion, it erred in applying his claim of ineffective assistance of postconviction counsel in Motion II to Mays's claims in Motion I.

¶13 A review of Motion I reveals no reference to ineffective assistance of postconviction counsel or any other "sufficient reason" for failing to raise the issues contained therein on appeal in August 2005. In fact, while Motion I directly cites ***Escalona-Naranjo***, it fails to present such a reason. Mays also fails to provide a "sufficient reason" in his appellate brief. It was not until the State filed its response brief that Mays, in his late-filed reply brief, attempted to bootstrap the "ineffective assistance of postconviction counsel" claim to the first motion.

¶14 Because Mays has failed to provide an explanation, let alone a "sufficient reason," for his failure to raise the issues in Motion I in his "original, amended or supplemental" motion and appeal, we conclude that the issues of whether (1) Mays's constitutional rights were violated by the State's failure to charge Mays by grand jury indictment,[6] and (2) the trial court erroneously

[6] Mays's argument that he is constitutionally entitled to an indictment has no legal basis in the State of Wisconsin. ***Goyer v. State***, 26 Wis. 2d 244, 246, 131 N.W.2d 888 (1965) ("[T]he (continued)

exercised its discretion[7] in denying Mays's motion to suppress evidence obtained in the warrantless search of 3609 West Hampton Avenue,[8] are barred by WIS. STAT. § 974.06(4) and ***Escalona-Naranjo***. ***Lo***, 264 Wis. 2d 1, ¶44; ***Escalona-Naranjo***, 185 Wis. 2d at 185-86.

II. The judgment of conviction improperly contains a reference to habitual criminality, WIS. STAT. § 939.62

¶15 Mays argues that the judgment of conviction shows that he was convicted and sentenced as a habitual criminal under WIS. STAT. § 939.62. Mays states that this is in error and that the error improperly affected the trial court's determination of his sentence. While the State admits that the reference to habitual criminality in the judgment of conviction is an error, it contends that the error is clerical in nature and did not affect Mays's sentence. The State, during sentencing, noted that there were no penalty enhancers to consider, and the trial court made no reference to habitual criminality in its sentencing remarks. In its order denying Mays's postconviction motions, the trial court did not address the issue of an improper conviction of habitual criminality. We generally do not address issues on appeal that were not considered by the trial court. *See* ***State v.***

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law is well settled that the presentment or indictment requirements of the Fifth [A]mendment are not made applicable to the states by the Fourteenth [A]mendment.").

[7] Wisconsin courts no longer use the term "abuse of discretion" due to its negative connotations; instead, we analyze whether a court erroneously exercised its discretion. ***Hefty v. Hefty***, 172 Wis. 2d 124, 128 n.1, 493 N.W.2d 33 (1992). While the terms have changed, the analysis is the same. ***Id.***

[8] The trial court conducted an extensive hearing on the issue of Mays's standing to challenge the search and applied the correct standard in finding that Mays failed to meet his burden in establishing a reasonable expectation of privacy at 3609 West Hampton Avenue. *See* ***State v. Dixon***, 177 Wis. 2d 461, 467-69, 501 N.W.2d 442 (1993) (applying ***Rakas v. Illinois***, 439 U.S. 128 (1981)); ***State v. Trecroci***, 2001 WI App 126, ¶¶26, 35, 246 Wis. 2d 261, 630 N.W.2d 555.

Holland Plastics Co., 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983). However, in the interest of judicial economy and to help guide trial courts and litigants, we may address issues that have been fully briefed and are likely to arise in future appeals. ***Metropolitan Greyhound Mgmt. Corp. v. Wisconsin Racing Bd.***, 157 Wis. 2d 678, 693-94, 460 N.W.2d 802 (Ct. App. 1990); *see also* ***Hull v. State Farm Mut. Auto. Ins. Co.***, 222 Wis. 2d 627, 640 n.7, 586 N.W.2d 863 (1998). We choose to do so in this instance.

¶16 Wisconsin courts, in determining whether an error in the judgment of conviction is of a clerical or judicial nature, have long applied the standard set forth by ***Bostwick v. Van Vleck***, 106 Wis. 387, 82 N.W. 302 (1900):

> The test to be applied in determining whether an error in a judgment is of a judicial character, or a *mere clerical mistake which may be corrected in the court where it was made at any time* … is whether the error relates to something that the trial court erroneously omitted to pass upon or considered and passed upon erroneously, or a mere omission to preserve of record, correctly in all respects, the actual decision of the court, which in itself was free from error. If the difficulty is found to be of the latter character, *it may be remedied as a mere clerical mistake, which will not have the effect to change the judgment pronounced in the slightest degree*, but merely to correct the record evidence of such judgment.

