COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2982 **Cir. Ct. No. 2005CF5201**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE MATAMOROS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jose Matamoros, *pro se*, appeals an order denying his motion for postconviction relief filed under WIS. STAT. § 974.06 (2007-08).[1] Matamoros argues that the postconviction court erred when it concluded that the claims asserted in his § 974.06 motion were barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree with the postconviction court and affirm.

I. BACKGROUND.

¶2 A jury found Matamoros guilty of one count of armed robbery, one count of false imprisonment while using a dangerous weapon, and two counts of substantial battery while using a dangerous weapon, all as party to a crime. This court affirmed his conviction following a direct appeal. *See* ***State v. Matamoros***, No. 07-1216-CR, unpublished slip op. (WI App May 13, 2008).

¶3 On December 24, 2008, Matamoros, *pro se*, filed a "Motion to Quash DNA Surcharges" based on his contention that the sentencing court had erroneously exercised its discretion in imposing the surcharge. (Some uppercasing omitted.) His motion was based on "new factors" and WIS. STAT. § 974.06. The postconviction court denied the motion on the ground that it was untimely.

¶4 On February 26, 2009, Matamoros, *pro se*, filed a motion titled "Notice of Motion and Motion for Reconsideration of Denial of Illicit Assessment of DNA Surcharge/Tax and Motion to Challenge the Statutory Authority to Order DNA Surcharge/Tax Absent Clear Standard for Such Assessment." (Some

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

uppercasing omitted.) In this motion, Matamoros challenged the constitutionality of the surcharge. The postconviction court denied Matamoros's motion for reconsideration "for the same reasons set forth in the court's previous decision."

¶5 On November 10, 2009, Matamoros, *pro se*, filed a WIS. STAT. § 974.06 motion and supporting affidavit. In his motion, Matamoros alleged that both his trial counsel and his postconviction counsel rendered ineffective assistance. The court denied Matamoros's motion after concluding that his ineffective assistance of counsel claims were barred pursuant to ***Escalona***.[2] The court held that Matamoros could have raised his current claims in the context of his § 974.06 motion challenging the DNA surcharge. The court noted that the ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an issue so as to overcome the ***Escalona*** bar. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (per curiam). It went on to conclude, however, that ***Rothering*** does not contemplate the filing of successive motions under § 974.06. As an additional basis for denying Matamoros's motion, the court concluded that Matamoros's allegations of ineffective assistance were "conclusory, unsupported and insufficient to warrant relief of any kind." Matamoros appeals.

II. ANALYSIS.

¶6 We agree with Matamoros's summation of the issue presented: "[D]id the two motions challenging the DNA surcharge filed by Matamoros

[2] In its order, the postconviction court vacated the DNA surcharge.

qualify as a bar to challenging constitutional issues as provided by ***Escalona***[?]" We conclude the answer to this question is "yes."

> We need finality in our litigation. [WISCONSIN STAT. §] 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.

Escalona, 185 Wis. 2d at 185. Therefore, a prisoner who wishes to pursue a second or subsequent postconviction motion under § 974.06 must demonstrate a sufficient reason for failing in the original postconviction proceeding to raise or adequately address the issues. *See* ***id.*** at 184. Whether litigation is procedurally barred presents a question of law that we review *de novo*. *See* ***State v. Tillman***, 2005 WI App 71, ¶14, 281 Wis. 2d 157, 696 N.W.2d 574.

¶7 To avoid the ***Escalona*** bar, Matamoros claims that the postconviction court erroneously construed his December 24, 2008 "Motion to Quash DNA Surcharges" as a motion filed pursuant to WIS. STAT. § 974.06. (Some uppercasing omitted.) On this point, we adopt the reasoning set forth in the State's brief:

> Matamoros's contention that [WIS. STAT.] § 974.06 is not the proper vehicle for challenging imposition of a DNA surcharge is generally correct. Where the claim is that the trial court erroneously exercised its discretion in imposing the surcharge, § 974.06 cannot be used to challenge the surcharge because only jurisdictional and constitutional grounds can be raised in a § 974.06 motion. *See* ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978). Thus, Matamoros's Motion to Quash DNA Surcharges could not be brought under § 974.06–Matamoros's reference to the statute in his motion notwithstanding–because that motion was premised solely on the allegedly improper exercise of sentencing discretion. The [postconviction] court implicitly recognized this when it denied the motion on the ground [that] it was untimely

