COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2230 **Cir. Ct. No. 2001CF1303**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM P. HAESSLY,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. This is the second appeal to this court arising out of William Haessly's conviction for party to the crime of first-degree intentional homicide. In the present action, Haessly appeals the denial of a postconviction

motion filed under WIS. STAT. § 974.06 (2005-06),[1] and an order denying his motion for reconsideration. We affirm the orders for the reasons discussed below.

BACKGROUND

¶2 Lorraine Molnar was beaten to death in her home on November 28, 1992. The police received numerous tips about a number of people who may have made negative comments about Molnar or behaved suspiciously or violently before or after her death, but the police were not able to connect any physical evidence from the scene to any suspect. More than eight years later, after obtaining statements from a number of people who claimed that William Haessly or Thaddeus Rudnicki had made statements about the crime to them over the years, the State issued a complaint against Haessly charging him with being party to the crime of felony murder for having killed Molnar during the commission of a robbery with Rudnicki. Haessly was arrested in Tennessee, interrogated there, and brought back to Wisconsin to face the felony murder charge—which was subsequently amended to first-degree intentional homicide.

¶3 Haessly's first attorney indicated to the court that Haessly would be challenging the voluntariness of his Tennessee statement due to mental illness, based on two past NGI determinations and other mental health records. At the suppression hearing, however, Haessly testified and successor counsel argued only that Haessly did not understand his rights because he was tired and intoxicated during the interrogation, having come off a twelve-hour shift and having drunk a quart of beer along with taking Tylenol with codeine. The court denied the

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

motion, accepting as true evidence showing that Haessly had not been interrogated until the day after he was arrested and, therefore, he was not intoxicated or sleepless.

¶4 At trial, the defense position was that Rudnicki had likely committed the crime himself and had only accused Haessly to shift blame and reduce his own sentence, since a felony murder charge against Rudnicki was reduced to conspiracy to commit burglary in exchange for Rudnicki's testimony. In addition to relying on Rudnicki and Haessly's statements, the State's position was that a series of inmates and ex-girlfriends who had testified could not have known details of the murder unless Rudnicki and/or Haessly had communicated those details to them, and that none of the witnesses other than Rudnicki got any concessions from the State or had any other grudges or motives to falsify their testimony. Rudnicki denied any personal involvement in the murder, but testified that he immediately suspected Haessly when he heard about the murder because they had just been casing the victim's house and Haessly showed up with an injured hand and junk jewelry to sell the day after the murder. Haessly took the stand and denied the murder, but admitted that he and Rudnicki had discussed burglarizing the victim's house and had cased it on a prior occasion. Haessly also conceded that he had been at or in the victim's house on four occasions, and that he had cuts on his hand during a conversation that he had with Rudnicki in his van around the time of the murder. Haessly provided an alibi witness who testified that Haessly "might" have been at his house the day of the murder, but who also said he was not going to give Haessly an alibi "for something like that." The State also produced testimony about Haessly's Tennessee statement in which Haessly admitted that the last time he was in the victim's house was on the day of the murder and Rudnicki's statement that he and Haessly had discussed never leaving a witness

alive again after they were caught on a prior burglary. The jury returned a guilty verdict, and then filled out an amended verdict form and affirmed their votes by individual polling after a defect was discovered in the originally submitted verdict form.

¶5 In his original postconviction motion and direct appeal, Haessly challenged the charging delay, the amendment of the charge to first-degree intentional homicide, statements made by the prosecutor during closing argument, and a defective verdict form. After we affirmed and the Wisconsin Supreme Court denied review, Haessly filed a habeas corpus petition in federal court challenging the delay in charging; the amendment of the charges; the admission of other acts evidence; and counsel's alleged failure to investigate other potential suspects, failure to object to the prosecutor's closing argument, failure to obtain a competency determination, and failure to contest the legality of Haessly's arrest. The federal district court determined that Haessly had not exhausted his claims for ineffective assistance of counsel, and that he had good cause at least for failing to earlier raise the claim relating to investigation of additional witnesses because he did not obtain the police reports until 2005 and may also have been mentally ill during prior postconviction proceedings. The district court therefore stayed the federal action pending further state action.

¶6 Haessly then filed the WIS. STAT. § 974.06 motion that is the subject of this appeal. The motion claimed: (1) ineffective assistance of trial counsel for failing to investigate other suspects; (2) ineffective assistance of trial counsel for failing to raise competency either at Haessly's suppression hearing or as an NGI defense; (3) trial court error in allowing other bad acts evidence; and (4) ineffective assistance of trial counsel for failing to challenge Haessly's arrest and extradition from Tennessee. The circuit court found that these claims were

both procedurally barred by ***Escalona-Naranjo*** and also insufficient on their face to warrant a hearing under ***Bentley***. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); ***State v. Bentley***, 201 Wis. 2d 303, 308-10, 548 N.W.2d 50 (1996).

