COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP184 **Cir. Ct. Nos. 1997CF971163, 1997CF971353**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT MORALLE MADDEN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert Moralle Madden appeals, *pro se*, from an order denying his WIS. STAT. § 974.06 (2005-06)[1] motion seeking to withdraw his guilty plea and alleging ineffective assistance of counsel. Madden claims that his trial counsel provided ineffective assistance by failing to explain the consequences of "read-ins," for failing to object to the State's alleged violation of the plea agreement, and for failing to raise an issue related to an inaccuracy in the presentence investigation report. Madden argues that his postconviction counsel provided ineffective assistance for failing to raise these claims regarding his trial counsel's failures. Because Madden's ineffective assistance claims are procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and because Madden waived his right to review on the claimed inaccuracy in the presentence investigation report, we affirm.

¶2 In 1997, Madden pled guilty to and was convicted of two counts of armed robbery and one count of robbery. He was sentenced to a total of sixty years in prison. In 1999, with the assistance of postconviction counsel, Madden filed a motion seeking to withdraw his guilty pleas, alleging that his trial counsel provided ineffective assistance, and failed to advise him of the effect of "read-ins," among other issues. We rejected Madden's claim and affirmed the judgment in ***State v. Madden***, No. 99-1956-CR, unpublished slip op. (WI App Oct. 3, 2000).

¶3 In 2006, Madden, again with the assistance of counsel filed a WIS. STAT. § 974.06 motion seeking to withdraw his guilty pleas on the basis that postconviction counsel provided ineffective assistance. The trial court denied the

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

motion, following a hearing. Madden filed a motion seeking reconsideration, which was also denied. He now appeals from those orders.

DISCUSSION

¶4 Madden contends in this appeal that his trial counsel provided ineffective assistance in a variety of ways, and that his postconviction counsel was remiss in not asserting these issues in his first appeal. With the exception of the inaccuracy of the presentence investigation report, however, the record refutes Madden's assertions.

¶5 During Madden's first appeal, his postconviction counsel asserted that Madden's trial counsel provided ineffective assistance for the same reasons Madden re-raises here. 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 were raised previously, or 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.*** "[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). Madden provides as his "sufficient reason" that his postconviction motion failed to assert the specific instances of trial counsel's deficient conduct. The record, however, refutes

Madden's contention as it demonstrates that postconviction counsel did, in fact, assert that trial counsel provided ineffective assistance for the same reasons that Madden asserts here. This court rejected those alleged failures in the previous appeal to this court.

¶6 Accordingly, Madden's claims regarding trial counsel's failures and postconvicton counsel's ineffectiveness are procedurally barred as they have already been raised and rejected.

¶7 The only exception to this conclusion is Madden's claim that trial counsel failed to raise the inaccuracy in the presentence investigation report, and that the trial court relied on the inaccuracy when it sentenced Madden. This claim was not raised in the earlier appeal and therefore will be addressed by this court.

¶8 Madden argues that the presentence investigation report erroneously referred to his attempt to incite a serious disruption while imprisoned at Kettle Morraine Correctional Institution. Madden points out that he successfully expunged that incident from his record, and therefore it should not have been considered by the trial court. Madden, however, failed to raise this issue during his sentencing, and therefore has waived this claim. ***State v. Groth***, 2002 WI App 299, ¶¶25-26, 258 Wis. 2d 889, 655 N.W.2d 163, abrogated on other grounds by ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1.

¶9 Madden was afforded an opportunity to review and contest the information in the presentence investigation report, but neither he nor his attorney made any changes or corrections to it. As indicated in the record:

> [DEFENSE COUNSEL]: Your Honor, this morning I had an opportunity to read through the presentence investigation report with my client, line by line, go through every page; and he indicated to me that he has no additions or corrections to that report.
>
> THE COURT: Is that so, Mr. Madden, did you review the presentence report with [defense counsel]?
>
> MR. MADDEN: Yes, Your Honor.
>
> THE COURT: And are there any corrections that you would like me to take note of on the, with respect to what's in the presentence report?
>
> MR. MADDEN: No, Your Honor.
>
> THE COURT: No?
>
> Any additions, anything you think should have been included that isn't in the presentence report?
>
> MR. MADDEN: No.

Madden knew that the Kettle Morraine incident had been expunged as he had fought to get the expungement. He also acknowledged that he reviewed the presentence investigation report and that there was nothing that needed correcting. The time to advise the trial court of the error was when the trial court directly addressed Madden. Failure to raise the issue at that time constitutes waiver. ***State v. Leitner***, 2001 WI App 172, ¶41, 247 Wis. 2d 195, 633 N.W.2d 207 (failure to raise issue of expunged convictions during trial court proceeding constitutes waiver). Based on the foregoing, we conclude that Madden waived the right to raise this issue by failing to advise the trial court of the expungement at the time of sentencing.

¶10 We also agree with the State's argument that even if Madden had not waived this issue, it is without merit as the trial court did not rely on the expunged incident when imposing sentence. The expunged incident was merely mentioned

by the trial court as one example of Madden's poor "track record" in correctional settings and was not specifically relied upon by the trial court in determining Madden's sentence. Accordingly, Madden cannot satisfy the burden set forth in ***Tiepelman***, 291 Wis. 2d 179, which requires a defendant to show both that the information was inaccurate *and* that the trial court actually relied on the inaccurate information in determining the sentence. ***Id.***, ¶¶2, 9, 26.[2]

By the Court.—Orders affirmed.

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

[2] Because the trial court did not rely on the inaccurate information, neither trial counsel, nor postconviction counsel were deficient in failing to raise this issue. In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37. Here, because we have concluded that the erroneous information in the presentence investigation report did not adversely affect the sentencing, Madden was not prejudiced by either counsel's failure to raise this issue and therefore any ineffective assistance claim on this basis is without merit.