> because it was neither filed within ninety days of sentencing nor within the timelines established in WIS. STAT. [RULE] 809.30.
>
> Unlike his initial motion, however, Matamoros's second motion seeking to vacate the DNA surcharge was properly brought under [WIS. STAT.] § 974.06 because the motion included a constitutional challenge to the surcharge. A constitutional challenge to the imposition of a DNA surcharge, such as the equal protection challenge successfully mounted in ***State v. Trepanier***, 204 Wis. 2d 505, 555 N.W.2d 394 (Ct. App. 1996) [(superseded by statute as stated in ***State v. Jones***, 2004 WI App 212, 277 Wis. 2d 234, 689 N.W.2d 917)], can be raised via a § 974.06 motion, assuming the defendant shows a sufficient reason why the constitutional issue was not raised on direct appeal. Despite the fact Matamoros labeled his second motion challenging the DNA surcharge a "Motion for Reconsideration," that motion was undoubtedly a constitutional challenge to the surcharge, and § 974.06 was the only vehicle available for bringing the challenge.
>
> Because Matamoros had already filed a [WIS. STAT.] § 974.06 motion in February 2009, his current § 974.06 motion challenging the performance of his trial and postconviction attorneys was a second or successive motion. Thus, pursuant to ***Escalona***, 185 Wis. 2d at 184, Matamoros had to allege a sufficient reason why he did not raise his claims of ineffective assistance in his previous § 974.06 motion.

(Record citations omitted.)

¶8 Although, as noted by the postconviction court, ineffective assistance of postconviction counsel may sometimes be a sufficient reason for failing to previously raise an issue, *see* ***Rothering***, 205 Wis. 2d at 682, we agree with the court's assessment that ***Rothering*** does not speak to the filing of successive WIS. STAT. § 974.06 motions at issue here. Because Matamoros has not alleged a sufficient reason for why he did not raise his claims of ineffective assistance in his previous § 974.06 motion, we conclude his claims are barred. *See* ***Escalona***, 185 Wis. 2d at 184. Accordingly, we affirm on this issue, albeit on a

slightly different basis than that relied on by the postconviction court.[3] *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) ("[W]e may affirm on grounds different than those relied on by the trial court.").

¶9 In his reply brief, Matamoros calls upon this court to invoke its liberal policy of determining whether he has used the right procedural tool in this matter. Matamoros asserts that he never intended to implicate WIS. STAT. § 974.06 and that he meant the motions to be construed strictly as they were labeled—as a "Motion to Quash DNA Surcharges" and a "Motion for Reconsideration."

¶10 Matamoros's argument misses its mark. His decision to label his motion a motion for reconsideration is irrelevant; instead, we look at the substance of the motion itself. Whether Matamoros intended to or not, he made constitutional claims in his motion for reconsideration that brought the motion within the ambit of WIS. STAT. § 974.06, and he cannot now avoid the effect of that filing. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983) (Courts liberally construe pleadings despite label given by defendant.); ***Buckley v. Park Bldg. Corp.***, 27 Wis. 2d 425, 431, 134 N.W.2d 666 (1965) (The nature of motion determined from its substance, and not its label.); *see also* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992) ("While some leniency may be allowed, neither a trial court nor a reviewing court has a duty to

[3] The postconviction court seems to have relied on Matamoros's December 24, 2008 "Motion to Quash DNA Surcharges" to invoke the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). (Some uppercasing omitted.) As set forth above, we conclude that it was Matamoros's February 26, 2009 "Motion for Reconsideration" setting forth constitutional arguments that brought ***Escalona*** into play. (Some uppercasing omitted.)

walk *pro se* litigants through the procedural requirements or to point them to the proper substantive law.").

¶11 Because we have concluded that Matamoros's ineffective assistance claims are barred, we do not address whether his motion was sufficient to warrant an evidentiary hearing. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

By the Court.—Order affirmed.

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