COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-3463 **Cir. Ct. No. 84-CF-193**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR T. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Victor Williams appeals from an order denying his postconviction motion brought under WIS. STAT. § 974.06 (1999-2000).[1] He raises a number of issues. We affirm.

¶2 In 1984, Williams entered no-contest pleas to three felony counts and was sentenced to the maximum sixteen years in prison on each count. He did not pursue a direct appeal under WIS. STAT. RULE 809.30 and § 974.02. Williams filed the postconviction motion now before us in 2000, and the court denied it without holding an evidentiary hearing.

¶3 On appeal, the State argues that Williams' motion should be barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We decline to apply ***Escalona-Naranjo*** in this case. In the circuit court the State did not argue that the motion should be barred by ***Escalona-Naranjo***, and, therefore, we ordinarily decline to apply it because Williams has not had the opportunity to explain why he did not raise the current issues in an earlier motion or appeal. ***State v. Avery***, 213 Wis. 2d 228, 247-48, 570 N.W.2d 573 (Ct. App. 1997). Furthermore, this is Williams' first postconviction motion under either WIS. STAT. RULE 809.30 or § 974.06. ***Escalona-Naranjo*** bars second motions, not first ones.

¶4 Williams argues that he should be allowed to withdraw his pleas on the ground that they were not knowing, voluntary, and intelligent because he did not know that the repeater enhancements on each of his sentences would increase the total possible sentence to forty-eight years, instead of the unenhanced total of

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

thirty years. During the plea colloquy the circuit court misstated the total sentence as thirty years and the plea questionnaire did not state the penalties.

¶5 In reviewing Williams' postconviction motion, the circuit court concluded that because of the court's erroneous statement of the penalty, the plea colloquy did not comply with the requirements of ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).[2] Following ***Bangert***, the court concluded that Williams must allege in his postconviction motion that he did not actually know or understand the information that should have been provided at the hearing. *See* ***id.*** at 274. The court found that Williams' motion did not make this allegation.

¶6 On appeal, Williams argues that he did allege that he did not know about the potential eighteen years as a repeater. His brief lists the places in his postconviction motion where he believes he made this allegation. However, none of those passages can reasonably be read as making the allegation.

¶7 Williams also argues that he made this allegation in his brief to the circuit court. His circuit court brief was filed when the court ordered further briefing on the question of the plea colloquy. Williams is correct that his brief to the circuit court unambiguously contains this allegation; however, we conclude that allegations in a circuit court brief are not sufficient, and do not amend or supplement the motion itself. In the leading case on whether an evidentiary hearing is required, the court discussed that the allegation must be made in the "motion." *See* ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 313, 548 N.W.2d 50 (1996). This is a reasonable requirement because if the allegation is not made in the

[2] We note that the plea colloquy in this case actually preceded ***Bangert***, but on appeal neither party has argued that it should not be applied here.

motion, the circuit court might simply deny the motion as facially deficient, without ordering briefs, and therefore defendants should not come to rely on briefs to augment deficient pleadings. Second, a defendant's lack of understanding, and a decision to plead based on that lack, is the key rationale for permitting plea withdrawal, and it is reasonable to require a defendant to make this allegation in his or her motion. In addition, if the defendant is permitted to make the allegation in a reply brief, it comes too late for the State to show why his or her statement is refuted by the record. Therefore, we conclude that Williams' claim was properly denied without a hearing.[3]

¶8 Williams next argues that his trial counsel was ineffective. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if a defendant makes an inadequate showing on one. ***Id.*** at 697.

¶9 Williams argues that his counsel was ineffective because he failed to pursue a possible intoxication defense. Williams alleged that he "had an unconscious mind" at the time of the offenses, after drinking eight beers and brandy that evening. He further describes himself as "not aware of committing [the crimes] because of the beers and liquor." To establish the defense of intoxication, a defendant must show that his intoxication was so severe as to

[3] In addition, we note that the remedy Williams is requesting on this issue is for the additional eighteen years to be removed from his sentence. That would not be the remedy if Williams' plea was not knowing, voluntary, and intelligent. Rather, his remedy would be withdrawal of the plea, which would mean the case would be returned to its pre-plea status, with all the original charges against him restored.

negate the existence of a state of mind essential to the crime. WIS. STAT. § 939.42(2).

¶10 The State argues that Williams offers no objective support for his claim that an intoxication defense should have been pursued. There is at least some evidence in the record that Williams was intoxicated at the time of the offense. However, other than Williams' own assertion, there is no indication, either within his motion or in the existing record, that his intoxication was so extreme as to make an intoxication defense plausible. To the contrary, his own version of the offense, as told to a psychologist who prepared a presentence report at the request of Williams' trial counsel, shows that while alcohol may have impaired his judgment, he was not sufficiently intoxicated for an intoxication defense. This claim was properly denied.

¶11 Williams also argues that his counsel was ineffective in several other ways, that there were certain deficiencies at his arraignment, and that his plea should be vacated because he did not enter it personally. We have reviewed the arguments and the record on these claims, and conclude they were also properly denied.

By the Court.—Order affirmed.

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