COURT OF APPEALS DECISION DATED AND FILED

May 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1277

Cir. Ct. No. 2007CF384

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

A'KIM MACK, A/K/A KELVIN MACK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

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

¶1 PER CURIAM. A'Kim Mack, a/k/a Kelvin Mack, *pro se*, appeals from an order denying his second WIS. STAT. § 974.06 (2009-10)[1] motion. To avoid the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), Mack submits that he received information that his trial attorney had a conflict of interest and that this information constitutes newly discovered evidence. We reject Mack's argument and affirm.

I. BACKGROUND

¶2 In 2007, Mack was charged with first-degree intentional homicide while armed. Pursuant to a plea agreement, Mack entered an ***Alford*** plea[2] to the amended charge of second-degree reckless homicide. He received a twenty-five-year sentence, bifurcated as fifteen years of initial confinement and ten years of extended supervision, consecutive to any other sentence. Mack did not appeal his conviction.

¶3 In 2009, Mack filed a motion pursuant to WIS. STAT. § 974.06. He argued that the circuit court lacked the authority to impose a consecutive sentence. The circuit court denied Mack's motion. He did not appeal this decision.

¶4 In 2010, Mack filed a second motion pursuant to WIS. STAT. § 974.06. Mack claimed that his trial counsel had a conflict of interest because he

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). An ***Alford*** plea is made when a defendant pleads guilty but maintains his or her innocence. *See* ***State v. Garcia***, 192 Wis. 2d 845, 851 n.1, 532 N.W.2d 111 (1995).

represented Francis Clark, an alibi witness for Mack, who later was identified as a witness for the State. According to Mack, Clark had retained his trial attorney to dispute allegations that Clark hindered Mack's apprehension and had "recently" made him aware of meetings held between the prosecutor and his trial attorney regarding the possible charges against Clark. Mack stated that Clark referred him to his trial attorney and that he was unaware that Clark had retained his trial attorney to represent her in the same matter. He sought a new trial based on these facts. Mack asserted that if he had known that his attorney and Clark "had a hidden agenda," he would not have trusted the attorney with his defense. The court denied Mack's motion on grounds that it was procedurally barred by ***Escalona*** and because the allegations set forth in the motion were conclusory. He now appeals.

II. ANALYSIS

¶5 Mack argues that his second postconviction motion was based on newly discovered evidence: information that his trial attorney had a conflict of interest. He asserts that he was not aware of the alleged conflict of interest until after he had filed his first WIS. STAT. § 974.06 motion. The issue then is whether this information constitutes newly discovered evidence, and thus, a sufficient reason to overcome ***Escalona***'s procedural bar.[3]

[3] Mack's reference to and reliance on a July 20, 2010 affidavit provided by Clark is improper as it postdates the notice of appeal and was not made part of the appellate record. *See* ***State v. Aderhold***, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979) ("The rule is well established that reviewing courts are limited to the record, and are bound by the record. The record is not to be enlarged by material which neither the trial court, nor the appellate court, acting within their respective jurisdictions, have ordered incorporated in the record."). Even if we were to consider the affidavit, it does not establish the date on which Mack learned of his trial attorney's representation of Clark.

¶6 When a defendant files a WIS. STAT. § 974.06 motion after he has already filed a previous motion or direct appeal, a sufficient reason must be shown for failure to raise the new issues. ***Escalona***, 185 Wis. 2d at 185; § 974.06(4). Whether ***Escalona***'s procedural bar applies to a postconviction claim is a question of law entitled to independent review. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶7 To prevail on a claim asserting that there is newly discovered evidence, a defendant must prove by clear and convincing evidence that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). "If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Id.***

¶8 As the State points out, it is unclear when Mack actually received the information from Clark that his trial attorney had a conflict of interest. In his postconviction motion, Mack claimed only that Clark had "recently" made him aware that his trial attorney represented Clark during meetings with the prosecutor about possible charges against Clark. In his appellate brief, Mack asserts that he received a letter from Clark advising him of the conflict. His postconviction motion does not, however, reference or attach the letter. In light of the foregoing, we agree with the State that Mack's failure to specifically indicate when he discovered the "new" information, precludes this court from concluding that it qualifies as newly discovered evidence. *See* ***id.*** ("[T]he defendant must prove, by clear and convincing evidence, that … the evidence was discovered after conviction.").

¶9 Moreover, even if we were to conclude that the purported conflict was discovered after his conviction, Mack failed to establish that he was not negligent in seeking this evidence. *See* ***id.*** ("[T]he defendant must prove, by clear and convincing evidence, that … the defendant was not negligent in seeking evidence."). In his postconviction motion, Mack claimed that Clark was his friend and his alibi witness and that she referred him to his trial attorney. Mack further alleged that his trial attorney and Clark "had a hidden agenda." Even if this attributed to his late discovery, Mack offers no explanation as to what prompted Clark to later disclose his trial attorney's representation of her. We conclude that Mack's allegations fall short of establishing by clear and convincing evidence that he was not negligent in seeking this evidence, and indeed, suggest that he could have discovered the alleged conflict earlier.

¶10 Because Mack has not established that he has newly discovered evidence, the underlying WIS. STAT. § 974.06 motion is barred by ***Escalona***.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.