COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1481 **Cir. Ct. No. 2002CF3088**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHUN WARREN,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Shun Warren, *pro se*, appeals from an order denying a motion for postconviction relief filed under WIS. STAT. § 974.06

(2007-08).[1] Because Warren's claims are either procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), or because they have already been litigated on appeal, *see* ***Peterson v. State***, 54 Wis. 2d 370, 381, 195 N.W.2d 837 (1972), we affirm.

BACKGROUND

¶2 Warren pled no contest to a charge of first-degree reckless homicide by use of a dangerous weapon, party to a crime. Warren was initially charged with first-degree intentional homicide arising from the killing of Dashan Morrow. The criminal complaint alleged that Warren had set up a drug purchase from Morrow and that Warren was planning to rob Morrow. When Morrow arrived at the appointed time and place for the drug transaction, Warren got into Morrow's car. A struggle ensued, and Warren shot Morrow several times with a .22 caliber handgun that Warren had with him. Warren negotiated a reduction in the charge to first-degree reckless homicide, denying that he intended to rob Morrow and claiming that he could not remember the precise facts of the fight with Morrow because he was under the influence of drugs.

¶3 Prior to sentencing, Warren moved to withdraw his plea. Among other things, Warren claimed that he had not read the criminal complaint which formed the factual basis for the plea and, therefore, his plea was not knowingly and voluntarily made. In particular, Warren claimed he was not aware that the criminal complaint alleged that he planned to rob Morrow, an allegation that he argued was inaccurate. Warren blamed his former trial attorney for not providing

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

him with a copy of the criminal complaint before the plea hearing. Warren also argued that his former trial attorney had coerced him into entering a plea, because she told him that if he went to trial, he had no defense and he would be sentenced to life in prison.

¶4 The circuit court denied the plea-withdrawal motion. The circuit court reviewed the plea colloquy and noted that it had reviewed the specific allegations of the complaint with Warren because Warren claimed intoxication and lack of memory of the incident. The circuit court stated that it "can't even find one shred of evidence or reason that this plea should be withdrawn other than the fact that Mr. Warren changed his mind." The circuit court also noted that the reference in the complaint that Warren intended to rob Morrow had been rendered irrelevant by the reduction in the charge to first-degree reckless homicide, a crime that does not include an element of intent. Subsequently, the court imposed a forty-year sentence, comprised of thirty years of initial confinement and ten years of extended supervision.

¶5 Warren filed a direct appeal of his conviction, and he renewed his plea-withdrawal argument. In affirming Warren's conviction, this court stated:

> Here, not only was the plea colloquy more than adequate to establish that Warren entered his plea knowingly, intelligently, and voluntarily, Warren's main reason for wishing to withdraw the plea – that he had not had a chance to read the complaint and, as a result, he was unaware that the complaint included an allegation that he intended to rob Morrow – was irrelevant to the charge to which he pled. Although Warren contended in his postconviction motion and repeats on appeal that it is uncertain whether he "had the requisite state of mind for the charge of reckless homicide," it is clear that first-degree reckless homicide has no "state-of-mind" element. To support that charge, there must be allegations of criminally-reckless conduct that show utter disregard for human life. WIS JI—CRIMINAL 1020 (2002). As the record shows, Warren was intoxicated

> and carrying a loaded gun when he got in Morrow's car to buy marijuana. These undisputed facts alone establish that Warren engaged in reckless conduct. Warren and Morrow struggled for some reason, Morrow was shot, and Warren left the car with a package of marijuana and did nothing to summon help for Morrow. These facts, taken together, establish that the circumstances of the crime showed utter disregard for human life. Thus, the facts Warren admitted support the charge to which he pled.

State v. Warren, No. 2005AP2493-CR, unpublished slip op. at 5 (WI App Apr. 11, 2005) (***Warren I***).

¶6 Warren next sought postconviction relief under WIS. STAT. § 974.06. Warren again sought to withdraw his no-contest plea, arguing that his trial attorney "coerced" him into pleading when she did not tell him that there were witnesses to his struggle with Morrow, and when she told him that if he did not accept the State's plea offer, he faced a first-degree intentional homicide charge and life in prison. Warren also argued that his trial attorney was ineffective because she did not obtain a psychological examination of him until after the plea, despite knowing that he had mental health problems. Finally, Warren argued that his sentence was harsh because the court held his plea-withdrawal motion against him. The circuit court denied the motion. Warren appeals, and he raises the same arguments as he did in the circuit court.

DISCUSSION

¶7 A defendant cannot raise an argument in a subsequent postconviction motion that was not raised in a prior postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. A defendant must "raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." ***Id.*** at 185; *see also* WIS. STAT. § 974.06(4)

("Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived … in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion," absent sufficient reason.).

> [A] criminal defendant [is] required to consolidate all postconviction claims into his or her original, supplemental, or amended motion. If a criminal defendant fails to raise a constitutional issue that could have been raised on direct appeal or in a prior § 974.06 motion, the constitutional issue may not become the basis for a subsequent § 974.06 motion unless the court ascertains that a sufficient reason exists for the failure either to allege or to adequately raise the issue in the appeal or previous § 974.06 motion.

State v. Lo, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756 (citations omitted). The procedural bar is driven by the "need [for] finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185.

¶8 To avoid the procedural bar of ***Escalona-Naranjo***, Warren couches his current challenges to the effectiveness of his trial attorney as ineffectiveness of postconviction counsel. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996) (The ineffective assistance of postconviction counsel in failing to raise a meritorious issue can be a sufficient reason to avoid the procedural bar of ***Escalona-Naranjo***.). However much of Warren's current argument was litigated in his direct appeal, his attempt to circumvent the procedural bar fails.

¶9 In our earlier opinion, we noted that Warren's pre-sentence plea-withdrawal motion included the allegation that "his attorney had coerced him into his plea, telling him that if he went to trial, he had no defense and that he would be sentenced to life in prison." ***Warren I***, unpublished slip op. at 3. Because Warren

argued that his trial attorney coerced him on direct appeal, he cannot raise that argument again. *See* ***Peterson***, 54 Wis. 2d at 381.

¶10 In this appeal, Warren argues that his trial attorney was ineffective because she did not inform him there were witnesses to his struggle with Morrow. He states that those witnesses were crucial to his defense because they would corroborate his statement that Morrow was shot during a struggle over a gun. He also faults his trial attorney for not obtaining a psychological report concerning his mental health until after he pled no contest, pointing out that the report's suggestion that he should take medication for the rest of his life was relevant to the issue of intent.

¶11 In our earlier opinion, we held that the alleged misinformation about Warren's intent to rob Morrow was irrelevant. We also noted that the record showed that Warren and Morrow "struggled for some reason, Morrow was shot, and Warren left the car with a package of marijuana and did nothing to summon help for Morrow … facts, [which] taken together, establish … utter disregard for human life"—the criminally-reckless conduct element of first-degree reckless homicide. ***Warren I***, unpublished slip op. at 5. Warren's continued focus on the issues of intent and that Morrow was shot during a struggle is little more than a re-characterization of the arguments made on direct appeal. As we held previously, Warren's intent was not material to the charge to which he pled—first-degree reckless homicide. Warren's current attacks on the ineffectiveness of trial counsel are substantially similar to his challenges to trial counsel that he made in his direct appeal. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶12 Warren does make one argument that was not raised on direct appeal—the sentencing court improperly held his attempt to withdraw his plea against him. However, because Warren could have made that argument in his direct appeal, it is barred by ***Escalona-Naranjo***. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

By the Court.—Order affirmed.

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