Id. at 390 (emphasis added); *see also* ***State v. Prihoda***, 2000 WI 123, ¶15 n.6, 239 Wis. 2d 244, 618 N.W.2d 857. Because clerical errors are minor and mechanical in nature, it is within the discretion of the trial court to decide whether a hearing at which the defendant is present is necessary before correcting the error.[9] ***Prihoda***,

[9] In determining if a hearing is necessary,

> [t]he circuit court should exercise its discretion, considering the need for adversary proceedings to clarify the issue. The circuit court may consider such factors as the nature of the request, *the*

(continued)

239 Wis. 2d 244, ¶31. When a discrepancy exists between the unambiguous record of the trial court's pronouncement and the written judgment of conviction, the record controls. *See* ***State v Perry***, 136 Wis. 2d 92, 113, 401 N.W.2d 748 (1987); ***State v. Schordie***, 214 Wis. 2d 229, 231 n.1, 570 N.W.2d 881 (Ct. App. 1997). We review the trial court's discretionary actions under the erroneous exercise of discretion standard; the denial of a postconviction motion for relief without a hearing is not an erroneous exercise of discretion if the record conclusively demonstrates the defendant is not entitled to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996).

¶17 Mays contends that nowhere "in the … trial transcripts or … sentencing transcripts was there any clearification [sic] as to whether the … statute played a role in [sentencing]." Moreover, Mays states that had the error in the judgment of conviction not occurred, he would not have been sentenced to twenty years. We disagree.

¶18 Contrary to Mays's contention, the record very clearly evidences that he was not charged, convicted or sentenced as a repeater. To charge a defendant as a repeater under WIS. STAT. § 939.62, the State must include the charge in the information. ***Block v. State***, 41 Wis. 2d 205, 210, 163 N.W.2d 196 (1968) ("The allegation of recidivism is put in the information in order to meet the due-process requirements of a fair trial."). Neither the original nor additional information include a charge of habitual criminality. Additionally, the jury verdict

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> *state of the record, the ease by which the determination can be made that a clerical error occurred* and should be corrected, issues of equity, and the risk and cost of transporting the offender for the purpose of attending the hearing.

State v. Prihoda, 2000 WI 123, ¶31, 239 Wis. 2d 244, 618 N.W.2d 857 (emphasis added).

stated that Mays was guilty of Count One *as charged in the information*, and the State was explicit in its sentencing recommendation that there were no statutory penalty enhancers charged or read in. *See* ¶5 *supra*.

¶19 Moreover, the trial court at sentencing stated that the maximum penalty for the Class B felony of which Mays was convicted was sixty years.[10] If the court had been considering the habitual criminality enhancer, the maximum sentence Mays could have received would have been at least sixty-two years and as much as sixty-six years.[11] *See* WIS. STAT. § 939.62(1)(c). The trial court's statement, coupled with Mays's sentence of ten years' initial confinement and ten years' extended supervision, further evidences that the trial court did not take § 939.62 into account when sentencing Mays.

¶20 Upon our review of the record in its entirety, we determine that the inclusion of WIS. STAT. § 939.62 in the judgment of conviction is an error of a clerical nature. *See* ***Prihoda***, 239 Wis. 2d 244, ¶31. Accordingly, we remand to the trial court for its amendment of, or direction to the court clerk to amend, the judgment of conviction to reflect only those crimes for which Mays was convicted—armed robbery, use of force as a party to a crime, WIS. STAT. §§ 943.32(2) and 939.05 (2001-02). *See* ***Prihoda***, 239 Wis. 2d 244, ¶27 ("[T]he circuit court may either correct the clerical error in the … written judgment of conviction or direct the clerk's office to make such a correction.").

[10] WISCONSIN STAT. § 939.50(3)(b), "classification of felonies," states that the penalty "[f]or a Class B felony[is] imprisonment not to exceed 60 years."

[11] WISCONSIN STAT. § 939.62(1)(c) states, "A maximum term of imprisonment of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony."

By the Court.—Order affirmed and cause remanded with instructions.

Not recommended for publication in the official reports.