COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP729 **Cir. Ct. No. 1996CF963555**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL ALLEN CHESIR,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Wedemeyer[1] and Kessler, JJ.

[1] This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 PER CURIAM. Michael Chesir appeals from a circuit court order denying his WIS. STAT. § 974.06 (2005-06) [2] postconviction motion by which he sought a new trial on the basis of newly-discovered evidence and on the basis of ineffective assistance by trial and appellate counsel. We conclude that Chesir's motion was procedurally barred because he twice previously sought postconviction and appellate relief and did not articulate an adequate reason for failing to raise these issues in those previous postconviction proceedings. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (postconviction claims that could have been raised in prior postconviction or appellate proceedings are barred absent a sufficient reason for failing to raise the claims in the earlier proceeding). We therefore affirm the circuit court's order.

¶2 In 1996, Chesir lived with his wife, Danita, their two daughters, and Danita's daughter, Nicole. Nicole accused Chesir of sexually assaulting her, and Chesir was charged with two counts of second-degree sexual assault and two counts of child enticement.[3] A jury found Chesir guilty on all counts.

¶3 Chesir sought postconviction relief in the circuit court, which was denied, and he appealed to this court. In an opinion released February 15, 2000, we affirmed the judgment of conviction and postconviction order. The supreme court denied review.

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

[3] The circuit court ordered Chesir to avoid any pretrial contact with either Danita or Nicole. He repeatedly disregarded that order, which led to additional charges of witness intimidation. Chesir's convictions on these charges are unrelated to the issues in this case, however, and we need not discuss them further.

¶4 In April 2001, Chesir, by counsel, filed a motion for postconviction relief under WIS. STAT. § 974.06, "on similar grounds as those submitted in the prior pleadings on appeal," and also "upon grounds of newly-discovered evidence." The basis of this latter claim was Chesir's contention that trial and appellate counsel had provided him ineffective assistance. More specifically, Chesir argued that the circuit court had erred in permitting introduction of "other acts" evidence against him, and that appellate counsel had been ineffective for failing to raise and brief the issue adequately. The circuit court denied the motion, Chesir appealed, but subsequently dismissed the appeal voluntarily.

¶5 In December 2005, Chesir, by counsel, filed the motion that is the subject of this appeal. He again raised claims of ineffective assistance of trial counsel, this time arguing that counsel was ineffective for failing to object when the State improperly introduced evidence of Nicole's prior sexual conduct,[4] and engaged in improper argument to the jury. He also argued that postconviction and appellate counsel had been ineffective for failing to raise these issues. The circuit court rejected Chesir's claims on the merits.

¶6 On appeal, the State argues that this court need not reach the merits of Chesir's claims and should instead conclude that Chesir's motion was procedurally barred under ***Escalona-Naranjo***. *See* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985) (appellate court may sustain lower court's holding on theory or reason not presented to lower court). Chesir, in reply, argues that the WIS. STAT. § 974.06 motion he filed in 2001 should not be

[4] Chesir argued that counsel should have objected to introduction of evidence regarding Nicole's virginity and his attempt to have Nicole take birth control.

considered by the court because it "did not affirmatively raise any substantive issues, and was instead an explicit, if mistaken, attempt to toll federal habeas time limits." He also argues that his motion should not be barred by ***Escalona-Naranjo*** because his latest motion "does not raise any issues that have been previously adjudicated," and because he has provided a sufficient reason for his failure to raise these issues on direct appeal—namely, the ineffective assistance of postconviction and appellate counsel for failing to raise them. We disagree.

¶7 In ***Escalona-Naranjo***, the supreme court, noting that WIS. STAT. § 974.06(4) states that any ground for appeal not raised "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," held:

> 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.
>
> We simply apply the plain language of subsection (4) which requires a *sufficient reason* to raise a constitutional issue in a sec. 974.06 motion that *could have been raised* on direct appeal or in a sec. 974.02 motion.

Escalona-Naranjo, 185 Wis. 2d at 185 (emphasis added).

¶8 ***Escalona-Naranjo*** is on point and dispositive. In that case, Escalona-Naranjo was convicted of crimes and pursued postconviction relief and a direct appeal in this court. He subsequently filed another postconviction motion under WIS. STAT. § 974.06, alleging ineffective assistance of counsel for counsel's failure to object to admission of "certain evidence and testimony." ***Escalona-Naranjo***, 185 Wis. 2d at 175. The supreme court concluded that Escalona-Naranjo's claim of ineffective assistance of counsel was not, in and of itself, a

sufficient reason for failing to raise it in earlier postconviction and appellate proceedings. ***Id.*** at 186. Therefore, the claim was procedurally barred.

¶9 In this instance, prior to filing the postconviction motion that is the subject of this appeal, Chesir sought postconviction relief and an appeal under WIS. STAT. RULE 809.30. When those efforts proved unsuccessful, he sought postconviction relief under WIS. STAT. § 974.06. Although Chesir now contends that first § 974.06 motion was simply "an attempt to toll federal habeas time limits," the fact remains that Chesir has failed to provide a reason sufficient to overcome the procedural bar of ***Escalona-Naranjo***. Chesir's argument that the bar does not apply because the issues raised have not been litigated and they are raised in the context of a claim of ineffective assistance by trial and appellate counsel is unavailing. Chesir has not yet demonstrated why the issues raised in his second § 974.06 motion—including his ineffective-assistance claims—could not have been raised four years earlier in his first § 974.06 motion.

By the Court.—Order affirmed.

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