COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3144 **Cir. Ct. No. 97-CF-725**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM F. WILLIAMS,

DEFENDANT-APPELLANT.

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

¶1 DEININGER, J.[1] William Williams appeals the denial of his motion for postconviction relief under WIS. STAT. § 974.06. He claims the trial court erred in denying his motion without a hearing. We conclude the trial court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

properly determined that Williams's motion was barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Accordingly, we affirm.

BACKGROUND

¶2 A jury in 1997 found Williams guilty of disorderly conduct. He moved unsuccessfully in 1998 for postconviction relief under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30. Williams then appealed to this court. *See* ***State v. Williams***, 2000 WI App 123, 237 Wis. 2d 591, 614 N.W.2d 11. Among other things, Williams asserted in his direct appeal that his trial counsel had been ineffective. ***Id***., ¶21. He also requested that we grant a new trial in the interest of justice on account of the trial court's refusal to grant a continuance in order to allow Williams's trial counsel to locate a witness, Michael Shea, who could allegedly have provided alibi testimony. ***Id***., ¶17. We rejected Williams's arguments and affirmed his conviction and the denial of postconviction relief. ***Id***., ¶26.

¶3 Williams filed a "Motion for New Trial" in 2001. He asserted in the motion that his trial counsel had been ineffective for not subpoenaing a second alleged alibi witness, Dennis Wills. He also claimed that justice had miscarried on account of the jury's inability to hear Wills's testimony. The trial court determined that the motion should be treated as "one under [WIS. STAT.] § 974.06 for postconviction relief." The court noted that Williams had raised the issues of ineffective assistance of counsel and the absence of an alibi witness in his direct appeal. Citing ***Escalona-Naranjo***, the court concluded that Williams was barred from raising these issues again in a § 974.06 motion.

¶4 Williams appeals the order denying his motion.

ANALYSIS

¶5 In addition to arguing the merits of his motion for a new trial, Williams contends the trial court should not have denied his motion without an evidentiary hearing. We disagree and conclude as did the trial court that Williams's present claim for relief from his conviction is barred under ***Escalona-Naranjo***. Accordingly, we do not reach the merits of Williams's claim.

¶6 The supreme court concluded in ***Escalona-Naranjo*** that WIS. STAT. § 974.06(4) precludes a defendant from raising by way of a motion under § 974.06 any grounds for relief that "have been finally adjudicated, waived or not raised in a prior postconviction motion," unless the court finds "'sufficient reason' exists for either the failure to allege or to adequately raise the issue in" the original motion. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. A "prior postconviction motion" includes one brought under § 974.02 and WIS. STAT. RULE 809.30, the "direct appeal" procedures. ***Id***. at 184-85.

¶7 Like Williams, the defendant in ***Escalona-Naranjo*** had pursued a motion for direct relief from his conviction under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30. ***Escalona-Naranjo***, 185 Wis. 2d at 174-75. His motion was also denied and the denial affirmed on appeal. ***Id***. Also like Williams, Escalona-Naranjo thereafter attempted to raise a claim of ineffective assistance of counsel by way of a postconviction motion under § 974.06. ***Id***. at 175. Although Escalona-Naranjo put forward a variation on his earlier claim of error, the supreme court concluded that he had not provided a sufficient reason for belatedly raising the new claim:

> Escalona-Naranjo raised the issue of ineffective assistance of counsel in two of his sec. 974.02 motions. At the same time, he already knew that his trial attorney had failed to

> object to what he believed to be inadmissible evidence. He chose not to make that allegation in those motions and has not alleged any *sufficient reason* why a court should now entertain that same claim in a sec. 974.06 motion.

Id. at 184.

¶8 Williams is guilty of the same omission. His original claim of ineffective assistance of counsel dealt with trial counsel's failure to object to a prospective juror. It is clear from the record, however, that Williams was well aware at the time of his first postconviction motion that Dennis Wills might be able to testify as to Williams's presence at another location close to the time of the charged offense. The transcript of the trial includes a colloquy among Williams, his counsel and the court concerning Williams's belief that Wills should be called as a witness and counsel's reason for not doing so. Quite simply, if Williams believed that his counsel's failure to call Wills as a witness constituted ineffective assistance of counsel, the claim could easily have been included in his § 974.02 motion. This is especially so given that Williams claimed ineffective assistance on other grounds and his trial counsel testified at the postconviction hearing.

¶9 Williams asserts that he first obtained a statement in February 2001 from Wills outlining what Wills could testify to. The fact remains, however, that the record shows Williams was aware of Wills's existence and his potentially helpful testimony at the time of his 1997 trial. We conclude that Williams has not presented a sufficient reason why his present claim of ineffective assistance could not have been raised in his first motion for postconviction relief. Thus, the trial court did not err in denying his motion on the basis of the holding in ***Escalona-Naranjo***.

¶10 To the extent that Williams's present motion seeks discretionary relief from his conviction on the grounds the jury was deprived of evidence crucial to a determination of his guilt or innocence, such relief is not available under WIS. STAT. § 974.06. *See* ***Vara v. State***, 56 Wis. 2d 390, 392, 202 N.W.2d 10 (1972) (A motion for relief under § 974.06 "is restricted to jurisdictional and constitutional issues. [It] is not a substitute for a motion for a new trial even though a new trial is requested."). As we have discussed, however, Williams knew of Wills's potential testimony at the time of trial, and it thus cannot constitute "newly discovered evidence" on which to ground a request for a new trial. *See* ***id***. at 393.

¶11 Finally, we note that even if the holding of ***Escalona-Naranjo*** does not strictly apply to a motion for a new trial grounded on other than jurisdictional or constitutional claims, its rationale suggests that Williams's request for discretionary relief also comes too late. Having previously requested a new trial because of the lack of one alibi witness, Williams should not be permitted to bring a subsequent motion requesting similar relief on the basis of the absence of another alibi witness, when the identity and potential testimony of the second witness was well known to Williams at the time of his first request. As the court explained in ***Escalona-Naranjo***: "We need finality in our litigation.… Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of [WIS. STAT. § 974.06]." ***Escalona-Naranjo***, 185 Wis. 2d at 185.

CONCLUSION

¶12 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.