COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP734 **Cir. Ct. No. 1988CF880764**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DILLARD EARL KELLEY, SR.,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Dillard Earl Kelley, Sr. appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2005-06)[1] motion. He claims that the trial

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

court erred in denying his motion seeking to vacate his judgment and his motion for appointment of counsel. Because Kelley's claims are procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 179, 517 N.W.2d 157 (1994), we affirm.

BACKGROUND

¶2 In 1989, Kelley was convicted of seven counts of second-degree murder, four counts of arson of a building, two counts of arson of property and one count of arson with intent to defraud, all as party to a crime. After a trial to the court, Kelley was found guilty and sentenced to 229 years in prison. Kelley appealed his convictions, challenging "the admissibility of his drug-related activities at trial and the length of his sentence." We summarily affirmed the convictions, holding that the other acts evidence was properly admitted and the trial court did not erroneously exercise its sentencing discretion. *See* ***State v. Kelley***, No. 90-0014-CR, unpublished slip op. (Wis. Ct. App. Aug. 16, 1990).

¶3 In 1993, Kelley filed another postconviction motion, which was denied by the trial court and the denial affirmed by this court. In 1996, Kelley petitioned the trial court for a writ of habeas corpus, which was denied and the appeal related to that was also denied. In 2002, Kelley filed a petition for writ of habeas corpus, which was dismissed by the trial court. In 2004, Kelley filed a WIS. STAT. § 974.06 motion, which the trial court summarily denied, citing ***Escalona***. The trial court ruled that most of Kelley's claims were procedurally barred either because they were raised in a previous postconviction motion or because Kelley had failed to provide any sufficient reason for not having raised them previously. We affirmed the trial court's order and the supreme court denied Kelley's petition for review.

¶4 In 2007, Kelley filed a motion to vacate the judgment of conviction "pursuant to [WIS. STAT.] § 901.03(4)" and a motion seeking appointment of counsel. The trial court denied both motions, stating "the court does not appoint counsel for purposes of filing a 974.06 motion," and the claims Kelley raises are procedurally barred by ***Escalona***. Kelley now appeals from the trial court order denying his motions.

DISCUSSION

¶5 Kelley raises numerous issues in an essentially incomprehensible brief to this court. He appears to raise nine issues and asserts that his claims are not procedurally barred. We disagree.

¶6 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, 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.***

¶7 "[D]ue process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error." ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). Kelley was already afforded his single opportunity—during his direct appeal to this court—where the merits of his evidentiary claim were addressed and

rejected. Thus, he is procedurally barred from attempting to raise additional claims in his current appeal.

¶8 Moreover, Kelley does not proffer any sufficient reason for raising his claims in this motion rather than in prior motions. Rather, he argues that the procedural bar does not apply because he is raising a claim under WIS. STAT. § 901.03(4)[2] and he argues the procedural bar does not apply to that statute. We are not convinced. Kelley's motion is clearly a WIS. STAT. § 974.06 motion, subject to the procedural bar. Further, the single evidentiary claim Kelley raises, which is subject to § 901.03(4), was previously rejected by this court in his direct appeal, and therefore cannot be reconsidered here.

By the Court.—Order affirmed.

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

[2] WISCONSIN STAT. § 901.03 provides:

> **901.03 Rulings on evidence. (1)** EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected;
>
> ….
>
> (4**)** PLAIN ERROR. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.