STANDARDS OF REVIEW

¶7 WISCONSIN STAT. § 974.06(1) permits a defendant to challenge a sentence, after the time for seeking a direct appeal or other postconviction remedy has expired, "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." Section 974.06(4) limits the use of this postconviction procedure, however, in the following manner:

> 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.

¶8 The purpose of subsection (4) of WIS. STAT. § 974.06 is "to require criminal defendants to consolidate all their postconviction claims into one motion or appeal." ***Escalona-Naranjo***, 185 Wis. 2d at 178 (emphasis deleted). Successive motions and appeals, including those raising constitutional claims, are procedurally barred unless the defendant can show a "sufficient reason" why the newly alleged errors were not previously or adequately raised. ***Id.*** at 185.

Furthermore, issues that have already been considered on direct appeal cannot be raised in a subsequent motion for relief under § 974.06. *See* ***State v. Rohl***, 104 Wis. 2d 77, 96, 310 N.W.2d 631 (Ct. App. 1981); *see also* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (an appellant may not relitigate matters previously decided, no matter how artfully rephrased).

¶9 We will independently review whether claims are procedurally barred. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). We will also independently determine whether a postconviction motion has alleged sufficient facts to warrant an evidentiary hearing. *See* ***Bentley***, 201 Wis. 2d at 308; ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 36, 274 Wis. 2d 568, 682 N.W.2d 433.

DISCUSSION

¶10 With regard to the procedural bar of ***Escalona-Naranjo***, most if not all of Haessly's current issues could have been raised in his original postconviction motion. Also, Haessly failed to explain to the circuit court what "sufficient reason" he had for failing to raise the present issues earlier. However, in light of the federal court's statement that Haessly may have had good cause for his earlier omissions, its stay pending further state court action, and Haessly's attachment of the federal decision to his WIS. STAT. § 974.06 motion, we are concerned that Haessly may not have understood that he needed to reiterate his reasons for failing to earlier raise the issues in the § 974.06 motion. Since the State has not addressed either Haessly's claim that his receipt of the discovery materials was delayed, or his contention that he has been incompetent for a portion of the time since his conviction, we decline to decide the present appeal on the

basis of ***Escalona-Naranjo*** and instead will consider the sufficiency of the postconviction motion itself.

¶11 Evaluating the sufficiency of the postconviction motion requires determining whether Haessly's allegations regarding counsel's performance, if true, would rise to the level of ineffective assistance.

> The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citations omitted).

¶12 Haessly's first ineffective-assistance-of-counsel claim regarding lack of investigation fails both on the performance and prejudice prongs because the tips discussed in the police reports had already been followed up on and did not lead to any exculpatory evidence. In other words, the tips turned out to be dead ends that would not have suggested any obvious additional lines of investigation by counsel. Moreover, Haessly has not alleged what, if any, additional useful information counsel could have obtained even if he had conducted additional interviews of the tipsters. Haessly also claims that counsel should have left "no stone unturned" in interviewing other inmates, and presents an affidavit from an

inmate named Wolfe who now claims he overheard Rudnicki bragging about framing Haessly in retaliation for another incident. Haessly, however, provides no reason why counsel would have known about Wolfe at the time of trial. Adequate performance by counsel does not require conducting a fishing expedition by interviewing all inmates of every jail or prison where either Haessly or Rudnicki was incarcerated.

¶13 To the extent that the Wolfe affidavit might qualify as newly discovered evidence rather than the basis for an ineffective assistance claim, the rule is that evidence which does no more than address the credibility of one of the witnesses is not sufficient to show the likelihood of a different result on retrial. *See* ***Simos v. State***, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972). Wolfe is not offering firsthand knowledge of the murder itself; he is only offering to provide testimony that might show that a state witness was lying or had a reason to lie.

¶14 Haessly's second claim regarding counsel's failure to use his mental health records at the suppression hearing fails on the prejudice prong since Haessly testified at the suppression hearing that he did in fact understand his rights and did not claim that he was having mental problems during his interviews. We also see no deficient performance in counsel's failure to pursue an NGI defense while Haessly was denying that he had anything to do with the crime. It was reasonable to choose one line of defense or the other. In addition, Haessly does not allege that any current expert would testify that Haessly was incompetent either at the time of the crime or when giving his statements.

¶15 Haessly's third claim regarding other act evidence fails because evidentiary decisions are outside of the constitutional scope of WIS. STAT. § 974.06. *See* ***State v. Lo***, 2003 WI 107, ¶24, 264 Wis. 2d 1, 665 N.W.2d 756

(issues such as the sufficiency of the evidence, jury instructions, errors in the admission of evidence, and other procedural errors cannot be raised in a § 974.06 motion because they do not raise constitutional or jurisdictional questions).

¶16 Haessly's fourth claim, alleging that his counsel failed to challenge his arrest and extradition from Tennessee, fails on the performance prong. He asserted that he did not get to see his arrest warrant until after his extradition and he challenges the credibility of the witness statement providing probable cause. These assertions do not, by themselves, provide legal grounds to invalidate the arrest.

By the Court.—Orders affirmed.

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