COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0359 **Cir. Ct. No. 77CF001340**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL S. MATYASZ,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: CLARE L. FIORENZA and JEFFREY A. CONEN, Judges. *Affirmed.*

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

¶1 PER CURIAM. Paul S. Matyasz appeals *pro se* from an order of the trial court denying his WIS. STAT. § 974.06 (2001-02)[1] postconviction motion

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

and from an order denying reconsideration of the same order. Matyasz asserts that the trial court erred when it denied his motion seeking to vacate his conviction for first-degree intentional homicide. Because the basis for his claim is partly barred by the law of the case, partly barred by WIS. STAT. § 974.06(4), and partly barred by procedural case law, we affirm.

BACKGROUND

¶2 Nearly twenty-three years ago, on February 11, 1978, a Milwaukee County jury convicted Matyasz of first-degree intentional homicide. The trial court sentenced him to life imprisonment. On June 14, 1978, Matyasz filed a motion for a new trial on the following grounds that are relevant to this appeal: (1) the trial court erred in failing to suppress statements that were involuntarily made to the assistant district attorney; and (2) the jury instruction given for first-degree murder improperly shifted the burden of defense to the defendant. The trial court denied the motion and, on direct appeal, we affirmed the trial court.

¶3 On September 19, 2002, Matyasz filed a WIS. STAT. § 974.06 motion based upon the following grounds: (1) the State used statements obtained in violation of ***Miranda***;[2] (2) his trial counsel was ineffective for failing to investigate the circumstances of his in-custody interrogation and for failing to file a motion to suppress; (3) jury instructions were erroneous; (4) his due process rights were violated by judicial coercion of the verdict; (5) his Fourth and Fifth Amendment rights were violated by police coercion; (6) the incompetence of the Milwaukee County medical examiner resulted in prejudicial error to his case; and

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

(7) the evidence was insufficient to sustain the jury verdict. The trial court denied the motion without a hearing and subsequently denied two motions for reconsideration of the order of denial. Matyasz now appeals *pro se* from the orders denying his postconviction motion.

ANALYSIS

¶4 From a reading of Matyasz's brief-in-chief, we conclude that five issues exist for examination and resolution, whether: (1) his ***Miranda*** rights were violated; (2) trial counsel provided ineffective assistance for failing to investigate the circumstances of his in-custody interrogation and for failing to file a motion to suppress any statements he gave; (3) the trial court erroneously instructed the jury; (4) postconviction counsel provided ineffective assistance; and (5) the trial court erred in ruling that Matyasz failed to proffer a sufficient reason for not advancing a basis for relief or why it was inadequately raised in his original motion. We shall examine each claim in turn.[3]

*A. **MIRANDA** RIGHTS VIOLATION*

¶5 Matyasz first claims that his ***Miranda*** rights were violated. This claim involves two sets of statements: statements he gave to Milwaukee County Assistant District Attorney Mario Spalatin, which were the subject of his direct appeal, *see* ***State v. Matyasz***, No. 79-1280, unpublished slip op. (Wis. Ct. App. Apr. 15, 1980), and statements given to Milwaukee Police Detective Thomas Jaecklen, which were reviewed in the postconviction motion precipitating this appeal. On appeal, Matyasz now complains that both statements were obtained in

[3] Matyasz does not challenge the ruling rejecting a ***Machner*** hearing.

violation of his ***Miranda*** rights. To achieve the purposes of orderly administration of justice, we shall consider both sets of statements. *See* ***In re Baby Girl K.***, 113 Wis. 2d 429, 448, 335 N.W.2d 846 (1983). For two reasons, we reject this claim of error.

¶6 First, it is a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." ***Univest Corp. v. General Split Corp.***, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989). The law of the case doctrine, however, is not a rule that must inexorably be followed in every case. The doctrine may be disregarded under circumstances in which cogent, substantial and proper reasons exist. ***Id.*** at 39. In Matyasz's direct appeal, he claimed his ***Miranda*** rights were violated as they relate to the statements he made to Assistant District Attorney Spalatin. This court rejected his claim, ruling:

> The facts show beyond a reasonable doubt that Matyasz was informed of his rights, understood them, and intelligently waived them. The state established a *prima facie* case of waiver by Spalatin's testimony. The defense produced no witnesses at the Miranda-Goodchild hearing to prove that Matyasz had a mistaken understanding as to his rights. The state's evidence remained uncontradicted.

Matyasz, No. 79-1280 at 4 (footnotes omitted).

¶7 Our earlier ruling becomes the law of the case. Matyasz has failed to present any reason to put aside the application of this doctrine. Thus, his claim of error in regard to statements given to the assistant district attorney fails.

¶8 Second, in seeking postconviction relief, Matyasz invoked the procedures of WIS. STAT. § 974.06. In interpreting the calls of § 974.06, our supreme court has declared that finality is quintessential in resolving litigation. To

achieve this result, § 974.06(4) was created to compel "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." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). As we set forth above, Matyasz pursued a direct appeal in which he claimed his ***Miranda*** rights were violated and thus, statements subsequently given to an assistant district attorney should have been suppressed. Failing in this effort in his direct appeal in 1980, he tried again in 2002 to obtain postconviction relief by repeating his claim that his ***Miranda*** rights were violated and arguing that the violation related to statements given to detective Jaecklen. Doubtless, at the time that Matyasz raised the ***Miranda*** challenge to statements given to the assistant district attorney, the same grounds existed to challenge the statements given to Jaecklen. Yet, Matyasz has presented no specific reason why the challenge to the Jaecklen statements was not raised in the direct appeal. Thus, § 974.06 and ***Escalona-Naranjo***, 185 Wis. 2d at 185, bar him from raising this issue now.

B. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

¶9 Matyasz claims that trial counsel provided him with ineffective assistance for failing to challenge the statements allegedly given in violation of his ***Miranda*** rights. As we have noted, WIS. STAT. § 974.06 and ***Escalona-Naranjo*** bar defendants from raising new issues in subsequent postconviction motions without an adequate reason for doing so. This rule bars Matyasz's ineffective assistance of trial counsel claim.

¶10 Matyasz failed to raise this issue in his direct appeal and he fails to provide any adequate reason for this failure. To the extent that he claims his

failure to raise this issue forms the basis of his alleged ineffective assistance of postconviction/appellate counsel claim, we reject those issues for the reasons stated later in the body of this opinion.

C. ERRONEOUS JURY INSTRUCTIONS

¶11 Matyasz next claims the trial court committed reversible error on two occasions when instructing the jury. First, the trial court instructed the jury that the "law presumes that a person reasonably intends all of the natural, probable, and usual consequences of his deliberate actions." Second, the trial court required the jury to decide guilt or innocence on the charge of first-degree intentional homicide before considering any lesser-included offense. We reject these two claims of error for the same reasons we have already rejected the claimed ***Miranda*** violations and for two other reasons as well.

¶12 First, in Matyasz's direct appeal, he raised the issue that the "natural and probable consequences" language violated due process. We examined the issue in depth, but rejected the challenge. Matyasz raises the same issue again. Our earlier decision regarding this issue became the law of the case in this appeal. ***Univest Corp.***, 148 Wis. 2d at 38. We surmise no cogent, substantial or proper reason to disregard the rule. Thus, this claim of error fails.

¶13 Second, no reason has been offered why the second instructional error was not proposed in the direct appeal along with the first alleged error. Thus, WIS. STAT. § 974.06 and ***Escalona-Naranjo*** act as a bar preventing him from doing so now.

¶14 Third, Matyasz's trial counsel failed to object to the sequence instruction, thereby waiving the right to raise this issue on appeal. WIS. STAT.

§§ 805.13(3) and 972.11(1); ***State v. Booth***, 147 Wis. 2d 208, 211, 432 N.W.2d 681 (Ct. App. 1988).

¶15 Fourth, because case law in Wisconsin has long approved of the sequence instruction about which Matyasz complains, his claim of error is void of any substantive merit. *See* ***State v. Pettit***, 171 Wis. 2d 627, 642, 492 N.W.2d 633 (Ct. App. 1992).

D. INEFFECTIVE POSTCONVICTION COUNSEL: PROPER PROCEDURE

¶16 Matyasz seeks to avoid the consequences of WIS. STAT. § 974.06(4) and ***Escalona-Naranjo***'s waiver provisions by asserting that he "could not have knowingly, voluntarily, or intelligently waived his right to raise these additional issues if post conviction counsel failed to consult" with him concerning the postconviction process. In this effort, Matyasz claims for first time that postconviction counsel was ineffective for failing to pursue a claim of ineffective assistance of trial counsel. For procedural reasons, we are compelled to reject this claim.

¶17 In the postconviction phase of this case, Matyasz was represented at various times by two lawyers: Barbara Berman and Mark Lukoff. Matyasz asserts that neither counsel ever consulted with him about his case. Assuming for the purposes of argument that his assertion is correct, he had two alternative courses of action to examine an ineffective assistance of trial counsel claim. If his complaint was based upon ineffective assistance of postconviction counsel, he was required to file, under WIS. STAT. § 974.06, either a petition for a writ of *habeas corpus* or a postconviction motion in the trial court that entered the judgment of conviction. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). If his claim was based upon ineffective assistance

of appellate counsel, he was required to file a petition for a writ of *habeas corpus* in the court of appeals. ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992). He pursued neither procedural remedy. Thus, his efforts to avoid the waiver rubrics of § 974.06 and ***Escalona-Naranjo*** are of no avail.

E. TRIAL COURT'S DENIAL OF MOTION

¶18 Finally, we reject Matyasz's assertion that the trial court erred in denying his postconviction motion. This claim is based on a single conclusory allegation stating that "Matyasz alleged sufficient reason for failing to raise his claims in prior postconviction proceedings, and because Matyasz'[s] claims of ineffective assistance of both trial and postconviction counsel were properly raised for the fi[r]st time in his Wis. Stat. § 974.06 postconviction motion." We are not persuaded. As noted in the body of this opinion, Matyasz has failed to follow proper procedures or allege sufficient facts to subvert those procedures. Just saying it is so does not make it so. Matyasz makes conclusory statements, but fails to back up those statements with any substantive facts or reasoning. Thus, there is no basis for this court to conclude that the trial court erred.

By the Court.—Orders affirmed.

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